PART III

3 Second Appeals

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1 See supra, "First appeals", Chap. 2.
2 S. 101.

shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
(2) An appeal may lie under this section from an appellate decree passed ex parte.
(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."3
3. NATURE AND SCOPE
Section 100 of the Code as amended by the Amendment Act of 1976 declares that an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court if the High Court is satisfied that the case involves a substantial question of law. Such appeal lies also against an appellate decree passed ex parte. The appellant has to precisely state in the memorandum of appeal the substantial question of law involved in the appeal. Where the High Court is satisfied that a substantial question of law is involved in the case, it shall formulate such question. The High Court can hear the appeal on the question so formulated. It, however, permits the respondent (opposite party) to argue at the hearing of the appeal that the question formulated by the court as a substantial question of law does not involve such question. But the High Court has power to hear the

3 Sub-section (1) of S. 100 before the Amendment Act of 1976 read as under:
"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 to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, namely:
(a) the decision being contrary to law or to some usage having the force of law;
(b) thedecisionhavingfailedtodeterminesomematerialissueoflaworusagehaving the force of law;
(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question. The High Court, however, is required to record reasons for such satisfaction.

The amendment made in Section 100 has drastically changed and considerably curtailed the scope of a second appeal. Under the old section, a second appeal was maintainable on any of the three grounds set out in clauses (a), (b) or (c)3, which were liberally interpreted by High Courts, resulting in a plethora of conflicting judgments.

The Law Commission rightly observed, "It appears that the wide language of Section 100 and the somewhat liberal interpretation placed judicially on it have practically resulted in giving a goodbye to the basic principle that on questions of fact decisions of courts of first instance would be final subject to one appeal."

After the amendment in Section 100, the following consequences ensued:

(i) The High Court must be satisfied that the case involves a substantial question of law;4

(ii) The memorandum of appeal must precisely state such question;5

(iii) The High Court at the time of admitting the appeal should formulate such question;6

(iv) The appeal shall be heard only on that question;7

(v) At the hearing of the appeal, the respondent can argue that the case does not involve such question;8

(vi) The High Court is, however, empowered to hear the second appeal on any other substantial question of law, not formulated by it, if it is satisfied that the appeal involves such question. The High Court, however, has to record reasons for doing so.9

4. OBJECT

Before the Amendment Act, 1976, the scope of second appeals was very wide. It has been rightly observed, "In dealing with second appeals, the courts had devised and successfully adopted several concepts, such as, a mixed question of fact and law, a legal inference to be drawn from the facts proved, and even the point that the case has not been properly approached by the courts below. This had created confusion in the minds of the public as to the legitimate scope of the

4 S. 100(1).
5 S. 100(3).
6 S. 100(4).
7 S. 100(5); Or. 42 R. 2.
8 S. 100(5).
9 Proviso to S. 100(5); Or. 42 R. 2.

second appeal under Section 100 and had burdened the High Courts with an unnecessary large number of second appeals."10

The Shah Committee which dealt with the arrears of cases in High Courts observed:

"It is necessary to provide for a stricter and better scrutiny of second appeals and they should be made subject to special leave, instead of giving an absolute right of appeal limiting it to a question of law."

The Law Commission11 in its Fifty-fourth Report reviewed the position and recommended that the right of second appeal should be confined to cases where (i) a question of law was involved; and (ii) the question of law so involved was substantial.

The phraseology used in the amended section (substantial question of law) indicates legislative intent for the change. There is no doubt that it has been done deliberately and intentionally with the avowed object of ensuring that the second appeal may not become a "third trial on facts" or "one more dice in the gamble".12

Considering the above recommendations, Section 100 has been drastically amended. By this amendment, the scope and ambit of the jurisdiction of the High Court to interfere with the decision of the inferior courts is very much narrowed down. The right of appeal is confined to cases where a question of law is involved and such question of law is a substantial one. Now the High Court can interfere with the decisions of inferior courts only when it is satisfied that a point involves a substantial question of law.13 With this, a large number of cases decided under the old Section 100 have become more or less academic.

5. SECOND APPEAL AND FIRST APPEAL14

6. SECOND APPEAL AND REVISION

Though a second appeal as well as a revision both lie in the High Court, there is a difference between the two. A second appeal lies to the High Court on the ground of a substantial question of law, while a revision lies on a jurisdictional error. Revisional powers of the High Court can be invoked only in those cases wherein no appeal lies. A second appeal can be filed against a decree passed by a first appellate court. While exercising revisional jurisdiction, the High Court cannot

10 Statement of Objects and Reasons.

11 Law Commission's Fifty-fourth Report at p. 187.

12 Koli Jiva Gaga v. Koli Ravji Chuga, (1996) 3 Guj CD 1; Gurdev Kaur v. Kaki, (2007) 1 SCC 546: AIR 2006 SC 1975.

13 Harcharan Singh v. Shivrani, (1981) 2 SCC 535 at p. 551: AIR 1981 SC 1284 at p. 1294.

14 See supra, Chap. 2; infra, Chap. 9.

interfere with an order passed by a subordinate court, if it is within the jurisdiction of such court, even if it is legally wrong. But the High Court can interfere with the decree passed by the first appellate court if it is contrary to law. A High Court cannot decide a question of fact in revision, but it can decide an issue of fact in a second appeal certain cases. Finally, the High Court may refuse to interfere in revision if it is satisfied that substantial justice has been done. In second appeal, however, the High Court has no discretionary power and it cannot decline to grant relief on equitable grounds.15

7. SUBSTANTIAL QUESTION OF LAW

(a) Meaning

The Legislature has not defined the term "substantial question of law", though the expression has been used in the Constitution16 as well as in other statutes.17 The phrase, however, cannot be confined to a strait- jacket and no rule of universal application can be formulated as to when it can be said that a substantial question of law has arisen.

(b) Nature and scope

A High Court can entertain a second appeal provided that it is satisfied that the case "involves" a substantial question of law.18 The term "involves" suggests that such a question must arise in the case and it is necessary to decide it.19 The mere fact that the question is raised by the appellant in the appeal is not enough and the High Court is not justified in entertaining the appeal. The term 'involves' implies a considerable element of necessity.20

(c) Test

Though the expression substantial question of law has not been defined in the Code, in Chunilal V. Mehta and sons v. Century Spg. & Mfg. Co. Ltd.21, the Supreme Court observed:

15 For detailed discussion, see infra, "Revision"; see also, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, Ss. 100,115.

16 Art. 133, Constitution of India.

17 S. 260-A, Income Tax Act, 1961; S. 30, Workmen's Compensation Act, 1923; S. 55, Monopolies and Restrictive Trade Practices Act, 1969.

18 S. 100(1).

19 SBI v. S. N. Goyal, (2008) 8 SCC 92: AIR 2008 SC 2594; Rajah Tasadduq Rasul v. Manik Chand, (1902-1903) 30 IA 35 (PC); Karunalaya v. Valangupalli Roman Catholic Mission, AIR 1943 Mad 67: (1942) 2 Mad LJ 350; Kunwar Jagdish Kumar v. L. Harikishen Das, AIR 1942 Oudh 362; Ganesh Prasad v. Makhna, AIR 1948 All 375.

20 Ibid, see also Pankaj Bhargava v. Mohinder Nath, (1991) 1 SCC 556: AIR 1991 SC 1233; Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179: AIR 2001 SC 965; Gurdev Kaur v. Kaki, (2007) 1 SCC 546: AIR 2006 SC 1975.

21 AIR 1962 SC 1314:1962 Supp (3) SCR 549.

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and, if so, whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well-settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law."22 It can thus be said that when a question is fairly arguable, or where there is room for a different opinion, or where an alternative view is equally possible, or where the point is not finally settled, or not free from doubt, it can be said that the question would be a "substantial question of law".23

(d) Substantial question of law and question of law of general importance

At the same time, however, it should be remembered that, for the purpose of invoking the jurisdiction of the High Court under Section 100 of the Code, the substantial question of law need not be of general importance. The Law Commission in its Fifty-fourth Report24 made it clear by observing:

"It should be noted that we are not limiting the scope of second appeal to questions of law of general importance. If the law has been clearly laid down by the High Court, and the decision of the subordinate court is in clear violation of the law as pronounced by the High Court, the power of the High Court to correct it should be left intact. This situation would not be covered if the limitation of general importance is inserted." (emphasis supplied)

22 Ibid, at p. 1318 (AIR): at pp. 557-58 (SCR). See also State of J&K v. Thakur Ganga Singh, AIR 1960 SC 356 at pp. 359-60: (1960) 2 SCR 346; State of Kerala v. R.E. D'Souza, (1971) 1 SCC 533: AIR 1971 SC 832; Mahindra & Mahindra Ltd. v. Union of India, (1979) 2 SCC 529 at pp. 550-51: AIR 1979 SC 798 at pp. 811-12; State of Assam v. Basanta Kumar, (1973) 1 SCC 461 at p. 469: AIR 1973 SC 1252 at p. 1257; Pankaj Bhargava v. Mohinder Nath, (1991) 1 SCC 556: AIR 1991 SC 1233; Vithaldas v. Ramchandra, 1995 Supp (3) SCC 374; Surain Singh v. Mehenga, (1996) 2 SCC 624.

23 For analytical discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.

24 Law Commission's Fifty-fourth Report at p. 90.

In other words, substantial question of law means a substantial question of law as between the parties in the case involved.25 A question of law is substantial as between the parties if the decision turns one way or the other on the particular view of law. If it does not affect the decision, it cannot be said to be substantial as between the parties.26 Ultimately, what is a substantial question of law would depend upon facts and circumstances of each case.27

In Ratanlal Bansilal v. Kishorilal Goenka28, the Full Bench of the High Court of Calcutta after referring to the Fifty-fourth Report of the Law Commission and a number of decisions, observed:

"[B]y importing the expression substantial question of law, the Commission can be said only to have sought to eliminate frivolous, flimsy and fragile second appeals and exhorted the High Courts to be on the strictest vigil against entry of appeals on inconsequential but ingenious grounds. It does not by its own avowal preclude admission of appeal in cases where there has been judicial misconduct in the assessment or admission of evidence. This predicates that facts found upon such misconduct of the proceedings and misapplication of the procedure with regard to evidence will necessarily be a question of law touching the legality of inference on proved facts....29 If the law is settled but is not applied to a set of facts despite the finding warranting its application, it is not perceivable how the legislature could conceive of barring the High Court from setting right the erroneous application.30 Where the finding of fact is on no evidence it is then to be either on assumptions, or on surmises, and conjectures. How such a situation shall be allowed to go unremedied where it leads

25 Raghunath Prasad v. Commr. of Pratapgarh, AIR 1927 PC 110: (1926-27) 54 IA 126; Guran Ditta v. Ram T. Ditta, AIR 1928 PC 172: (1927-28) 55 IA 235; Bharawan Estate v. Rama Krishna, AIR 1953 SC 521 at p. 523:1954 SCR 506; Buckingham & Carnatic Co. Ltd. v. Workers, AIR 1953 SC 47 at p. 49:1953 SCR 219:1952 Lab AC 490; Secy, to Govt. Home Deptt. v. T.V. Hari Rao, AIR 1978 Mad 42 at p. 45; Ratanlal v. Kishorilal Goenka, AIR 1993 Cal 144: (1993) 1 Cal LT 162 (FB).

26 Mahant Har Kishan v. Satgur Prasad, AIR 1953 All 129.

27 Pankaj Bhargava v. Mohinder Nath, (1991) 1 SCC 556: AIR 1991 SC 1233.

28 AIR 1993 Cal 144: (1993) 1 Cal LT 162 (FB).

29 Ibid, at p. 159 (AIR) (para 61).

30 Ratanlal Bansilal v. Kishorilal Goenka, AIR 1993 Cal 144: (1993) 1 Cal LT 162 (FB); see also Kshitish Chandra v. Santosh Kumar, (1997) 5 SCC 438: AIR 1997 SC 2517; Kondiba Dagadu v. Savitribai Sopan, (1999) 3 SCC 722: AIR 1999 SC 2213; Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179: AIR 2001 SC 965; Rajeshwari v. Puran Indoria, (2005) 7 SCC 60; Govindaraju v. Mariamman, (2005) 2 SCC 500: AIR 2005 SC 1008; Hero Vinoth (Minor) v. Seshammal, (2006) 5 SCC 545: AIR 2006 SC 2234; Gurdev Kaur v. Kaki, (2007) 1 SCC 546: AIR 2006 SC 1975.

to the denial of justice? This will bring the judicial system to discredit before the people"31 (emphasis supplied)

(e) Formulation of question

Formulation of a substantial question of law is the sine qua non and a condition precedent for the exercise of power by the High Court.32

(f) Duty of appellant

The Code requires the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal, which he proposes to urge before the High Court.33

(g) Duty of court

If the High Court is satisfied that a substantial question of law is involved in the case, it should formulate such a question.34

The Code thus enjoins upon the High Court to formulate a substantial question of law. This duty is irrespective of the duty cast on the appellant. It is, no doubt, open to the High Court to consider the question stated or formulated by the appellant (or by his advocate) in the memorandum of appeal and if the High Court is satisfied that the appeal involves such a question and it is a substantial question of law, it should formulate the question. Often the court admits an appeal by virtually formulating a substantial question (questions) of law by taking it (them) verbatim from the memorandum of appeal filed by the appellant. Nevertheless the words "shall formulate that question" leave no room for doubt that ultimately it is the duty of the High Court to formulate a substantial question of law.35

(h) Hearing of appeal

The Code states expressly that the appeal shall be heard on the question (substantial question of law) formulated by the High Court.36 It thus interdicts the appellant from urging any other ground in appeal without the leave of the court. The scope of hearing of second appeal is thus circumscribed by the question formulated by the court. Not only

31 Ibid, at pp. 160-61 (AIR) (para 69).
32 S. 100(4); For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.
33 S. 100(3); For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.
34 S. 100(4); For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.
35 For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.
36 S. 100(5); For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.

that but it allows the respondent to argue that the question formulated by the High Court is not involved in the case.37

Generally, at the time of preliminary hearing of appeal, the respondent, who had succeeded for the first appellate court is not present in the High Court, and the second appeal is heard ex parte. But even if he is present, admission of appeal is essentially between the appellant and the court and the respondent (or his counsel) has no "right" of audience. Moreover, at that stage, the court does not critically or analytically examine the case closely. If prima facie, it is satisfied that the appeal involves a substantial question of law, it may admit such appeal. It is at the time of final hearing that the respondent may be able to convince the court that no such question of law is involved in the case which can be said or termed "substantial". The legislature, therefore, advisedly conferred a right on the respondent to raise such contention at the time of hearing of appeal.38

(i) Saving power of High Court

Proviso to sub-section (5) of Section 100, however, preserves powers of the High Court taking a second appeal for the final hearing to hear and decide the appeal upon any substantial question of law not framed or formulated at the time of admission of the appeal. The proviso is thus a repository of judicial discretion. It, no doubt, requires the High Court to exercise the power by recording reasons.39

(j) Substantial question of law involved: Illustrative cases

Whether or not, in a particular matter, a substantial question of law is involved depends upon the facts and circumstances of each case. Moreover, the expression "involves" implies a considerable degree of necessity. It does not mean that in certain contingencies such a question might possibly arise.40 Similarly, the mere fact that such a question is raised in the second appeal is also not sufficient. It must definitely and clearly arise in the case.41 Finally, if a question of law has already been settled by the highest court, that question, however important

37 For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) S. 100.

38 For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.

39 Proviso to S. 100 (5); see also, Or. 42 R. 2. For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.

40 Banke Lal v. Jagat Narain, ILR (1901) 23 All 94 at p. 98; Hafiz Mohammad v. Sham Lal, AIR 1944 All 273 at pp. 275-76 (FB); Emperor v. Saver Manuel Dantes, AIR 1941 Bom 245 (FB); Hansraj Singh v. R., AIR 1949 All 632 at p. 634.

41 Ibid, see also A.B. Lagu v. State of Madhya Bharat, AIR 1950 MB 81 at p. 82; Durga Chowdhrani v. Jewahir Singh, (1891) 18 Cal 23 at p. 30 (PC); Kuar Nirbhai Das v. Rani Kuar, ILR (1894) 16 All 274 at pp. 275-76 (PC); Karuppanan v. Srinivasan, ILR (1902) 25 Mad 215 at pp. 219-20 (PC).

and difficult it may have been regarded in the past and however large may be its effect on any of the parties, would not be regarded as a substantial question of law.42

The following questions may be said to be substantial questions of law:43

(i) A question of law on which there is conflict of judicial opinion;
(ii) Recording of a finding without any evidence on record;
(iii) Inference from or legal effect of proved or admitted facts;
(iv) Disregard or non-consideration of relevant or admissible evidence;
(v) Taking into consideration irrelevant or inadmissible evidence;
(vi) Misconstruction of evidence or documents;
(vii) Interpretation or construction of material documents;
(viii) A question of admissibility of evidence;
(ix) Placing onus of proof on a wrong party;
(x) Disposal of appeal before disposing an application for additional evidence under Order 41 Rule 27, etc.

(k) Substantial question of law not involved: Illustrative cases The following questions were held not to be substantial questions of law:44

(i) Concurrent findings of fact recorded by courts of below;
(ii) Finding of fact recorded by the first appellate court;
(iii) Where two views are possible;
(iv) Where new case is sought to be made out in second appeal;
(v) Where new plea is raised which is either based on fact, or on mixed question of fact and law, or on mere question of law (and not on substantial question of law);
(vi) Where the question raised is too general or omnibus in nature;
(vii) Where inference as to finding of fact has been drawn on the basis of evidence and material on record;
(viii) Where the question is finally concluded by the Supreme Court, Privy Council or Federal Court;
(ix) Where a finding of fact has been attacked on the ground that it is erroneous (as against perverse);

42 Pankaj Bhargava v. Mohinder Nath, (1991) 1 SCC 556: AIR 1991 SC 1233.
43 For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) S. 100.
44 For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II, S. 100.

(x) Where the High Court feels that the reasoning of the first appellate court is not proper, etc.

Like first appeal,45 where second appeal involves construction of material documents and if more than one view is possible, even if the High Court dismisses the appeal summarily, it should record reasons for doing so.46

8. NO SECOND APPEAL IN CERTAIN CASES: SECTIONS 101-102

No second appeal is maintainable except on the grounds specified in the Code47 Likewise, no second appeal lies in any suit where the subject-matter of the original suit for recovery of money does not exceed twenty five thousand rupees48

9. NO LETTERS PATENT APPEAL: SECTION 100-A

Section 100-A as inserted by the Amendment Act of 1976 enacts that no further appeal49 shall lie against the decision of a Single Judge in a second appeal. In the Statement of Objects and Reasons, it has been stated, "Under the Letters Patent, an appeal lies in certain cases, against the decision of a Single Judge in a second appeal. Such appeal, in effect, amounts to a third appeal. For the purpose of minimising delay in the finality of adjudications, it is not desirable to allow more than two appeals. In the circumstances, new S. 100-A is being inserted to provide that there should be no further appeal against the decision of a Single Judge in a second appeal."50

This provision is prospective and not retrospective and would not affect vested right of Letters Patent Appeal against the judgment pronounced before 1 February 1977.51

10. LIMITATION

A second appeal lies to a High Court within a period of ninety days from the date of the decree appealed against.52

11. FORM OF APPEAL53 Since the second appeal is maintainable only when it involves a substantial question of law, a memorandum of second appeal must precisely state such question. However, unlike the memorandum of first

45 See supra, Chap. 2.
46 Shankar v. Gangabai, (1976) 4 SCC 112 at p. 115: AIR 1976 SC 2506.
47 S. 101.
48 S. 102, as amended by the Amendment Act of 2002.
49 Letters Patent Appeal.
50 Gazette of India, Extra., Pt. II, S. 2, dated 08-04-1974 at p. 308.
51 Fr. Abraham Mathews v. Illani Pillai, AIR 1981 Ker 129 (FB).
52 Art. 116, Limitation Act, 1963.
53 For Model Second Appeal, see infra, Appendix "E".

appeal, it need not set out the grounds of objections to the decree appealed from.54 If the High Court is satisfied that the appeal involves such question, it will formulate that question and the hearing of appeal will be confined to that question only and the appellant cannot urge any other ground in appeal except with the leave of the court. But even if the High Court fails to formulate a substantial question of law at the time of admitting the appeal, the appeal cannot be dismissed on that ground and the court can formulate such a question at a later stage also.55

No doubt, such a situation is regrettable. But failure on the part of the court cannot prejudicially or adversely affect the party. This does not, however, mean that the appellant has no duty at all. He must be vigilant to bring to the notice of the court the above error and get it corrected. In a given case if the conduct of the party in this regard lacks bona fides, his appeal may be dismissed also, but as a general principle of law, a party cannot be penalised for the mistake of the court. The proviso to sub-section (5) of Section 100 is indicative of the legislative intention in this regard. It confers enabling power upon the court to cure the defect and to ensure that no injustice is done to the appellant.

In Sonubai Yeshwant v. Bala Govinda56, Masodkar, J. rightly observed, "The restrictive scheme of Section 100 couched in mandatory terms, firstly, casts a duty on the court not to admit the appeals which do not involve substantial questions of law for such an appeal is not provided for; and secondly, it requires the admission order to speak about and spell out such substantial question and, thirdly, on that question the notice has to be issued to the respondents, who are enabled to show that such a question is neither a substantial question of law, nor arises in a given appeal but further at that stage with the leave of the court the appellant is further enabled to rely on any other substantial question of law which can form the part of the debate at the final hearing stage. While working out this compact scheme, however, occasion like the present one may arise wherein though the court admitted the appeal it failed to spell out the substantial questions of law as enjoined by subsection (4). Doubtless such a situation is regrettable. Nonetheless, such omission is the omission of the court and not of the party. The principle that applies to the omissions, errors or mistakes on the part of the court should always be available in such an eventuality provided the course of justice is not prejudiced or affected to opponent's disadvantage. Once the litigant has diligently followed the procedural law, he

54 Or. 41 R. 1. See also supra, Chap. 2; infra, Appendix 'D'.
55 Sonubai Yeshwant Jadhav v. Bala Govinda Yadav, infra.
56 AIR 1983 Bom 156: (1983) 1 Bom CR 632.

cannot be punished for the omission of the court. To act ex debito justitiae is the basic rule in matters of administration of justice and, particularly, when it arises out of the procedural laws. Failure on the part of the court, therefore, though serious does not affect the process of appeal which is set for final hearing, nor can the appeal be dismissed for that reason. There are ample complementary and supplementary inherent powers with which the court is clothed to cure such defects and that is expressly recognised by the provisions of Section 151 of the Code of Civil Procedure. Drawing upon that power in a given case, the court would be entitled to cure such a defect of court's failure to comply with the mandatory requirements of sub-section (4) of Section 100 even by formulating such a question at the later stage."57

12. POWER OF HIGH COURT TO DECIDE ISSUE OF FACT:

SECTION 103

Though no second appeal lies on a question of fact, when such appeal is already before the High Court, and the evidence on record is sufficient, it may decide any issue of fact necessary for the disposal of the appeal, if such issue (a) has not been determined either by the trial court or by the appellate court or by both; or (b) has been wrongly determined by such court or courts by reason of its/their decisions on a substantial question of law.58 This provision enables a High Court to decide even an issue of fact in certain circumstances.

13. PROCEDURE AT HEARING

The provisions relating to first appeals59 shall apply to second appeals also.60

14. PENDING APPEALS

As seen above, the right of appeal is a substantive right and is not merely a matter of procedure. Moreover, institution of a suit carries with it a right of appeal which is a vested right and such right is governed by the law prevailing at the date of filing of the suit or proceeding and it cannot be abrogated or curtailed by a subsequent legislation61

57 Sonubai Yeshwant v. Bala Govinda, AIR 1983 Bom 156 at p. 162.

58 S. 103. See also Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; Gurbaksh Singh v. Nikka Singh, AIR 1963 SC 1917 at p. 1919: 1963 Supp (1) SCR 55; Afsar Sheikh v. Soleman Bibi, (1976) 2 SCC 142: AIR 1976 SC 163; N.G. Dastane v. S. Dastane, (1975) 2 SCC 326 at p. 334: AIR 1975 SC 1534 at p. 1539; Balai Chandra v. Shewdhari Jadav, (1978) 2 SCC 559 at p. 566: AIR 1978 SC 1062 at p. 1067; Jadu Gopal v. Pannalal Bhowmick, (1978) 3 SCC 215 at p. 235: AIR 1978 SC 1329 at pp. 1340-41; Bhagwan Sharma v. Bani Ghosh, 1993 Supp (3) SCC 497: AIR 1993 SC 398.

59 Or. 41; see supra, Chap. 1.

60 Or. 42 R. 1.

61 Colonial Sugar Refining Co. Ltd. v. Irving, 1905 AC 369 (PC).

On the above analogy, the right of second appeal which accrued in favour of the appellant on the date of filing of the suit cannot be restricted or narrowed down by the Amendment Act of 1976 by which Section 100 was amended.

However, with a view to remove doubts, Section 97 of the Amendment Act, 1976 relating to "Repeal and Saving" clarifies that the provisions of the new Section 100 will not affect any second appeal admitted before the date the Amendment Act came into force.62

15. GENERAL PRINCIPLES

From the aforesaid discussion, the following general principles can be deduced regarding second appeals:

(i) A second appeal lies in the High Court;

(ii) Such an appeal is maintainable only on a substantial question of law alone;

(iii) An appeal lies also against an ex parte decree;

(iv) No second appeal lies except on grounds mentioned in S. 100,

i.e. except on a substantial question of law. Thus, no appeal cart be filed on a question of fact, question of law, or mixed question of fact and law;

(v) No second appeal lies in a money decree, where the amount does not exceed twenty five thousand rupees;

(vi) The memorandum of appeal must state substantial question of law;

(vii) The High Court should formulate a substantial question of law while admitting an appeal;

(viii) The appeal will be heard only on such question;

(ix) The High Court, however, has power to hear the appeal on other substantial question of law not formulated by it at the admission stage by recording reasons;

(x) At the hearing the respondent can argue that such question does not involve the appeal;

(xi) A substantial question of law does not mean a question of general importance but a question arising between the parties to the appeal;

(xii) In certain circumstances, a High Court can also decide an issue of fact;

(xiii) Procedure at the hearing will be the same as that of the first appeal;

(xiv) No letters patent appeal lies against the decision in the second appeal;

62 Kamla Devi v. Kushal Kanwar, (2006) 13 SCC 295: AIR 2007 SC 663; Vidya Vati v. Hans Raj, AIR 1993 Del 187.

(xv) The provisions of the Amendment Act of 1976 do not apply to second appeals already admitted prior to the amendment and pending for hearing.

PART III
4 Appeals from Orders

SYNOPSIS

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1. GENERAL

SECTIONS 104 to 108 and Order 43 deal with appeals from orders. They state that certain orders are appealable. No appeal lies against other orders. But those orders can be attacked in an appeal from the final decree. They also provide for the forum of an appeal.

2. ORDER: MEANING

"Order" has been defined as "the formal expression of any decision of a civil court which is not a decree"1. Thus, an adjudication of a court which does not fall within "decree", is an "order"2.

3. ORDER AND DECREE

In spite of some similarities, an order differs from a decree.3

4. NATURE AND SCOPE

The Code has made certain orders appealable. Appeals can be filed only against those orders4 which are made appealable. No appeal lies from other orders.5

1 S. 2(14).

2 Ibid, see also Vidyachar... R 129.

3 For detailed discussion...

4 S. 104(1). See also Ke... Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393: AIR 1974 SC 1126; Shah Babulal v. Jayaben D. K...

5 S. 104(2).

5. APPEALABLE ORDERS: SECTION 104, ORDER 43

An appeal shall lie from the following orders:

(i) An order awarding compensatory costs in respect of false or vexatious claims or defence. (Section 35-A)6 Such appeal, however, is limited to two grounds, namely:

(a) No such order could have been made; or

(b) An order for less amount ought to have been made.7

(ii) An order refusing leave to institute a suit against public nuisance. (Section 91)8

(iii) An order refusing leave to institute a suit in case of breach of trust. (Section 92)9

(iv) An order awarding compensation for obtaining arrest, attachment or injunction on insufficient grounds. (Section 95)10

(v) An order imposing a fine11 or directing the arrest or detention in civil prison of any person except where such arrest or detention is in execution of a decree.12

(vi) An order returning a plaint to be presented to the proper court. (Order 7 Rule 10)13

(vii) An order rejecting an application (in appealable cases) to set aside the dismissal of a suit for default. (Order 9 Rule 9)14

(viii) An order rejecting an application (in appealable cases) to set aside an ex parte decree. (Order 9 Rule 13)15

(ix) An order dismissing a suit or striking out defence for non- compliance with an order for discovery. (Order 9 Rule 13)16

(x) An order objecting to the draft of a document or an endorsement on a negotiable instrument. (Order 21 Rule 34)17

(xi) An order setting aside or refusing to set aside a sale. (Order 21 Rule 72, 92)18

(xii) An order rejecting an application to set aside orders passed ex parte in execution proceedings. [Order 21 Rule 106(1)]19

6 S. 104(1)050.

7 Proviso to S. 104(l)(ff).

8 S. 104(1)(ffa).

9 S. 104 (1) (ffa).

10 S. 104(l) (g).

11 S. 104(l)(h); Or. 16 Rr. 10, 12, 17 & 21; Or. 26 R. 17.

12 S. 104(l)(h); Or. 38 Rr. 1 & 4; Or. 39 R. 2-A.

13 Or. 43 R. 1(a).

14 R. 1(c).

15 R. 1(d).

16 R. 1(f).

17 R. 1(i).

18 R. 1 (j)

19 R. 1 (ja).

(xiii) An order refusing to set aside the abatement or dismissal of a suit. (Order 22 Rule 9)20
(xiv) An order giving or refusing to give leave to continue a suit by or against an assignee. (Order 22 Rule 10)21
(xv) An order rejecting an application (in appealable cases) to set aside the dismissal of a suit for not furnishing security for costs within time. (Order 25 Rule 2)22
(xvi) An order rejecting an application for permission to sue as an indigent person. (Order 33 Rule 5 or 7)23
(xvii) An order in an interpleader suit for costs of the plaintiff where the defendant in interpleader suit sues the plaintiff in another court (Order 35 Rule 3), or for costs and discharge of the plaintiff in an interpleader suit. (Order 35 Rule 4 or 6)24
(xviii) An order to deposit money or other property or to furnish security or fresh security for appearance of the defendant (Order 38 Rule 2 or Rule 3) or for attachment of property before judgment. (Order 38 Rule 6)25
(xix) An order granting or refusing to grant interim injunction.
(Order 39 Rule 1 or 2)26
(xx) An order for attachment of property or detention of a person disobeying an order of injunction. (Order 39 Rule 2-A)27
(xxi) An order discharging, varying or setting aside injunction. (Order 39 Rule 4)28
(xxii) An order for deposit of money or other thing in court or for its delivery to the person entitled. (Order 39 Rule 10)29
(xxiii) An order for appointment of receiver. (Order 40 Rule l)30
(xxiv) An order for attachment and sale of property of defaulting receiver. (Order 40 Rule 4)31
(xxv) An order refusing to restore an appeal dismissed for default of appearance by appellant. (Order 41 Rule 19)32

20 R. 1(k).
21 R. 1(l).
22 R. 1(n).
23 R. 1(na).
24 R. 1(p).
25 R. 1(q).
26 R. l (r).
27 R. l(r).
28 R. l(r).
29 R. l(r).
30 R. l(s).
31 R. l(s).
32 R. 1(t).

(xxvi) An order refusing to rehear an appeal heard ex parte. (Order 41 Rule 21)33
(xxvii) An order of remand (in appealable cases). (Order 41 Rule 23 or 23-A)34
(xxviii) An order granting an application for review. (Order 47 Rule 1)35

6. OTHER ORDERS: SECTION 105, RULE 1-A

Section 105 enacts that every order whether appealable or not, except an order of remand, can be attacked in an appeal from the final decree on the ground (i) that there is an error, defect or irregularity in the order; and (ii) that such error, defect or irregularity affects the decision of the case.36 The principle underlying Section 105 is that when an interlocutory order is appealable, the party against whom such order is made is not bound to prefer an appeal against it. There is no such law which compels a party to appeal from every interlocutory order by which he may feel aggrieved. Section 105 makes it clear that an order appealable under Section 104 may be questioned under this section in an appeal from the decree in the suit, even though no appeal has been preferred against the interlocutory order.37

Prior to the Amendment Act of 1976, an order under Order 23 Rule 3 recording or refusing to record an agreement, compromise or satisfaction was appealable.38 By the Amendment Act of 1976, the said provision has been deleted. However Rule 1-A has been added which provides that in an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.39

7. RES JUDICATA

The doctrine of res judicata applies to two stages of the same litigation also40 Hence, if any interlocutory order has not been challenged,

33 R. 1(t).
34 R. 1(u).
35 R. 1(w).
36 S. 105 R. 1-A. See also Satyadhyan Ghosal v. Deorjin Debi, AIR 1960 SC 941 at p. 946: (1960) 3 SCR 590; Amar Chand v. Union of India, AIR 1964 SC 1658 at p. 1661; Lonankutty v. Thomman, (1976) 3 SCC 528 at p. 535: AIR 1976 SC 1645 at p. 1651:1976 Supp SCR 74; Jasraj Inder Singh v. Hemraj Multanchand, (1977) 2 SCC 155 at p. 164: AIR 1977 SC 1011 at pp. 1017-18.
37 Ibid, see also Maharajah Moheshur Sing v. Bengal Govt., (1859) 7 Moo IA 283 at p. 302 (PC).
38 Or. 43 R. 1 (m) (before the amendment).
39 R. 1-A(2). See also Anant v. Achut, AIR 1981 Bom 357.
40 Satyadhyan Ghosal v. Deorjin Debi, AIR 1960 SC 941: (1960) 3 SCR 590; Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993: (1964) 5 SCR 946. For detailed discussion, see supra,

the same would operate as res judicata at all subsequent stages of the suit and no party can be allowed to "set the clock back" during the pendency of the proceedings.41 It thus gives finality to such orders.42 Correctness thereof, however, can be challenged by an aggrieved party in a regular appeal from the final decree43

8. LIMITATION

An appeal from an order can be filed in a High Court within ninety days and in another court within thirty days from the date of the order.44

9. FORUM OF APPEAL: SECTION 106

Appeals from orders in cases in which they are appealable, shall lie to the court to which an appeal would lie from the decree in the suit in which the order is made45 Where such order is made by a court other than a High Court in the exercise of appellate jurisdiction, an appeal shall lie to the High Court45 In certain circumstances, even a letters patent appeal is maintainable46

10. PROCEDURE AT HEARING

The provisions relating to first appeals47 shall apply to appeals from orders also.48

11. LETTERS PATENT APPEAL

Sub-section (2) of Section 104 states that no appeal shall lie from any order made in appeal. A question may arise whether a Letters Patent Appeal would lie against an order passed by a Single Judge of the High Court.

There was a conflict of opinions on this point in the past but the controversy has been set at rest by a decision of the Supreme Court in Shah

Pt. II, Chap. 2.

41 Ibid, see also Sankaranarayan v. K. Sreedevi, (1998) 3 SCC 751; Ishwar Dass v. Sohan Lal, (2000) 1 SCC 434: AIR 2000 SC 426.

42 Satyadhyan Ghosal v. Deorjin Debi, AIR 1960 SC 941: (1960) 3 SCR 590; Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993: (1964) 5 SCR 946. For detailed discussion, see, Pt. II, Chap. 2.

43 S. 105.

44 Art. 116, Limitation Act, 1963.

45 S. 106.

46 Shah Babulal v. Jayaben D. Kania, (1981) 4 SCC 8 at p. 22: AIR 1981 SC 1786; Madan Naik v. Hansubala Devi, (1983) 3 SCC 15: AIR 1983 SC 676; jugal Kishore v. S. Satjit Singh, (1984) 1 SCC 358; Umaji Keshao v. Radhikabai, 1986 Supp SCC 401: AIR 1986 SC 1272; Madhusudan Vegetable Products v. Rupa Chemicals, (1986) 27 (1) Guj LR 101.

47 Or. 41, see supra, Chap. 2.

48 Or. 43 R. 2.

Babulal v. Jayaben D. Kania49 wherein the Apex Court held that Section 104 applies to appeals to the High Court from subordinate courts. If a Single Judge of the High Court exercises original jurisdiction and makes an order, an appeal is competent under the Letters Patent to a Division Bench. But if such order is passed by a court subordinate to the High Court and an appeal against that order is decided by the Single Judge of the High Court under Section 104, no Letters Patent Appeal is maintainable.50

12. APPEAL TO SUPREME COURT

The bar to further appeal under Section 104(2) does not apply to appeals to the Supreme Court.51

49 (1981) 4 SCC 8: AIR 1981 SC 1786.

50 Ibid, see also Resham Singh v. Abdul Sattar, (1996) 1 SCC 49; New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corpn., (1997) 3 SCC 462: AIR 1997 SC 978.

51 Dewaji v. Ganpatlal, AIR 1969 SC 560; Satyadhyan Ghosal v. Deorjin Debi, AIR 1960 SC 941: (1960) 3 SCR 590.

PART III
5 Appeals by Indigent Persons
SYNOPSIS

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3. Inquiry: Rule 3 530
4. Power and duty of court 530

5. Payment of court fees: Rule 2 530
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7. Letters patent appeal 531

1. GENERAL
AS DISCUSSED above,1 Order 33 deals with suits by indigent persons. Order 44 deals with appeals by indigent persons. The provisions of Order 44 are subject in all matters to the provisions of Order 33 insofar as they are applicable.2

2. WHO MAY APPEAL: RULE 1
Any person entitled to prefer an appeal, who is unable to pay court fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as an indigent person.3
Before the Amendment Act of 1976, certain restrictions were imposed on the right of an indigent person to prefer an appeal under sub-rule (2) of Rule 1. It provided that the court shall reject the application to appeal in forma pauperis, unless it is shown that the decree is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust. Those restrictions were considered to be unjust, unfair, discriminatory and without any rational basis.4 The Law Commission,5 therefore, recommended that the said provisions be deleted. The said recommendation of the Law Commission

1 See supra, "Suits by indigent persons", Pt. II, Chap. 16.
2 Or. 44 R. 1. See also Dipo v. Wassan Singh, (1983) 3 SCC 376: AIR 1983 SC 846.
3 Ibid.
4 Law Commission's Fifty-fourth Report at p. 313.
5 Law Commissions Fifty-fourth Report at p. 313; see also Ram Sarup v. Union of India, (1983) 4 SCC 413: AIR 1983 SC 1196.

was accepted and, accordingly, sub-rule (2) of Rule 1 was deleted. The present position is that an indigent person may also file an appeal on all the grounds available to an ordinary person. An indigent person can also file cross-objections.6

3. INQUIRY: RULE 3

Rule 3 provides that where the appellant was allowed to sue as an indigent person in the trial court, no fresh inquiry is necessary if the applicant files an affidavit to the effect that he has not ceased to be an indigent person since the date of the decree appealed from. However, if the government pleader or the respondent disputes the truth of the statement made in such affidavit, an inquiry into the question as to whether or not the applicant is an indigent person shall be held by the appellate court, or under its order by an officer of that court.7

Where it is alleged that the applicant became an indigent person after the date of the decree appealed from, the inquiry into the means of the applicant shall be made by the appellate court or under its order by an officer of that court or by the trial court if the appellate court considers it necessary in the circumstances of the case.8

4. POWER AND DUTY OF COURT

At the stage of hearing of an application, the question to be considered by the court is whether the applicant is an indigent person. If he is, the application will be allowed and the memorandum of appeal will be registered. If he is not, the application will be rejected.9

5. PAYMENT OF COURT FEES: RULE 2

The rejection of an application for leave to appeal as an indigent person does not ipso facto result in the rejection of the memorandum of appeal filed along with the application.10 It only means that the court is not satisfied about the claim of the applicant that he is an indigent person and nothing more.11 Rule 2 empowers the court to grant time for payment of court fees when the application for leave to appeal as an indigent person is rejected.

6 Or. 41 R. 22(5). For detailed discussion of "Cross-objections", see supra, Chap. 2.
7 R. 3(1); see also M.L. Sethi v. R.P. Kapur, (1972) 2 SCC 427: AIR 1972 SC 2379.
8 R. 3(2).
9 Ram Sarup v. Union of India, (1983) 4 SCC 413: AIR 1983 SC 1196.
10 State of T-C v. John Mathew, AIR 1955 TC 209 (FB); Shahizadi Begam v. Alakh Nath, AIR 1935 All 620.
11 Ram Sarup v. Union of India, (1983) 4 SCC 413: AIR 1983 SC 1196.

6. LIMITATION

The period of limitation for presenting an application for leave to appeal as an indigent person to the High Court is sixty days and to other courts is thirty days. The limitation starts from the date of the decree appealed from.12

7. LETTERS PATENT APPEAL

There is difference of opinions as to whether a Letters Patent Appeal lies against an order granting or refusing to grant leave to appeal as an indigent person. The majority opinion, however, is that an appeal is maintainable against such orders. The expression "appeal" as used in Order 44 is very wide and comprehensive and includes a Letters Patent Appeal. The phrase "any person entitled to prefer an appeal" takes within its sweep not only the persons who are entitled to prefer an appeal as of right but also the persons who can file an appeal with the leave of the court.13

12 Art. 130, Limitation Act, 1963.

13 K.Y. Sodamma v. K. Gunneswarudu, AIR 1973 AP 295; Chandel Ranjit Kunwar v. Hiralal, AIR 1972 MP 133.

PART III
6 Appeals to Supreme Court

SYNOPSIS

1. GENERAL
2. CONDITIONS: SECTION 109, ORDER 45 RULE 3
(i) Judgment, decree or final order
(ii) Substantial question of law of general importance
(iii) Need to be decided by Supreme Court
3. Procedure at hearing
(a) Application for leave and certificate of fitness
(b) Effect of amendment in Constitution
(c) Security and deposit: Rules 7, 9 & 12
(d) Admission of appeal: Rule 8
(e) Powers of court pending appeal
(f) Execution of orders of Supreme Court: Rules 15 & 16
4. Appeals under Constitution

1. GENERAL

APPEALS TO the Supreme Court are governed by the provisions of Articles 132, 133 and 134-A of the Constitution of India with regard to civil matters. Subject to the provisions of the Constitution, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies that—

(a) The case involves a substantial question of law of general importance; and

(b) In the opinion of the High Court the said question needs to be decided by the Supreme Court.1

Sections 109 and 112 read with Order 45 deal with appeals to the Supreme Court.

2. CONDITIONS: SECTION 109, ORDER 45 RULE 3

An appeal would lie to the Supreme Court under Section 109 of the Code only if the following conditions are fulfilled:

1 Ss. 109 & 112.

(i) a judgment, decree or final order must have been passed by the High Court;
(ii) a substantial question of law of general importance must have been involved in the case; and
(iii) in the opinion of the High Court, the said question needs to be decided by the Supreme Court.

(i) Judgment, decree or final order

An appeal lies to the Supreme Court only against a judgment, decree or final order of the High Court. A judgment, decree or final order against which an appeal can be preferred to the Supreme Court must be one which purports to put an end to the litigation between the parties.2 No certificate can be granted in respect of an interlocutory order.3 The test whether the order is final or not will not depend on whether the controversy is finally over, but whether the controversy raised before the High Court is finally over or not.4 (emphasis supplied)

(ii) Substantial question of law of general importance

An appeal would lie to the Supreme Court if the High Court certifies that the case involves a substantial question of law of general importance. The expression substantial question of law of general importance has not been defined in the Code, but it is clear that the High Court can grant certificate under Section 109 only when it is satisfied that the question of law involved in the case is not only substantial but also of general importance. In other words, the substantial question of law must be such that, apart from the parties to the litigation, the general public should be interested in determination of such question by the Supreme Court, e.g., it would affect a large number of persons or a number of proceedings involving the same question.5 Therefore, if the question is settled by the Supreme Court, the application of the

2 Jethanand & Sons v. State of U.P., AIR 1961 SC 794 at p. 796: (1961) 3 SCR 754; Ramesh v. Gendalal, AIR 1966 SC 1445 at p. 1449: (1966) 3 SCR 198. For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II at pp. 485-500.

3 Syedna Taher Saifuddin v. State of Bombay, AIR 1958 SC 253 at p. 255:1958 SCR 1010; Ramesh v. Gendalal Motilal Patni, supra.

4 Ramesh v. Gendalal Motilal Patni, AIR 1966 SC 1445 at p. 1449: (1966) 3 SCR 198; Union of India v. Gopal Singh, (1967) 2 SCWR 639; Tarapore & Co. v. V.O. Tractors Export, (1969) 1 SCC 233 at p. 238: AIR 1970 SC 1168 at pp. 1169-70; Prakash Chand v. Hindustan Steel Ltd., (1970) 2 SCC 806 at p. 808: AIR 1971 SC 2319; see also, Or. 45 R1.

5 Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd., AIR 1962 SC 1314 at p. 1318:1962 Supp (3) SCR 549 at pp. 557-58; Mahindra & Mahindra Ltd. v. Union of India, (1979) 2 SCC 529 at pp. 550-51: AIR 1979 SC 798 at pp. 811-12; SBI v. N. Sundara Money, (1976) 1 SCC 822 at p. 824: AIR 1976 SC 1111 at p. 1112.

principle to the facts of a particular case does not make the question a substantial question of law of general importance.6

(iii) Need to be decided by Supreme Court

It is not sufficient that the case involves a substantial question of law of general importance, but, in addition to it, the High Court must be of the opinion that such question needs to be decided by the Supreme Court. The word needs suggests that there has to be a necessity for a decision by the Supreme Court on the question, and such a necessity can be said to exist when, for instance, two views are possible regarding the question and the High Court takes one view of the said views. Such a necessity can also be said to exist when a different view has been expressed by another High Court.7

3. PROCEDURE AT HEARING

(a) Application for leave and certificate of fitness

Whoever desires to appeal to the Supreme Court shall apply by a petition to the court whose decree is sought to be appealed from.8 Ordinarily, such a petition should be decided within sixty days from the date of filing of the petition.9 Every petition should state the grounds of appeal and pray for the issue of a certificate (i) that the case involves a substantial question of law of general importance; and (ii) that in the opinion of the court the said question needs to be decided by the Supreme Court.10 After notice to the other side, the court may grant or refuse to grant the certificate.11

(b) Effect of amendment in Constitution

These provisions, however, must be read in the light of and subject to Article 134-A of the Constitution. By the Constitution (Forty-fourth Amendment) Act, 1978, Article 134-A has been inserted with effect from 1 August 1979. It states that every High Court, passing or making a judgment, decree, final order or sentence referred to in Article 132(1)

6 Chunilal V. Mehta and Sons Ltd. v. Century Spg. b Mfg. Co. Ltd., supra; Mahindra & Mahindra Ltd. v. Union of India, (1979) 2 SCC 529 at pp. 550-51: AIR 1979 SC 798 at pp. 811-12; SBI v. N. Sundara Money, (1976) 1 SCC 822 at p. 824: AIR 1976 SC 1111 at p. 1112; Pankaj Bhargava v. Mohinder Nath, (1991) 1 SCC 556 at p. 563: AIR 1991 SC 1233; For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II at pp. 509-14.

7 SBI v. N. Sundara Money, supra; Union of India v. Hafiz Mohd. Said, AIR 1975 Del 77 at pp. 78-79 (FB). For detailed discussion and case law, see, Author's, Code of Civil Procedure (Lawyers' Edn.) Vol. II at pp. 514-15.

8 Or. 45 R. 2(1).

9 R. 2(2).

10 R.3.

11 Rr. 3(2), 6, 7.

or 133(1) or 134(1), may, if it deems so to do, either suo motu or shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence, determine whether a certificate may be given or not.12

The effect of the amendment is that if an aggrieved party wants to approach the Supreme Court under Article 132, 133 or 134 after getting certificate from the High Court, he will have to make an oral application immediately after the pronouncement of the judgment, and if such an application is not made immediately, by taking resort to Article 133(b) of the Limitation Act, 1963, he may not be able to approach the Supreme Court. The reason is that the source of power are Articles 132, 133, 134 read with Article 134-A, and if an application is not made as per the provisions of the Constitution, the procedural law [Article 133(b), Limitation Act, 1963] cannot override the substantive law (Article 134-A of the Constitution) and such an application even if it is filed within a period of sixty days from the date of judgment, order, etc. as per Article 133(b) of the Limitation Act, 1963, it is not maintainable at law. The author is of the opinion that in the light of the Constitution (Forty-fourth Amendment) Act, 1978, Article 133(b) of the Limitation Act, 1963 requires to be amended. But even if it is not done, it cannot override the provisions of the Constitution.13

(c) Security and deposit: Rules 7, 9 & 12

When the certificate is granted, the applicant should furnish security for the costs of the respondent and also deposit the expenses for translating, printing, indexing, etc. within the stipulated period. The court may revoke acceptance of security. The court has also the power to refund the balance of the deposit after necessary deductions for expenses.14

(d) Admission of appeal: Rule 8

Where the directions regarding furnishing of security and making of deposit are carried out, the court shall declare the appeal admitted, give notice thereof to the respondent and transmit the record to the Supreme Court.15 If the security furnished or the costs deposited appears to be inadequate, the court may order further security to be furnished or costs to be deposited.16 If the appellant fails to comply with

12 For Statement of Objects and Reasons, see, Gazette of India, Extra., Pt. II, S. 2, dt. 15 May 1978 at p. 616; see also SBI v. Employees' Union, (1987) 4 SCC 370: AIR 1987 SC 2203.

13 Keshava S. Jamkhandi v. Ramachandra S. Jamkhandi, AIR 1981 Kant 97: (1980) 2 Kant LJ 432 (FB); Dhangir v. Jankidas, AIR 1990 Raj 102.

14 Rr. 7, 9 & 12.

15 R.8.

16 Rr. 10 & 14; see also, R, 9-A.

such order, the proceedings shall be stayed and the appeal shall not proceed without an order of the Supreme Court.17 The execution of the decree shall not be stayed meanwhile.18

(e) Powers of court pending appeal

The pendency of an appeal to the Supreme Court does not affect the right of the decree-holder to execute the decree unless the court otherwise directs.14 The court may stay execution after taking sufficient security from the appellant or it may allow the decree to be executed after taking sufficient security from the respondent.19

(f) Execution of orders of Supreme Court: Rules 15 & 16

The appeal will then be heard by the Supreme Court and an order will be made. Whoever desires to execute a decree or an order of the Supreme Court shall apply by a petition accompanied by a copy of the decree or order sought to be executed to the court from which the appeal was preferred to the Supreme Court. Such court shall transmit the record of the Supreme Court to the trial court or to such court as the Supreme Court may direct, with the necessary directions for execution of the same. The court to which it is transmitted shall execute it in the same manner as it executes its own decrees and orders.20 The orders relating to such execution shall be appealable in the same manner as the orders relating to the execution of its own decree.21

4. APPEALS UNDER CONSTITUTION

Over and above Articles 132, 133 and 134-A, Article 136 of the Constitution confers very wide and plenary powers on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order (final as well as interlocutory) passed by any court or tribunal. Section 112 of the Code saves the powers conferred on the Supreme Court by the Constitution and declares that nothing in the Code of Civil Procedure would affect these powers.22

17 R. 11.
18 R. 13(1). See also Deochand v. Shiv Ram, AIR 1965 SC 615 at p. 617: (1965) 1 SCR 109.
19 R 13(2). See also Deochand v. Shiv Ram, supra.
20 R. 15.
21 R. 16.
22 For detailed discussion, see, Author's, Lectures on Administrative Law (2008) at pp. 390-97.

PART III

7

Reference

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1. NATURE AND SCOPE

SECTION 113 of the Code empowers a subordinate court to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the court itself feels some doubt about a question of law. The High Court may make such order thereon as it thinks fit.

Such opinion can be sought by a court when the court trying a suit, appeal or execution proceedings entertains reasonable doubt about a question of law.1

2. OBJECT

The underlying object for the provision for reference is to enable subordinate courts to obtain in non-appealable cases the opinion of the High Court in the absence of a question of law and thereby avoid the commission of an error which could not be remedied later on.2 Such provision also ensures that the validity of a legislative provision (Act, Ordinance or Regulation) should be interpreted and decided by the

1 S. 113; Or. 46 R. 1.

2 Chhotubliai v. Bai Kashi, LR 733; Birendra Kishor v. Secy. of State, AIR 1921 Cal 262 (FB).

highest court in the State.3 The reference must, therefore, be made before passing of the judgment in the case.4

3. CONDITIONS

The right of reference, however, is subject to the conditions prescribed by Order 46 Rule 1 and, unless they are fulfilled, the High Court cannot entertain a reference from a subordinate court.5 The rule requires the following conditions to be satisfied to enable a subordinate court to make a reference:

(i) There must be a pending suit or appeal in which the decree is not subject to appeal or a pending proceeding in execution of such decree;

(ii) A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding; and

(iii) The court trying the suit or appeal or executing the decree must entertain a reasonable doubt on such question.

Questions of law on which a subordinate court may entertain a doubt may be divided into two classes:

(i) Those which relate to the validity of any Act, Ordinance or Regulation; and

(ii) Other questions.

In the latter case, the reference is optional, but in the former case it is obligatory if the following conditions are fulfilled:6

(i) It is necessary to decide such question in order to dispose of the case;

(ii) The subordinate court is of the view that the impugned Act, Ordinance or Regulation is ultra vires; and

(iii) There is no determination either by the Supreme Court or by the High Court to which such court is subordinate that such Act, Ordinance or Regulation is ultra vires.

3 Ibid, see also Public Prosecutor v. Dr. B. Krishnasami, AIR 1957 AP 567; M.S. Oberoi v. Union of India, AIR 1970 Punj 407: (1970) 72 Punj LR 830; Indian Council of Agricultural Research v. Veterinary Council of India, (1996) 63 DLT 786.

4 Diwalibai v. Sadashivdas, ILR (1900) 24 Bom 310 at p. 314.

5 Garling v. Secy, of State for India, ILR (1903) 30 Cal 458 at p. 462; Distt. Munsif, Chittoor, In re, AIR 1970 AP 365: ILR 1970 AP 1175; Ranadeb Choudhuri v. Land Acquisition judge, AIR 1971 Cal 368 at p. 375: 75 CWN 375; Geevarghese George v. K.P. Abraham, AIR 1979 Ker 237; Behramshaw Hormanshah Bharda v. Dastoorji, AIR 1980 Guj 74.

6 Proviso to S. 113. See also Ganga Pratap Singh v. Allahabad Bank Ltd., AIR 1958 SC
293 at p. 295:1958 SCR 1150; State Financial Corpn. Ltd. v. Satpathy Bros. & Nanda Co. (P) Ltd., AIR 1975 Ori 132 at p. 133: ILR 1975 Cut 659 (FB); H.P. Financial Corpn. v. Nahan Electricals, AIR 1982 HP 49; Behramshaw Hormanshah v. Dastoorji, AIR 1980 Guj 74 at p. 78: (1980) 21 Guj LR 202; Municipal Corpn. of City v. Shivshanker Gaurishanker, (1998) 9 SCC 197: AIR 1999 SC 2874.

The object of this provision is to see that the Act of legislature should be interpreted by the Supreme Court in the State.7

4. REASONABLE DOUBT

A reference can be made on a question of law only when the judge trying the case entertains a reasonable doubt about it.8 There can be no reasonable doubt on a question decided by the High Court to which the judge making reference is subordinate.9 But if such decision is doubted in a later decision by the same court or by a higher court, e.g. Privy Council, Federal Court or Supreme Court, there is a room for reasonable doubt to make reference.10

5. WHO MAY APPLY?

Only a court can refer a case either on an application of a party or suo motu.11 "Court" means a Court of Civil Judicature.12 A tribunal or persona designata cannot be said to be a "court" and no reference can be made by them.13

6. POWER AND DUTY OF REFERRING COURT

A reference can be made only in a suit, appeal or execution proceeding pending before the court. Such reference can be made when a subordinate court entertains a doubt on a question of law.14 Further, such question must have actually arisen between the parties litigating and the court must have been called upon to adjudicate the lis.15 No reference, hence, can be made on a hypothetical question or to provide an answer to a point likely to arise in future.16

7 Public Prosecutor v. Dr. B. Krishnasami, AIR 1957 AP 567.

8 Ralia Ram v. Sadh Ram, AIR 1952 Pepsu 1 (FB); E.E. Dawoodjee & Sons v. Municipal Corpn. of Rangoon, AIR 1923 Rang 193: (1923) 1 Rang 220:76IC 519; Distt. Munsif, Chittoor, In re, AIR 1970 AP 365.

9 Ibid, see also Bhanaji Raoji Khoji v. Joseph De Brito, (1906) Bom 226; Hurish Chunder v. W.P.O. Brien, (1870) 14 Suth WR 248.

10 Ibid, see also Fatima-ul-Hasna v. Baldeo Sahai, AIR 1926 All 204(2) (FB); Puttu Lal v. Parbati Kunwar, (1914-15) 42 IA 155 (PC); see also infra, "Power and duty of referring court".

11 S. 113; Or. 46 R. 1.

12 Phul Kumari v. State, AIR 1957 All 495; Delhi Financial Corpn. v. Ram Parshad, AIR 1973 Del 28.

13 Ramakant Bindal v. State of U.P., AIR 1973 All 23; Nanak Chand v. Estate Officer, AIR 1969 P&H 304; Banarsi Yadav v. Krishna Chandra, AIR 1972 Pat 49 (FB).

14 Tika Ram v. Maheshwari Din, AIR 1959 All 659: (1959) 2 All 87:1959 All LJ 592; State Financial Corpn. Ltd. v. Satpathy Bros. & Nanda Co. (P) Ltd., AIR 1975 Ori 132: ILR 1975 Cut 659 (FB); L.S. Sherlekar v. D.L. Agarwal, AIR 1968 Bom 439: (1968) 70 Bom LR 100.

15 Banarsi Yadav v. Krishna Chandra Dass, AIR 1972 Pat 49 (FB); Distt. Munsif, Chittoor, In re, AIR 1970 AP 365: ILR 1970 AP 1175.

16 Ibid, see also Ranganath v. Hanumantha, (1984) 1 Kant LC 243.

But once the question "arises" and the Proviso is attracted and validity of any Act, Ordinance or Regulation is challenged, and the referring court is prima facie satisfied that such Act, Ordinance or Regulation is ultra vires, the case has to be referred to the High Court.17

7. POWER AND DUTY OF HIGH COURT

The jurisdiction of the High Court is consultative.18 In dealing with and deciding the reference the High Court is not confined to the questions referred by a subordinate court. If a new aspect of law arises, the High Court can consider it.19 The High Court may answer the question referred to it and send back the case to the referring court for disposal in accordance with law.20 It may also refuse to answer the reference or even to quash it.21 The High Court, however, cannot make any order on merits nor can it make suggestions.22

8. PROCEDURE AT HEARING

The referring court should draw up a statement of the facts of the case, formulate the question of law on which opinion is sought and give its opinion thereon.23 The court may either stay the proceedings or pass a decree or order contingent upon the decision of the High Court on the point referred, which cannot be executed until receipt of a copy of the judgment of the High Court on the reference.24 If the High Court answers the question in favour of the plaintiff, the decree will be confirmed. If it is answered against him, the suit will be dismissed.25 The High Court after hearing the parties, if they so desire, shall decide the point so referred and transmit a copy of its judgment to the court which shall dispose of the case in accordance with the said decision.26 Where the referring court has not complied with the conditions laid down for making reference, the High Court has power to return the case for amendment.27 The High Court can even quash the order of

17 Ganga Pratap Singh v. Allahabad Bank Ltd., AIR 1958 SC 293:1958 SCR 1150.
18 Delhi Financial Corpn. v. Ram Parshad, AIR 1977 Del 80; Raja Hussain v. Gaviappa, AIR 1984 Kant 108.
19 S.K. Roy v. Board of Revenue, AIR 1967 Cal 338; CIT v. Scindia Steam Navigation Co. Ltd., AIR 1961 SC 1633.
20 Or. 46 R. 3; see also S.K. Roy v. Board of Revenue, supra.
21 Or. 46 R. 5; see also Krishnarao Bhaskar v. Lakshman Ramchandra, AIR 1929 Bom 30.
22 Municipal Corpn. of City v. Shivshanker Gaurishanker, (1998) 9 SCC 197: AIR 1999 SC 2874.
23 Or. 46 Rr. 1 & 4-A.
24 R.2.
25 L.S. Sherlekar v. D.L. Agarwal, AIR 1968 Bom 439: (1968) 70 Bom LR 100.
26 R.3.
27 Garling v. Secy. of State for India, ILR (1903) 30 Cal 458 at p. 462.

reference.28 The High Court may alter, cancel or set aside any decree or order passed or made by the court making the reference and make such order as it thinks fit.29

9. COSTS

As a general rule, the costs of reference shall be the costs in the cause.30 But if the reference is altogether unwarranted, the High Court may direct the referring judge to personally pay the costs.31

10. REVISION

An order refusing to make reference to the High Court is a "case decided" under Section 115 of the Code and is revisable.32

11. REFERENCE AND APPEAL33

12. REFERENCE AND REVIEW34

13. REFERENCE AND REVISION35

14. REFERENCE UNDER CPC AND CRPC Section 395(1) of the Code of Criminal Procedure, 1973 provides that where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of the opinion that such Act, Ordinance or Regulation or provision is invalid or inoperative but has not been declared by the High Court to which that court is subordinate or by the Supreme Court, the court shall state a case setting out its opinion and the reason therefor and refer the same for the decision of the High Court. Sub-section (2) of Section 395 enables a Court of Session or a Metropolitan Magistrate to make reference for the decision of the High Court any question of law arising in a case pending before the court.36

28 Krishnarao Bhaskar v. Lakshman Ramchandra, AIR 1929 Bom 30 at p. 31.
29 R.5.
30 R.4.
31 L.S. Sherlekar v. D.L. Agarwal, AIR 1968 Bom 439 at pp. 442-43.
32 Cantonment Board v. Phulchand, AIR 1932 Nag 70.
33 See infra, Chap. 9.
34 See infra, Chap. 9.
35 See infra, Chap. 9.
36 For detailed discussion, see, C.K. Thakker, Criminal Procedure (2007) at pp. 283-85.

15. REFERENCE UNDER CPC AND CONSTITUTION

Article 228 of the Constitution provides for transfer of certain cases to a High Court.37 Section 113 of the Code refers to the questions regarding the validity of any " Act, Ordinance or Regulation or of any provision", while Article 228 of the Constitution refers to a substantial question of law as to the "interpretation of the Constitution". An interpretation of an Act or statute does not necessarily involve an interpretation of the Constitution, nor vice versa. But a question as to the validity of an Act or provision may involve the interpretation of the Constitution in one form or the other.38

Again, under Section 113 of the Code, the subordinate court trying the case can go into the question of vires of any Act, Ordinance or Regulation and can make a reference only when prima facie it is of the opinion that such Act, Ordinance or Regulation is invalid or inoperative; under Article 228 of the Constitution, on the other hand, a subordinate court cannot even investigate into such question. It is the duty of a subordinate court to refer the case to the High Court as soon as it discovers that it involves a substantial question of law as to the interpretation of the Constitution. It is also the duty of the High Court to withdraw such a case from a subordinate court.39

37 Art. 228 reads as under:

"Transfer of certain cases to High Court.—If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may:

(a) either dispose of the case itself; or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of the judgment on such question, and the said courts shall on receipt thereof, proceed to dispose of the case in conformity with such judgment."

38 Ranadeb Choudhuri v. Land Acquisition Judge, supra Ganga Pratap Singh v. Allahabad Bank Ltd., supra; Penguine Textiles Ltd. v. A.P. State Financial Corpn., AIR 1971 AP 339.

39 Ibid, see also Behramshaw Hormanshah v. Dastoorji, AIR 1980 Guj 74 at p. 78: (1980) 21 Guj LR 202 at p. 208.

PART III
8 Review

SYNOPSIS

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1. GENERAL

SECTION 114 of the Code gives a substantive right of review in certain circumstances and Order 47 provides the procedure therefor. The provision relating to review constitutes an exception to the general rule that once the judgment is signed and pronounced by the court it becomes functus officio (ceases to have control over the matter) and has no jurisdiction to alter it.1

2. REVIEW: MEANING

Stated simply, review means to reconsider, to look again or to re-examine.2 In legal parlance, it is a judicial re-examination of the case by the

1 Or. 20 R. 3.

2 Chamber's 21st Century Dictionary (1997) at p. 1197; Random House Dictionary (1970) at p. 1227; Black's Law Dictionary (1979) at p. 1186; Concise Oxford English Dictionary

same court and by the same judge.3 In review, a judge, who has disposed of the matter reviews an earlier order passed by him in certain circumstances.4

3. NATURE AND SCOPE

The normal principle of law is that once a judgment is pronounced or order is made, the court becomes functus officio. Such judgment or order is final and it cannot be altered or changed.5

As a general rule, once an order has been passed by a court, a review of such order must be subject to the rules of the game and cannot be lightly entertained.6 A review of a judgment is a serious step and reluctant resort to it is called for only where a glaring omission, patent mistake or like grave error has crept in earlier by judicial fallibility.7

A power of review should not be confused with appellate powers which enable an appellate court to correct all errors committed by the subordinate court.8 In other words, it is beyond dispute that a review cannot be equated with the original hearing of the case, and finality of the judgment by a competent court cannot be permitted to be reopened or reconsidered, unless the earlier judicial view is manifestly wrong.9 It is neither fair to the court which decided the matter nor to the huge backlog of dockets waiting in the queue for disposal to file review petitions indiscriminately and fight over again the same battle which has been fought and lost. Public time is wasted in such matters

(2002) at p. 1225.

3 Maharajah Moheshur Sing v. Bengal Govt., (1857-60) 7 Moo IA 283; State of Orissa v. Commr. of Land Records and Settlement, (1998) 7 SCC 162: AIR 1998 SC 3067; Lily Thomas v. Union of India, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433.

4 For detailed discussion, see infra, "When review lies: Circumstances".

5 Or. 20 R. 3.

6 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845 at p. 855: (1965) 1 SCR 933 at p. 948; Sow Chandra Kante v. Sk. Habib, (1975) 1 SCC 674: AIR 1975 SC 1500; Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167: AIR 1980 SC 674; Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389: AIR 1979 SC 1047; Meera Bhanja v. Nirmala Kumari, (1995) 1 SCC 170: AIR 1995 SC 455; State of Orissa v. Commr. of Land Records and Settlement, (1998) 7 SCC 162: AIR 1998 SC 3067; Kewal Chand v. S.K. Sen, (2001) 6 SCC 512.

7 Ibid, see also Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, AIR 1954 SC 526 at p. 538: (1955) 1 SCR 520.

8 Ibid, see also Lily Thomas v. Union of India, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433; Delhi Admn. v. Gurdip Singh, (2000) 7 SCC 296; Susheela Naik v. G.K. Naik, (2000) 9 SCC 366.

9 Ibid, see also B.H. Prabhakar v. Karnataka State Coop. Apex Bank Ltd., (2000) 9 SCC 482.

and the practice, therefore, should be deprecated.10 Greater care, seriousness and restraint is needed in review applications.11
If a review application is not maintainable, it cannot be allowed by describing such an application as an application for "clarification" or "modification".12
A right of review is both, substantive as well as procedural. As a substantive right, it has to be conferred by law, either expressly or by necessary implication. There can be no inherent right of review. As a procedural provision, every court or tribunal can correct an inadvertent error which has crept in the order either due to procedural defect or mathematical or clerical error or by misrepresentation or fraud of a party to the proceeding, which can be corrected ex debito justitae (to prevent the abuse of process of court)13.

4. OBJECT

The remedy of review, which is a reconsideration of the judgment by the same court and by the same judge, has been borrowed from the courts of equity. The concept was not known to common law. The remedy has a remarkable resemblance to a writ of error.14 The basic philosophy inherent in the recognition of the doctrine of review is acceptance of human fallibility. If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such mistakes or errors must be corrected to prevent miscarriage of justice.15 Justice is above all. It is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can come in its way. The law has to bend before justice.16 Rectification of an order stems from the fundamental

10 Sow Chandra Kante v. Sk. Habib, (1975) 1 SCC 674: AIR 1975 SC 1500; Delhi Admn. v. Gurdip Singh, (2000) 7 SCC 296.
11 Delhi Admn. v. Gurdip Singh Uban, (2000) 7 SCC 296 at p. 309; Sow Chandra Kante v. Sk. Habib, (1975) 1 SCC 674: AIR 1975 SC 1500.
12 Delhi Admn. v. Gurdip Singh Uban, (2000) 7 SCC 296 at p. 309; see also Sone Lal v. State of U.P., (1982) 2 SCC 398.
13 Delhi Admn. v. Gurdip Singh Uban, (2000) 7 SCC 296: AIR 2000 SC 3737; Patel Narshi Thakershi v. Pradyuman Singhji, (1971) 3 SCC 844: AIR 1970 SC 1273; M.C. Mehta v. Union of India, (1999) 2 SCC 91: AIR 1999 SC 582.
14 Sow Chandra Kante v. Sk. Habib, (1975) 1 SCC 674: AIR 1975 SC 1500; Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167: AIR 1980 SC 674.
15 Ibid, see also S. Nagaraj v. State of Karnataka, 1993 Supp (4) SCC 595; Lily Thomas v. Union of India, (2000) 6 SCC 224: AIR 2000 SC 1650; Cauvery Water Disputes Tribunal, Re, 1993 Supp (1) SCC 96 (II): AIR 1992 SC 1183; Susheela Naik v. C.K. Naik, (2000) 9 SCC 366.
16 Lily Thomas v. Union of India, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433;
S. Nagaraj v. State of Karnataka, 1993 Supp (4) SCC 595.

principle that justice is above all. It is exercised to remove an error and not to disturb finality.17

5. REVIEW AND APPEAL18
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7. REVIEW AND REVISION20
8. WHO MAY APPLY?

A person aggrieved by a decree or order may apply for review of a judgment.21 A "person aggrieved" means a person who has suffered a legal grievance or against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.22 The expression "person aggrieved" denotes an elastic, and to some extent, an illusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition.23

Generally speaking, a person aggrieved has been understood to mean one who has a genuine grievance because an order has been made which prejudicially affects his interests.24 But the concept of "person aggrieved" varies according to the context, purpose and provisions of the statute.25 However leniently one may construe the expression "party aggrieved", a person not affected directly and immediately cannot be so considered, otherwise an interpretation of service rules and regulations may affect several members and they will also be considered "persons aggrieved".26

A person who is neither a party to the proceedings nor a decree or order binds him, cannot apply for review as the decree or order does

17 Ibid, see also Common Cause, A Registered Society v. Union of India, (1999) 6 SCC 667 at p. 752: AIR 1999 SC 2979.
18 See infra, Chap. 9.
19 Ibid.
20 Ibid.
21 S. 114; Or. 47 R. 1.
22 Sidebotham, Re, Ex p. Sidebotham, (1880) 14 Ch D 458 at p. 465: (1874-80) All ER Rep 588 (CA); Kabari (P) Ltd. v. Shivnath Shroff, (1996) 1 SCC 690: AIR 1996 SC 742; S.P. Gupta v. Union of India, 1981 Supp SCC 87: AIR 1982 SC 149. For detailed discussion of "person aggrieved", see, V.G. Ramachandran, Law of Writs (1993) at pp. 22-43.
23 Jasbhai Motibhai v. Roshan Kumar, (1976) 1 SCC 671 at p. 677: AIR 1976 SC 578 at p. 581; Bangalore Medical Trust v. B.S. Muddappa, (1991) 4 SCC 54: AIR 1991 SC 1902.
24 Attorney General of the Gambia v. N'Jie, 1961 AC 617 at p. 634: (1961) 2 All ER 504 (PC) (per Lord Denning); see also Official Receiver, Ex p., In re, Reed, Bowen & Co., (1887)
19 QB 174; Adi Pherozshah Gandhi v. H.M. Seervai, (1970) 2 SCC 484: AIR 1971 SC 385.
25 Bar Council of Maharashtra v. M. V. Dabholkar, (1975) 2 SCC 702: AIR 1975 SC 2092 at p. 2098.
26 Gopabandhu Biswal v. Krishna Chandra, (1998) 4 SCC 447: AIR 1998 SC 1872.

not adversely or prejudically affect him.27 But if third party is affected or prejudiced by a judgment or order, he can seek review of such order.28 Again, a person who is a necessary party to the suit and yet not joined and the order passed in such suit affects him, may seek review thereof.29

9. WHEN REVIEW LIES?: CIRCUMSTANCES A review petition is maintainable in the following cases:

(a) Cases in which no appeal lies

A decree or order from which no appeal lies is open to review.30 Hence, an application for review against a decree passed by a Court of Small Causes is competent.31 On the same principle, where an appeal is dismissed on the ground that it was incompetent or was time-barred, the provisions of review would get attracted.32

(b) Cases in which appeal lies but not preferred

A review petition is also maintainable in cases where appeal is provided but no such appeal is preferred by the aggrieved party.33 The fact that an order is subject to appeal is no ground to reject an application for review.34 An application for review can be presented so long as no appeal is preferred against the order.35

Where, however, an appeal is already instituted before making an application for review, the court cannot entertain such application.36 Likewise, where an appeal is preferred and is disposed of, no review would lie against the decision of the lower court.37 But if an application for review is preferred first and then an appeal is filed, the jurisdiction

27 Bharat Singh v. Firm Sheo Pershad Giani Ram, AIR 1978 Del 122; Gopabandhu Biswal v. Krishna Chandra Mohanty, supra; Jagdish Ch. Patnaik v. State of Orissa, (1998) 4 SCC 456: AIR 1998 SC 1926; Satvir Singh v. Baldeva, (1996) 8 SCC 593: AIR 1997 SC 169.

28 Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909.

29 Savithramma v. H. Gurappa Reddy, AIR 1996 Kant 99 at p. 106: (1996) 1 Civ LJ 557.

30 S. 114(a); Or. 47 R. 1(1)(b); see also Ganeshi Lal v. Seth Mool Chand, AIR 1935 All 435: (1935) 57 All 781:157 IC1084.

31 S. 114(c); Or. 47 R. 1; see also Ganeshi Lal v. Seth Mool Chand, AIR 1935 All 435: (1935) 57 All 781:157 IC 1084.

32 Ram Baksh v. Rajeshwari Kunwar, AIR 1948 All 213; Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372: (1964) 5 SCR 174.

33 R. 1(1)(a); see also Lily Thomas v. Union of India, (2000) 6 SCC 224: AIR 2000 SC 1650.

34 Mohd. Bakhsh v. Pirthi Chand, AIR 1933 Lah 226: (1933) 14 Lah 55:143 IC 768.

35 Sitaramasastry v. Sunderamma, AIR 1966 AP 173.

36 Gopabandhu Biswal v. Krishna Chandra, (1998) 4 SCC 447: AIR 1998 SC 1872.

37 Mallikarjun Sadashiv v. Suratram Shivlal, AIR 1971 Bom 45; Ganeshi Lal v. Seth Mool Chand, AIR 1935 All 435: (1935) 57 All 781:157 IC 1084.

of the court to deal with and decide the review petition is not affected.38

The words "from which an appeal is allowed" should be construed liberally keeping in mind the underlying object of the provision that before making a review application, no superior court has been moved for getting the selfsame relief, so that for one and the same relief two parallel proceedings before two forums are not taken.39 If review is granted before disposal of the appeal, the decree or order ceases to exist and the appeal will not remain.40

Conversely, if appeal is decided on merits before an application of review is heard, such petition becomes infructuous and is liable to be dismissed.41 The principle applies to dismissal of Special Leave Petitions by the Supreme Court.42 But if a Special Leave Petition is merely filed and is not decided, the bar would not apply43

(c) Decisions on reference from Court of Small Causes

The Code of Civil Procedure, 1908 allows a review of a judgment on a reference from a Court of Small Causes.44

10. GROUNDS

An application for review of a judgment may be made on any of the following grounds:45

(i) Discovery of new and important matter or evidence; or

(ii) Mistake or error apparent on the face of the record; or

(iii) Any other sufficient reason.

Let us consider the above grounds in detail:

(i) Discovery of new evidence

A review is permissible on the ground of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.

38 Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372: (1964) 5 SCR 174.

39 Kabari (P) Ltd. v. Shivnath Shroff (1996) 1 SCC 690 at pp. 703-04: AIR 1996 SC 742.

40 Ram Baksh v. Rajeshwari Kunwar, AIR 1948 All 213.

41 Gour Krishna Sarkar v. Nilmadhab Shah, AIR 1923 Cal 113: (1922) 36 Cal LJ 484: 73 IC 34; Khatemannessa Bibi v. Upendra Chandra, AIR 1928 Cal 804.

42 Shree Narayana Dharmasanghom Trust v. Swami Prakasananda, (1997) 6 SCC 78; State of Maharashtra v. Prabhakar Bhikaji, (1996) 3 SCC 463; Yogendra Narayan v. Union of India, (1996) 7 SCC 1; Abbai Maligai Partnership Firm v. K. Santhakumaran, (1998) 7 SCC 386: AIR 1998 SC 1486.

43 Kapoor Chand v. Ganesh Dutt, 1993 Supp (4) SCC 432: AIR 1993 SC 1145.

44 R. 1(1)(c): see also Ramchandra v. Sitaram Vinayak, ILR (1886) 10 Bom 68; Ganeshi Lal v. Seth Mool Chand, AIR 1935 All 435: (1935) 57 All 781:157 IC 1084.

45 Or. 47 R. 1.

As a general rule, where a litigant has obtained a judgment in a court of justice, he is by law entitled not to be deprived of the fruits thereof without very strong reasons.46 Therefore, where a review of a judgment is sought by a party on the ground of discovery of fresh evidence, utmost care ought to be exercised by the court in granting it47

It is very easy for the party who has lost the case to see the weak points in his case and he would be tempted to try to fill in gaps by procuring evidence which will strengthen that weak part of his case and put a different complexion upon that part.48

The underlying object of this provision is neither to enable the court to write a second judgment49 nor to give a second innings to the party who has lost the case because of his negligence or indifference.50 Therefore, a party seeking review must show that there was no remiss on his part in adducing all possible evidence at the trial.51

Again, the new evidence must be such as is presumably to be believed, and if believed to be conclusive.52 In other words, such evidence must be (1) relevant; and (2) of such a character that if it had been given it might possibly have altered the judgment.53

Thus, the discovery of a document containing an admission of liability by the defendant would be a good ground for review.54 Similarly, where the decree for restitution of conjugal rights was passed and subsequently it was discovered that the parties were cousins and the marriage was, therefore, null and void, the review was granted.55 Again, where the court issued commission for the examination of a witness in Pakistan and subsequently it was brought to its notice that there was

46 Nundo Lal v. Punchanon Mukherjee, AIR 1918 Cal 618 at p. 621; Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845 at p. 855: (1965) 1 SCR 933 at p. 948; Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167 at pp. 171-72: AIR 1980 SC 674 at pp. 677-78.

47 Nundo Lal case, supra; Hridey Kanta v. Jogesh Chandra, AIR 1959 Cal 150 at p. 152; State of Gujarat v. Dr. B.J. Bhatt, (1977) 18 Guj LR 173 at p. 175.

48 Nundo Lal Mullick v. Punchanon Mukherjee, supra.

49 S.O. Krishna Aiyar v. S.V. Narayanan, AIR 1951 Mad 660; Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, supra; Patel Naranbhai v. Patel Gopaldas, AIR 1972 Guj 229.

50 Sardar Balbir Singh v. Atma Ram, AIR 1977 All 445 at p. 447; Sow Chandra Kante v. Sk. Habib, (1975) 1 SCC 674: AIR 1975 SC 1500.

51 Kessowji Issur v. Great Indian Peninsula Railway Co., ILR (1907) 31 Bom 381 (PC); Patel Naranbhai Jinabhai v. Patel Gopaldas Venidas, AIR 1972 Guj 229; Sardar Balbir Singh v. Atma Ram Srivastava, AIR 1977 All 445.

52 Brown v. Dean, 1910 AC 373 (HL) at p. 374.

53 Appa Rao, In re, (1886) 10 Mad 73 at p. 77 (PC); Nundo Lal v. Punchanon Mukherjee, supra.

54 Faiz Mohhamad v. Mohd. Zakariya, (1911) 11 IC 15 (Lah).

55 Mary Josephine v. James Sidney, AIR 1930 Pat 63.

no reciprocal arrangement in this respect between Pakistan and India, the court reviewed its earlier decision.56

But where it is doubtful whether the evidence, even if produced, would have had any effect on the judgment, review cannot be granted. Thus, where a suit was dismissed on two grounds; namely (i) for want of notice as required by law; and (ii) the illegitimacy of the plaintiff; and a review was applied for on the ground of legitimacy of the plaintiff, it was refused on the ground that the suit was, in any case, required to be dismissed on the ground of want of notice.57 Further, Rule 1 refers to evidence or other matter in the nature of evidence, and therefore, review cannot be granted on the ground of discovery of new points of law or authorities which show that the decision was not correct.58 Nor can it be granted on the happening of some subsequent event or change in law.59

As observed by Lord Davey,60 "The section61 does not authorise the review of a decree which was right when it was made on the ground of happening of some subsequent event."

Before an application of review can be granted, the applicant must establish that even after exercise of due diligence, such evidence was not within his knowledge or could not be produced by him before the court at the time when the decree was passed.62 There must be sufficient evidence of diligence in getting all the evidence available.57

An application for review should be refused when such evidence could have been produced had reasonable care and diligence been exercised.57 Thus, where the trial lasted for three years, an application for review of the judgment was refused on the ground that no sufficient cause was shown as to why the new evidence was not produced at the relevant time.63

56 Mohd. Azizul v. Mohd. Ibrahim, AIR 1958 All 19.

57 Mahabir Prasad v. Collector of Allahabad, AIR 1914 All 44; Jina Lima v. Lalji Parbat, AIR 1951 Kutch 59.

58 Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao, infra; Raja Shatrunji v. Mohd. Azmat, (1971) 2 SCC 200 at pp. 203-04: AIR 1971 SC 1474 at pp. 1476-77; Patel Naranbhai v. Patel Gopaldas, supra.

59 A.C. Estates v. Serajuddin & Co., AIR 1966 SC 935: (1966) 1 SCR 235; Raja Shatrunji v. Mohd. Azmat Azim Khan, supra.

60 Rajah Kotagiri Venkata v. Rajah Vellanki Venkatrama, (1900) 27 IA 197 at p. 205 (PC).

61 Present Or. 47 R. 1.

62 Kessowji Issur v. Great Indian Peninsula Railway Co., supra; Nundo Lal v. Punchanon Mukherjee, supra; Administrator General of W.B. v. Kumar Purnendu, AIR 1970 Cal 231 at p. 234.

63 Shivalingappa v. Revappa, AIR 1915 PC 78.

(ii) Error apparent on the face of record

Another ground for review is a mistake or an error apparent on the face of the record. What is an error apparent on the face of the record cannot be defined precisely or exhaustively, and it should be determined judicially on the facts of each case.64 Such error may be one of fact or of law.65 However, no error can be said to be an error apparent on the face of the record if it is not self-evident and requires an examination or argument to establish it66 In other words, an error cannot be said to be apparent on the face of the record where one has to travel beyond the record to see if the judgment is correct or not.67

An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.68

In Thungabhadra Industries Ltd. v. Govt. of A.P.69, the Supreme Court rightly observed:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."70 (emphasis supplied)

The following have been held to be errors apparent on the face of the record: pronouncement of judgment without taking into consideration

64 Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 233 at p. 244: (1955) 1 SCR 1104.

65 Karutha Kritya v. R. Ramalinga Raju, AIR 1960 AP 17 at p. 21.

66 Thungabhadra Industries, infra; Satyanarayan v. Mallikarjun Bhavanappa, AIR 1960 SC 137 at p. 141-42: (1960) 1 SCR 890; Beant Singh v. Union of India, (1977) 1 SCC 220 at pp. 221-22: AIR 1977 SC 388 at p. 389. (The expression "record" should be construed liberally and should not be restricted as is done in the writ of certiorari; Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, AIR 1954 SC 526 at p. 538: (1955) 1 SCR 520; P.N. Eswara Iyer v. Registrar, Supreme Court of India, (1980) 4 SCC 680: AIR 1980 SC 808; Meera Bhanja v. Nirmala Kumari, (1995) 1 SCC 170: AIR 1995 SC 455; Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715; Delhi Admn. v. Gurdip Singh, (2000) 7 SCC 296: AIR 2000 SC 3737.

67 Ibid, see also Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumala, AIR 1960 SC 137: (1960) 1 SCR 890.

68 Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumala, AIR 1960 SC 137: (1960) 1 SCR 890; Meera Bhanja v. Nirmala Kumari, (1995) 1 SCC 170: AIR 1995 SC 455.

69 AIR 1964 SC 1372: (1964) 5 SCR 174.

70 Ibid, at p. 1377 (AIR); see also, Author's, Lectures on Administrative Law (2008) Lecture VII.

the fact that the law was amended retrospectively;71 or without considering the statutory provisions;72 or on the ground of omission to try a material issue in the case;73 or on the ground that the court decides against a party on matters not in issue;74 or where the judgment is pronounced without notice to the parties;75 or where the want of jurisdiction is apparent on the face of the record;76 or taking a view contrary to the law laid down by the Supreme Court.77

The following have been held not to be errors apparent on the face of the record: an erroneous decision on merits;78 or an erroneous view of law;79 or the fact that the other High Court has taken a different view on the question;80 or that a different conclusion would have been arrived at;81 or where the judgment is based on two or more grounds, each of which is sufficient to sustain it and one of them is erroneous.82

The Explanation to Rule 1 has been inserted by the Amendment Act of 1976. It clarifies the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for review of such judgment.

(iii) Other sufficient reason

The last ground for review is "any other sufficient reason". The expression "any other sufficient reason" has not been defined in the Code. However, relying on the judgment of the Privy Council83 and the

71 Raja Shatrunji v. Mohd. Azmat, supra.
72 Gulam Abbas v. Mulla Abdul Kadar, (1970) 3 SCC 643.
73 Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, AIR 1954 SC 526 at p. 540: (1955) 1 SCR 520.
74 Ibid, at p. 545 (AIR).
75 Bankcy Bihari v. Abdul Rehman, AIR 1932 Oudh 63.
76 Lahiri v. Makhan Lal Basak, AIR 1935 Cal 153 (1); Ram Prosad v. Sricharan Mandal, AIR 1918 Cal 946; Bommadevara Venkatarayulu v. Lanka Venkata Rattamma, AIR 1939 Mad 293.
77 CST v. Pine Chemicals, (1995) 1 SCC 58; Medical & Dental College v. M.P. Nagaraj, AIR 1972 Mys 44.
78 Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389: AIR 1979 SC 1047; Patel Naranbhai v. Patel Gopaldas, AIR 1972 Guj 229.
79 Thungabhadra Industries Ltd. v. Govt. of A. P., supra; Ujjam Bai v. State of U.P., AIR 1962 SC 1621: (1963) 1 SCR 778.
80 Iftikhar Ahmad v. Bharat Kumar, AIR 1957 Raj 165.
81 Girdharlal v. Kapadvanj Municipality, AIR 1930 Bom 317; Patel Naranbhai Jinabhai v. Patel Gopaldas Venidas, supra.
82 Devji v. Dhanji, AIR 1952 Kutch 45; Mahabir Prasad v. Collector of Allahabad, supra.
83 Chhajju Ram v. Neki, AIR 1922 PC 112: (1921-22) 49 IA 144; Bisheshwar Pratap v. Parath Nath, (1933-34) 61 IA 378: AIR 1934 PC 213: 31 CWN 89 (PC).

Federal Court84, the Supreme Court85 has held that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule".

The following have been held to be sufficient reasons for granting review: where the statement in the judgment is not correct;86 or where the decree or order has been passed under a misapprehension of the true state of circumstances;87 or where a party had no notice or fair opportunity to produce his evidence;88 or where the court had failed to consider a material issue, fact or evidence;89 or where the court has omitted to notice or consider material statutory provisions;90 or a ground which goes to the root of the matter and affects inherent jurisdiction of the court;91 or misconception by the court of a concession made by the advocate;92 or where a party's evidence has been closed owing to a misconception on the part of his pleader;93 or a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.94

The following, on the other hand, have been held not sufficient reasons for granting review: omission to frame an issue regarding the valuation of the suit;95 or negligence or inadvertence on the part of the party or his pleader;96 or absence of the party on the date of the

84 Hari Shankar v. Anath Nath, AIR 1949 FC106 at pp. 110-11.

85 Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, supra, at p. 538 (AIR). See also Raja Shatrunji v. Mohd. Azmat, supra, at pp. 203-04 (SCC): at pp. 1475-76 (AIR); Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, supra, at p. 390 (SCC): at p. 1048 (AIR).

86 Bank of Bihar v. Mahabir Lal, AIR 1964 SC 377 at p. 880: (1964) 1 SCR 842.

87 Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, supra.

88 Rajkishore Das v. Nilamani Das, AIR 1968 Ori 140; Kunjan v. Chandra Has, AIR 1925 Oudh 266.

89 Burma Shell Oil Storage Distributing Co. of India Ltd. v. Labour Appellate Tribunal, AIR 1955 Cal 92; C.C. Naidu v. Seva Transports Ltd., AIR 1953 Mad 39; Rukhmabai v. Ganpatrao, AIR 1932 Nag 177.

90 Girdhari Lal v. D.H. Mehta, (1971) 3 SCC 189: (1971) 3 SCR 748; Hari Shankar v. Anath Nath, supra.

91 Ayesha Bai v. Duleep Singh, AIR 1961 Raj 186; Harjit Singh v. Hardev Singh, 1972 Cur LJ 158.

92 Moran Mar Basselios Catholicos v. Mar Poulose Athanasius, supra.

93 Pridhanmal v. Laloo, AIR 1931 Sind 3 (4).

94 O.N. Mohindroo v. District judge, (1971) 3 SCC 5: (1971) 2 SCR 11 at p. 27; Hari Shankar v. Anath Nath, supra.

95 Pareswar Khuntia v. Amareswar Khuntia, (1973) 39 Cut LT 24.

96 Corpn. of Madras v. P.G. Arunachalam, AIR 1974 Mad 288; S. Anthony D'Costa v. Francis R. Anthony, AIR 1962 Mad 304; Manorath v. Atma Ram, AIR 1934 Nag 187.

hearing;97 or subsequent events;98 or failure of a party or his pleader to raise a plea;99 or that the case should have been argued differently;100 or to enable the applicant to raise points which he could and ought to have raised at the former hearing;101 or where the review is sought on the ground that if another opportunity were given to the applicant to establish his case, he could prove that the judgment of the court is wrong;102 or that the case has been mismanaged by his counsel;103 or that the court took a different view in a subsequent case.104

11. BY WHOM REVIEW MAY BE MADE

Review is reconsideration of the same subject-matter by the same court and by the same judge. If the judge who has decided the matter is available he alone has jurisdiction to consider the case, and review the earlier order passed by him. He is best suited to remove any mistake or error apparent on the face of his own order. Moreover, he alone will be able to remember what was earlier argued before him and what was not urged. The law, therefore, insists that if he is available, he alone should hear the review petition.105

There may, however, be situations wherein this course is not possible. The same "judicial officer" may not be available. Death or such other unexpected or unavoidable causes might prevent the judge who passed the order from reviewing it. Such exceptional cases are allowable only ex necessitate and in those cases his successor or any other judge or court of concurrent jurisdiction may hear the review petitions and decide the same.106

97 Siva Subramania Chettiar v. Adaikkalam Chettiar, AIR 1944 Mad 293; Chatar Das v. Keshavdas, AIR 1954 MB 3.

98 Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao, (1900) 27 IA 197 (PC).

99 Ayesha Bai v. Duleep Singh, supra; Union of India v. Sudhir Kumar, AIR 1975 Ori 64.

100 Bhagwati v. Director of Consolidation, AIR 1977 All 163; Chhajju Ram v. Neki, AIR 1922 PC 112.

101 J.N. Surty v. T.S. Chettyar, AIR 1928 PC 103: (1927-28) 55 IA 161; Pitambar Mallik v. Ramchandra Prasad, AIR 1968 Pat 320; Ayesha Bai v. Duleep Singh, supra; S. Anthony D'Costa v. Francis R. Anthony, AIR 1962 Mad 304.

102 Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, infra; Bhagwati v. Director of Consolidation, supra.

103 Pitambar Mallik v. Ramchandra Prasad, supra; S. Anthony D'Costa v. Francis R. Anthony, supra.

104 Expln. to Rule 1 as added by the Amendment Act of 1976. See also Patel Naranbhai v. Patel Gopaldas, AIR 1972 Guj 229.

105 S. 114; Or. 47 R. 1; see also Maharaja Moheshur Sing v. Bengal Govt., (1857-60) 7 Moo IA 283; Devaraju Pillai v. Sellayya Pillai, (1987) 1 SCC 61: AIR 1987 SC 1160; State of Orissa v. Commr. of Land Records and Settlement, (1998) 7 SCC 162: AIR 1999 SC 3067.

106 Ibid, see also Reliance Industries Ltd. v. Pravinbhai, (1997) 7 SCC 300: AIR 1997 SC 3892.

12. NO INHERENT POWER OF REVIEW It is well-settled that the power of review is not an inherent power. It must be conferred by law either expressly or by necessary implication. If there is no power of review, the order cannot be reviewed. In such cases, the question whether the order is correct or valid in law does not arise for consideration.107 It is, however, the duty of the court to correct grave and palpable errors committed by it.108

This principle applies to courts, tribunals, quasi-judicial authorities or administrative authorities exercising quasi-judicial powers. The principle has no application to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would lead to untoward and startling results. The Government is free to alter its policy or its decisions in administrative matters. The administration cannot be hidebound by rules and restrictions of judicial procedure though of course they are bound to obey statutory provisions and also observe the principles of natural justice where rights of parties are affected. Finally, decisions of the Government are subject to judicial review and questioned in a competent court on all available grounds.109

13. FORM OF APPLICATION

An application for review should be in the form of a memorandum of appeal.110 The form of an application, however, is immaterial. The substance and not the form of an application is decisive.111

14. CRUCIAL DATE

The crucial date for determining whether or not the terms of the Code are satisfied is the date when the application for review is filled.112

107 Patel Narshi Thakershi v. Pradyuman Singhji, (1971) 3 SCC 844: AIR 1970 SC 1273; Stale of Assam v. J.N. Roy, (1976) 1 SCC 234: AIR 1975 SC 2277; Gram Panchayat, Kanonda v. Director, Consolidation of Holdings, 1989 Supp (2) SCC 465: AIR 1990 SC 763; Lily Thomas v. Union of India, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433.

108 Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909; Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389: AIR 1979 SC 1047; A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602: AIR 1988 SC 1531; Meera Bhanja v. Nirmala Kumari, (1995) 1 SCC 170: AIR 1995 SC 455; Surjit Singh v. Union of India, (1997) 10 SCC 592; United India Insurance Co. Ltd. v. Rajendra Singh, (2000) 3 SCC 581: AIR 2000 SC 1165.

109 R.R. Verma v. Union of India, (1980) 3 SCC 402: AIR 1980 SC 1461.

110 R. 3.

111 Raja Shatrunji v. Mohd. Azmat, (1971) 2 SCC 200: AIR 1971 SC 1474.

112 Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372: (1964) 5 SCR 174; Kannegolla Naghabhushanam v. Land Acquisition Officer, AIR 1993 AP 209.

15. SUO MOTU REVIEW

The power of review can be exercised by a court on an application by a "person aggrieved". The Code does not empower the court to exercise power of review suo motu.

It is settled principle of law that when a statute requires a particular thing to be done in a particular manner, it has to be done only in that manner and in no any other manner. "There is no provision either in Section 114 or in Order 47 of the Code providing for any suo motu review."'13

In A.R. Antulay v. R.S. Nayak,114 however, Mukharji, J. (as he then was) observed that the Supreme Court may exercise power of review suo motu in an appropriate case.

16. PROCEDURE AT HEARING

An application for review may be divided into the following three stages:115

(i) First stage

An application for review commences ordinarily with an ex parte application by the aggrieved party. The court may reject it at once if there is no sufficient ground or may issue rule calling upon the opposite party to show cause why review should not be granted.116

(ii) Second stage

The application for review shall then be heard by the same court and by the same judge who passed the decree or made the order, unless he is no longer attached to the court, or is precluded from hearing it by absence or other cause for a period of six months after the application.117 If the rule is discharged, the case ends and the application will be rejected. If, on the other hand, the rule is made absolute, the application will be granted for rehearing of the matter.118

113 Danomal v. Union of India, AIR 1967 Bom 355; Jaya Devi v. State of Bihar, (1996) 7 SCC 757: AIR 1996 SC 1174; Viswanathan v. Muthuswamy Gounder, AIR 1978 Mad 221; Calcutta Properties Ltd. v. S.N. Chakrabortty, AIR 1988 Cal 131: (1987) 1 Cri LJ 535; Vinod Chandra v. Manilal, (1994) 1 Guj LR 291: (1993) 2 Guj LH 1045.

114 (1988) 2 SCC 602 at p. 654: AIR 1988 SC 1531:1988 Cri LJ 1661.

115 Sha Vadilal v. Sha Fulchand, (1906) ILR 30 Bom 56: 7 Bom LR 664; Maji Mohan v. State of Rajasthan, AIR 1967 Raj 264.

116 R. 4(1).

117 R. 5.

118 R. 4(2).

(iii) Third stage

In the third stage, the matter will be reheard on merits by the court either at once or at any time fixed by it. After rehearing the case, the court may either confirm the original decree or vary it.119

The effect of allowing an application for review is to recall the decree already passed. Any order made subsequently whether reversing, confirming or modifying the decree originally passed will be a new decree superseding the original one.120

17. LIMITATION

The period of limitation for an application for review of a judgment by a court other than the Supreme Court is thirty days from the date of the decree or order.121

18. APPEAL

An order granting an application for review is appealable, but an order rejecting an application is not appealable.122 No second appeal lies from an order made in appeal from an order granting review.123

19. LETTERS PATENT APPEAL

An order refusing an application for review cannot be said to be a "judgment" and hence, no Letters Patent Appeal lies. But an order granting review may amount to judgment and a Letters Patent Appeal is competent.124

20. REVISION

An application for review can be said to be a "proceeding" and a decision thereon amounts to a "case decided" under the Code and such decision is revisable.125

21. REVIEW IN WRIT PETITIONS

After the amendment in Section 141 of the Code and insertion of Explanation to that section it is clear that the provisions of Order 47 of the Code do not apply to writ petitions filed in a High Court under Article 226 of the Constitution.126

119 R. 8.

120 Sushil Kumar v. State of Bihar, (1975) 1 SCC 774: AIR 1975 SC 1185.

121 Art. 124, Limitation Act, 1963.

122 Or. 43 R. 1(w); see also, Or. 47 R. 7.

123 S. 104(2).

124 Sattemma v. Vishnu Murthy, AIR 1964 AP 162; Jwala Prasad v. Jwala Bank Ltd., AIR 1961 All 381 (FB); Devaraju Pillai v. Sellayya Pillai, (1987) 1 SCC 61: AIR 1987 SC 1160.

125 Vidya Vati v. Devi Das, (1977) 1 SCC 293 at pp. 296-97: AIR 1977 SC 397 at p. 400; see also infra, "Revision", Chap. 9.

126 Expln. to S. 141.

There is nothing in Article 226 to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.127

At the same time, however, there are definitive limits to the exercise of the power of review. It cannot be forgotten that a review is not an appeal in disguise whereby an erroneous decision is reheard and corrected. This general rule applicable to civil proceedings would apply to proceedings under Article 226 of the Constitution as well.128

While exercising the power of review, a High Court may bear in mind the following principles:129

(i) The provisions of the Civil Procedure Code in Order 47 are not applicable to the High Court's power of review in proceedings under Article 226 of the Constitution.

(ii) The said powers are to be exercised by the High Court only to prevent miscarriage of justice or to correct grave and palpable errors. (The epithet "palpable" means that which can be felt by a simple touch of the order and not which could be dug out after a long drawn out process of argumentation and ratiocination.)

(iii) The inherent powers, though ex facie plenary, are not to be treated as unlimited or unabridged but they are to be invoked on the grounds analogous to the grounds mentioned in Order 47 Rule l.130

22. REVIEW BY SUPREME COURT

The provisions of Order 47 apply to orders passed under the Code of Civil Procedure. Article 137 of the Constitution confers power on the Supreme Court to review its judgments subject to the provisions of any law made by Parliament or the Rules made under Article 145. The power of the Supreme Court, therefore, cannot be curtailed by the Code of Civil Procedure.131

23. CONCLUDING REMARKS

It is submitted that the following observations of Pathak, J. (as he then was) in the leading case of Northern India Caterers (India) Ltd. v. Lt.

127 Shevdeo Singh v. State of Punjab, AIR 1963 SC 1909; Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389: AIR 1979 SC 1047; Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167: AIR 1980 SC 674.

128 Ibid, see also A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602: AIR 1988 SC 1531.

129 Gujarat University v. Sonal P. Shah, AIR 1982 Guj 58: (1982) 23 (1) Guj LR 171 (FB).

130 Ibid, at p. 62 (AIR).

131 Art. 137, Constitution of India, Or. 40, Supreme Court Rules, 1966. For detailed discussion, see, V.G. Ramachandran, Law of Writs (2006) Vol. II, Pt. V, Chap. 2.

Governor of Delhi132 lay down the correct principle of law on the power of review and, therefore, are worth quoting:
"The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so... . [W]hatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility."'133 (emphasis supplied)

132 (1980) 2 SCC 167: AIR 1980 SC 674.
133 Ibid, at p. 172 (SCC): at p. 678 (AIR). See also, Author's, Lectures on Administrative Law (2008) Lecture VII.

PART III
9
Revision

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1. GENERAL

Section 115 of the Code of Civil Procedure empowers a High Court to entertain a revision in any case decided by any subordinate court in certain circumstances. This jurisdiction is known as revisional jurisdiction of the High Court.

2. REVISION: MEANING

According to the dictionary meaning, "to revise" means "to look again or repeatedly at"; "to go through carefully and correct where necessary", "to look over with a view to improving or correcting". "Revision" means "the action of revising, especially critical or careful examination or perusal with a view to correcting or improving".1

3. SECTION 115

Section 115 invests all High Courts with revisional jurisdiction. It reads as under:

"(1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears:

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation.—In this section, the expression, 'any case which has been decided' includes any order made, or any order deciding an issue, in the course of a suit or order proceeding."

4. NATURE AND SCOPE

Section 115 authorises the High Court to satisfy itself on three matters: (a) that the order of the subordinate court is within jurisdiction;

1 Shorter Oxford English Dictionary (1990) Vol. II at p. 1821; Concise Oxford English Dictionary (2002) at p. 1226; Chamber's 21 st Century Dictionary (1997) at p. 1197; Random House Dictionary (1970) at p. 1227; Ram Sarup v. Shikhar Chand, AIR 1961 All 221 at p. 227: 1960 All LJ 810: 1961 All WR 32 (FB); Shankar Ramchandra v. Krishnaji Dattatreya, (1969) 2 SCC74: AIR 1970 SCI.

(b) that the case is one in which the court ought to exercise its jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision.2

If the High Court is satisfied with these three matters, it has no power to interfere because it differs, however profoundly, from the conclusion of the subordinate court on questions of fact or of law.3 It is well-established that where there is no question of jurisdiction the decision cannot be corrected for a court has jurisdiction to decide wrongly as well as rightly.4

In Major S. S. Khanna v. Brig. F.J. Dillon5, Shah, J. (as he then was) stated, "The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e. there is a case decided by a subordinate court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction may be exercised."

Hidayatullah, J. (as he then was) also observed that "the section is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists or an assumption of jurisdiction where none exists and lastly acting with illegality or material irregularity".6

In Pandurang Ramchandra Mandlik v. Maruti Ramchandra Ghatge7, Gajendragadkar, J. (as he then was) rightly propounded:

"The provisions of S. 115 of the Code have been examined by
judicial decisions on several occasions. While exercising its jurisdiction under S. 115, it is not competent to the High Court to

2 Keshardeo v. Radha Kissen, AIR 1953 SC 23 at pp. 27-28:1953 SCR 136; Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492:1959 Supp (1) SCR 733; Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497: (1964) 4 SCR 409; Manick Chandra v. Debdas Nandy, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446; Pandurang Dhondi v. Maruti Hari, AIR 1966 SC 153 at p. 155: (1966) 1 SCR 102; D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh, (1969) 3 SCC 807: AIR 1971 SC 2324; ML. Sethi v. R.P. Kapur, (1972) 2 SCC 427: AIR 1972 SC 2379; Sk. Jaffar v. Mohd. Pasha, (1975) 1 SCC 25 at pp. 27-28: AIR 1975 SC 794 at pp. 796; Johri Singh v. Sukh Pal Singh, (1989) 4 SCC 403 at pp. 416-17: AIR 1989 SC 2073.

3 N.S. Venkatagiri v. Hindu Religious Endowments Board, AIR 1949 PC 156:(1948-49) 76 IA 67; Keshardeo Chamria v. Radha Kissen Chamria, supra; M.L. Sethi v. R.P. Kapoor, supra.

4 Major S.S. Khanna v. Brig. F.J. Dillon, supra, at p. 505 (AIR). See also, observations of Lord Hobhouse in Malkarjun Bin Shidramappa v. Narhari Bin Shivappa, (1899-1900) 27 IA 216 at p. 225: ILR (1901) 25 Bom 337 (PC).

5 AIR 1964 SC 497 at pp. 499-500: (1964) 4 SCR 409.

6 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497: (1964) 4 SCR 409.

7 AIR 1966 SC 153: (1966)1 SCR 102.

correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As cls. (a), (b) and (c) of S. 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of S. 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under S. 115."8 (emphasis supplied)

5. OBJECT

The underlying object of Section 115 is to prevent subordinate courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. It clothes the High Court with the powers to see that the proceedings of the subordinate courts are conducted in accordance with law within the bounds of their jurisdiction and in furtherance of justice.9 It enables the High Court to correct, when necessary, errors of jurisdiction committed by subordinate courts and provides the means to an aggrieved party to obtain rectification of a non-appealable order. In other words, for the effective exercise of its superintending and visitorial powers, revisional jurisdiction is conferred upon the High Court.10

At the same time, however, the judges of the lower courts have perfect jurisdiction to decide a case, and even if they decide wrongly, they do not commit "jurisdictional error". Revisional jurisdiction is not intended

8 Ibid, at p. 155 (AIR).

9 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497 at p. 505: (1964) 4 SCR 409; Baldevdas v. Filmistan Distributors (India) (P) Ltd., (1969) 2 SCC 201: AIR 1970 SC 406.

10 Ibid, see also Manick Chandra v. Debdas Nandy, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446.

to allow the High Court to interfere and correct errors of fact or of law.11

6. REVISION AND APPEAL12
7. REVISION AND SECOND APPEAL13
8. REVISION AND REFERENCE14
9. REVISION AND REVIEW15
10. REVISION AND WRIT

The revisional power under Section 115 of the Code is clearly in the nature of a power to issue a writ of certiorari,16 It is, however, not as wide as certiorari since it can be exercised only in the case of a jurisdictional error and not in the case of any other error. Power of the High Court in revision is not in any manner wider than the power under Article 226 of the Constitution.

Again, if the petitioner has already filed a revision in the High Court under Section 115 and has obtained an order, he cannot thereafter invoke the jurisdiction of the High Court under Article 226. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court.17

In Major S.S. Khanna v. Brig. F.J. Dillon18 Hidayatullah, J. (as he then was) stated, "The power given by S. 115 of the Code is clearly limited to the keeping of the subordinate courts within the bounds of their jurisdiction. It does not comprehend the power exercisable under the writ of prohibition or mandamus. It is also not a full power of certiorari inasmuch as it arises only in a case of jurisdiction and not in a case of error... . Where there is no question of jurisdiction, the decision cannot be corrected for it has been ruled that a court has jurisdiction to decide

11 Rajah Amir Hassan v. Sheo Baksh Singh, (1883-1884) 11 IA 237: ILR (1885) 11 Cal 6 (PC); N.S. Venkatagiri v. Hindu Religious Endowments Board, AIR 1949 PC 156: (1948-49)

76 IA 67; Keshardeo Chamria v. Radha Kissen Chamria, supra; see also supra, "Nature and scope".

12 See supra, "Appeal and Revision", Chap. 2 . See also infra, under that head.

13 See infra, "Second Appeal and Revision".

14 See infra, "Reference and Revision".

15 See infra, "Review and Revision".

16 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497 at pp. 504-05: (1964) 4 SCR 409.

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

18 AIR 1964 SC 497: (1964) 4 SCR 409.

wrongly as well as rightly. But once a flaw of jurisdiction is found the High Court need not quash and remit as is the practice in English Law under the writ of certiorari but pass such order as it thinks fit."19

11. REVISION AND POWER OF SUPERINTENDENCE

A revision under Section 115 of the Code and a petition under Article 227 of the Constitution are two separate and distinct proceedings. One cannot be identified with the other.20

Firstly, while the revisional power is only judicial, the power of superintendence is both judicial as well as administrative. Secondly, the revisional power is statutory and it can be taken away by a legislation. But the power of superintendence is constitutional and cannot be taken away or curtailed by a statute. Finally, the revisional powers of the High Court are restricted and can be exercised on all the conditions laid down in Section 115 of the Code being fulfilled, none of those restrictions apply to exercise of supervisory powers of the High Court under Article 227 of the Constitution.21

But once a party chooses to invoke revisional jurisdictional of the High Court and exhausts that remedy, he cannot be allowed to press in aid supervisory jurisdiction thereafter. Where there are two modes of invoking the jurisdiction of a court, tribunal or authority and an aggrieved party chooses and exhausts one of the remedies, it would not be proper and sound exercise of discretion to grant relief in the other set of proceedings. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the court to prevent abuse of the process of law as also to respect and accord finality to its own decisions.22

19 Ibid, at p. 505 (AIR). For detailed discussion of writs, see, V.G. Ramachandran, Law of Writs (2006) Vol. I, Pt. II, Chaps. 1-5; see also Author's Lectures on Administrative Law (2008) Lecture IX.

20 Ibid, see also Vishesh Kumar v. Shanti Prasad, (1980) 2 SCC 378 at p. 387: AIR 1980 SC 892 at p. 897; Satyanarayan v. Mallikarjun Bhavanappa, AIR 1960 SC 137: (1960) 1 SCR 890; Major S. S. Khanna v. Brig. F.J. Dillon, supra; Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, supra.

21 Jetha Bai & Sons v. Sunderdas, (1988) 1 SCC 722: AIR 1988 SC 812. For detailed discussion of supervisory jurisdiction of High Courts, see, Author's, Lectures on Administrative Law (2008) Lecture IX; see also, V.G. Ramachandran, Law of Writs (2006) Vol. II, Pt. IV, Chap. 1.

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

12. CONVERSION OF REVISION INTO APPEAL23
13. APPEAL, REFERENCE, REVIEW AND REVISION: DISTINCTION
(1) Appeal and revision
(a) An appeal lies to a superior court, which may not necessarily be a High Court, while a revision application under the Code lies only to the High Court.
(.b) An appeal lies only from the decrees and appealable orders, but a revision application lies from any decision of a court subordinate to the High Court from which no appeal (either first appeal or second appeal or appeal from an order) lies to the High Court or to any subordinate court.
(c) A right of appeal is a substantive right conferred by the statute, while the revisional power of the High Court is purely discretionary.
(d) An appeal abates if the legal representatives of a deceased party are not brought on record within the prescribed period. A revision application, however, does not abate in such cases. The High Court may at any time bring the proper parties on the record of the case.
(e) The grounds for an appeal and a revision application are also different. A revision application lies only on the ground of jurisdictional error. An appeal lies on a question of fact or of law or of fact and law.
(f) Filing of an application is not necessary in case of revision. An aggrieved party may invoke the jurisdiction of the High Court by filing an application or the High Court may exercise the revisional jurisdiction even suo motu (of its own motion). In case of appeal, on the other hand, a memorandum of appeal must be filed before the appellate court by the aggrieved party.
(2) First appeal and second appeal
(a) Whereas a first appeal lies from a decree passed by a court exercising original jurisdiction, a second appeal lies from a decree passed by a court exercising appellate jurisdiction.
(b) A first appeal lies to a superior court, which may or may not be a High Court, whereas a second appeal lies only in the High Court.
(c) The grounds of first appeal and second appeal are different. Whereas a first appeal can be filed on a question of fact, or

23 See supra, "Conversion of Appeal into Revision", Chap. 2.

of law, or of fact and law, a second appeal can lie only on a substantial question of law.
(d) Where the amount of a decree does not exceed three thousand rupees, a first appeal is maintainable on a question of law, but a second appeal does not lie in such cases.
(e) In a first appeal an appellate court has power to decide issues of fact, but in a second appeal a High Court can decide issues of fact only in certain cases. (Section 103)
(f) The period of limitation for filing a first appeal is ninety days in case such an appeal lies to a High Court and thirty days if it lies in any other court. A second appeal, however, can be filed only in a High Court within ninety days.
(g) A letters patent appeal is maintainable against a "judgment" of a Single judge of a High Court to a Division Bench of the same Court, but no such appeal is maintainable against a decision of a Single Judge in a second appeal. (Section 100-A)
(3) Second appeal and revision
(a) A second appeal lies to the High Court on the ground of a substantial question of law, while a revision application lies on the ground of jurisdictional error.
(b) The revisional powers of the High Court can be invoked only in those cases in which no appeal (either first appeal or second appeal or appeal from an order) lies to the High Court or to any subordinate court. The second appeal lies only in the High Court under Section 100 of the Code.
(c) While exercising revisional jurisdiction the High Court cannot interfere with an order passed by the subordinate court, if it is within its jurisdiction even if it is legally wrong. The High Court, on the other hand, can interfere with a decree passed by the lower appellate court if it is contrary to law.
(d) The High Court cannot decide a question of fact in the exercise of its revisional jurisdiction, while it can decide a question of fact in the second appeal in certain circumstances.
(e) The High Court may decline to interfere in revision if it is satisfied that substantial justice has been done. In the second appeal, however, the High Court has no discretionary power and it cannot refuse to grant relief merely on equitable grounds.
(4) Appeal and reference
(a) A right of appeal is a right conferred on the suitor, while the power of reference is vested in the court.

(b) Reference is always made to the High Court. An appeal can be filed to a superior court which need not necessarily be a High Court.
(c) The grounds of appeal are wider than the grounds of reference.
(d) Reference is always made pending a suit, appeal or execution proceedings, while an appeal can only be filed after the decree is passed or an appealable order is made.
(5) Appeal and review
(a) An appeal lies to the superior court, while a review lies to the same court.
(b) Review of a judgment involves reconsideration of the same subject-matter by the same judge, while an appeal is heard by a different judge.
(c) The grounds of appeal are wider than the grounds of review.
(d) A second appeal lies on a substantial question of law. A second review application, however, does not lie.
(6) Reference and review
(a) In reference, it is the subordinate court and not the party which refers the case to the High Court. In case of review, the application is made by the aggrieved party.
(b) The High Court alone can decide matters on reference. Review, on the other hand, is by the court which passed the decree or made the order.
(c) Reference is made pending a suit, appeal or execution proceedings, while an application for review can be made only after the decree is passed or order is made.
(d) The grounds for reference and review are different.
(7) Reference and revision
(a) In reference, the case is referred to the High Court by a court subordinate to it. In case of revision, the jurisdiction of the High Court is invoked either by the aggrieved party or by the High Court suo motu.
(b) The grounds of reference relate to reasonable doubt on a question of law, while the grounds for revision relate to jurisdictional errors of the subordinate court.
(8) Review and revision
(a) Revisional jurisdiction can only be exercised by the High Court, while the power of review can be exercised by the very court which passed the decree or made the order.

(b) Revisional power can be exercised by the High Court only in a case where no appeal lies to the High Court, but review can be made even when an appeal lies to the High Court.
(c) Revisional powers can be exercised by the High Court even suo motu (of its own motion), but for review an application has to be made by an aggrieved party.
(d) The powers of revision and review can be exercised on different grounds.
(e) The order granting review is appealable, but an order passed in the exercise of revisional jurisdiction is not appealable.

14. LAW COMMISSION'S VIEW

According to Law Commission, while dealing with revisional jurisdiction, a High Court should bear in mind the following rules:24
(1) Rule nisi should not be issued except upon a very careful and strict scrutiny;
(2) Where no stay is granted, record of subordinate court should not be called for; and even where record is necessary, only copies of thereof should be required to be produced; and
(3) Whenever stay is granted, every effort should be made to dispose of revision within two to three months.

15. WHO MAY FILE?

A person aggrieved by an order passed by a court subordinate to the High Court may file a revision against such order.25 But the High Court may even suo motu exercise revisional jurisdiction under Section 115 of the Code.26

16. CONDITIONS

The following conditions must be satisfied before revisional jurisdiction can be exercised by the High Court:
(i) a case must have been decided;
(ii) the court which has decided the case must be a court subordinate to the High Court;
(iii) the order should not be an appealable one; and
(iv) the subordinate court must have (a) exercised jurisdiction not vested in it by law; or (b) failed to exercise jurisdiction vested

24 Report of Civil Justice Committee at p. 281, para 4.
25 Madanlal Tiwari v. Bengal Nagpur Cotton Mills Ltd., AIR 1964 MP 297; Rajinder Singh v. Karnal Central Coop. Bank Ltd., AIR 1965 Punj 331.
26 For detailed discussion, see infra, "Suo motu exercise of power".

in it; or (c) acted in the exercise of its jurisdiction illegally or with material irregularity.27

(i) Case decided

The expression "case decided" was not defined in the Code of 1908. It gave rise to a number of conflicting decisions on the question whether the said expression included an interlocutory order also. But the conflict was ultimately resolved by the Supreme Court in the case of Major S. S. Khanna v. Brig. F.J. Dillon28, holding that Section 115 applies even to interlocutory orders. In that case, Shah, J. (as he then was) observed: "The expression 'case' is a word of comprehensive import; it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression 'case' as an entire proceeding only and not a part of proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject to, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice."29 (emphasis supplied) Explaining the ratio laid down in Major Khanna30, the Supreme Court in Baldevdas Shivlal v. Filmistan Distributors (India) (P) Ltd.,31 held that a case may be said to have been decided if the court adjudicates for the purpose of the suit some right or obligation of the parties in controversy. Every order in the suit cannot be regarded as a case decided within the meaning of Section 115 of the Code.

On the recommendation of the Joint Committee of Parliament, an Explanation has been added to Section 115 by the Amendment Act of 1976 which makes it clear that the expression "case decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding".32 Thus, the expression "any case which has been decided" after the Amendment Act of 1976 means "each decision which terminates a part of the controversy involving the question of jurisdiction".33

27 Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492: 1959 Supp (1) SCR 733; Major S. S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497: (1964) 4 SCR 409; Pandurang Dhondi v. Maruti Hari, supra; see also Baldevdas v. Filmistan Distributors (India) (P) Ltd., (1969) 2 SCC 201: AIR 1970 SC 406.

28 AIR 1964 SC 497: (1964) 4 SCR 409.

29 Ibid, at p. 501 (AIR) (per Shah, J.).

30 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497: (1964) 4 SCR 409.

31 (1969) 2 SCC 201 at p. 206: AIR 1970 SC 406 at p. 407.

32 Tata Iron & Steel Co. v. Rajarishi Exports (P) Ltd., AIR 1978 Ori 179 at p. 180.

33 Gulam Rasool v. Mariyam, AIR 1980 Raj 197 at p. 199.

(ii) Subordinate court

The High Court cannot exercise revisional jurisdiction unless the case is decided by a court and such court is subordinate to the High Court. A court means a court of civil judicature. It does not include any person acting in an administrative capacity.

As a general rule, where it is provided that a matter should be decided by a particular court, the presiding officer of such court will act as a court. But where it is provided that a particular judge should decide a matter, the provisions of the statute will have to be considered for the purpose of determining whether the judicial officer acts as a court or as a persona designata,34

It is the intention that determines the question. If the intention is that the prescribed officers should enforce the rights and liabilities created by the statute in the exercise of the existing jurisdiction of courts, they act as courts. If, on the other hand, the intention is to create new courts, they act as persona designata.35

Again, while judicial functions are essential for a court,36 the mere fact that a person exercises judicial functions is not sufficient to constitute him a court.37 Further, a court will be said to be subordinate to the High Court, when it is subject to its appellate jurisdiction.38 However, the mere fact that a statute provides an appeal to a court from a particular body does not necessarily constitute that body as a court.39

(iii) No appeal lies

The revisional jurisdiction of the High Court can be invoked in respect of any case in which no appeal lies to the High Court.40 The word "appeal" includes first appeal as well as second appeal. Therefore, where an appeal lies to the High Court either directly or indirectly, revision under Section 115 does not lie. On the other hand, where no first or second appeal lies to the High Court, the revision is competent.

34 Central Talkies Ltd. v. Dwarka Prasad, AIR 1961 SC 606 at p. 609: (1961) 3 SCR 495; Ram Chandra v. State of U.P., AIR 1966 SC 1888 at pp. 1889-90: 1966 Supp SCR 393; Surindra Mohan v. Dharam Chand Abrol, AIR 1971 J&K 76 at pp. 78, 80 (FB); Chatur Mohan v. Ram Behari, AIR 1964 All 562 at p. 566.

35 National Telephone Co. Ltd. v. HM Postmaster-General, 1913 AC 546 (HL); Surindra Mohan v. Dharam Chand Abrol, supra.

36 Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., AIR 1949 PC 129 (133).

37 National Federation of Railway v. E.I. Railway Admn., AIR 1950 All 80 at p. 81.

38 Spring Mills Ltd. v. G.D. Ambekar, AIR 1949 Bom 188.

39 C. Abboy Reddiar v. Collector of Chingleput, AIR 1952 Mad 45 at p. 46.

40 Vidya Vati v. Devi Das, (1977) 1 SCC 293 at pp. 296-97: AIR 1977 SC 397 at p. 400; Sunderlal v. Paramsukhdas, AIR 1968 SC 366 at p. 371: (1968) 1 SCR 362; Manick Chandra v. Debdas Nandy, (1986) 1 SCC 512: AIR 1986 SC 446.

As has been rightly observed by the Supreme Court in the case of Major S.S. Khanna v. Brig. F.J. Dillon41, "If an appeal lies against the adjudication directly to the High Court, or to another court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded."42

(iv) Jurisdictional error

(a) Nature and scope

The power conferred by Section 115 of the Code is clearly limited to the keeping of subordinate courts within the bounds of their jurisdiction. Section 115 is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists, an assumption of jurisdiction where none exists, and lastly, acting with illegality or material irregularity. Where there is no question of jurisdiction in this manner, the decision cannot be corrected because a court has jurisdiction to decide wrongly as well as rightly.43

(b) Error of fact and error of law

As stated above, the revisional powers of the High Court are limited to the question of jurisdiction only and the decision of the subordinate court on all questions of law and fact not touching its jurisdiction is final.44 (emphasis supplied)

In other words, Section 115 is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.45

(c) Error of law and error of jurisdiction

There is, however, a distinction between cases in which on a wrong decision the court has assumed jurisdiction which is not vested in it and those in which in exercise of its jurisdiction the court has arrived at a conclusion erroneous in law or in fact. In the former class of cases, revisional power is permissible, while in the latter class of cases it is

41 AIR 1964 SC 497: (1964) 4 SCR 409.

42 Ibid, at p. 501 (AIR). See also Custodian of E.P. v. Nasir Uddin, AIR 1962 Punj 218 (FB); Paruchuru Thirumala Satyanarayana v. Vannava Ramalingam, AIR 1952 Mad 86 (FB); B. Manmohan Lal v. B. Raj Kumar Lal, AIR 1946 All 89 (FB).

43 Per Hidayatullah, J. in Major S. S. Khanna v. Brig. F.J. Dillon, supra, at p. 505 (AIR). See also supra, "Nature and scope"; Manick Chandra Nandy v. Debdas Nandy, supra.

44 S. Rama Iyer v. Sundaresa Ponnapoondar, AIR 1966 SC 1431 at p. 1432: (1966) 3 SCR 474.

45 J.R. Datar v. Dattatraya Balwant, C.A. 585 of 1964, decided on 7 September 1966; Pandurang Dhondi v. Maruti Hari, supra; D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh, supra; M.L. Sethi v. R.P. Kapoor, supra; M.K. Palanippa v. A. Pennuswami, (1970) 2 SCC 290 at pp. 292-93.

not.46 Thus, if by an erroneous decision on a question of fact or law touching its jurisdiction, e.g. on a preliminary or jurisdictional fact upon the existence of which its jurisdiction depends, the subordinate court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to the revisional jurisdiction of the High Court under Section 115.47 (As observed by the Privy Council48, wherever jurisdiction is given to a court by an Act of Parliament and such jurisdiction is only given upon certain specified terms contained in that Act, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise.

In the leading case of R. v. Commr. for Special Purposes of Income Tax49, Lord Esher, M.R. observed:

"When an inferior court or tribunal or body which has to exercise the power of deciding facts is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction."50

It is submitted that the following observations of the Supreme Court in the case of Mohd. Hasnuddin v. State of Maharashtra51 lay down correct law on the point and, therefore, are worth quoting:

"Every tribunal of limited jurisdiction is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within the limits of its special jurisdiction and whether the jurisdiction of such tribunal is dependent

46 N. S. Venkatagiri v. Hindu Religions Endowments Board, supra; Joy Chand v. Kamalaksha, AIR 1949 PC 239: (1948-49) 76 IA 131; Ratilal v. Ranchhodbhai, AIR 1966 SC 439 at pp. 441-42: Vora Abbasbhai v. Gulamnabi, AIR 1964 SC 1341 at pp. 1347-48: (1964) 5 SCR 157.

47 J.R. Datar v. Dattatraya Balwant, C.A. 585 of 1964, decided on 7 September 1966; Pandurang Dhondi v. Maruti Hari, supra; D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh, supra; M.L. Sethi v. R.P. Kapoor, supra; M.K. Palanippa v. A. Pennuswami, (1970) 2 SCC 290 at p. 292-93.

48 Nusserwanjee Pestonjee v. Meer Mynoodeen Khan, (1855) 6 Moo IA 134.

49 (1888) 21 QB 313: 36 WR 776.

50 Ibid, at p. 319. See also Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492:1959 Supp (1) SCR 733; Mohd. Hasnuddin v. State of Maharashtra, infra.

51 (1979) 2 SCC 572: AIR 1979 SC 404.

on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it and that statute also defines the conditions under which the tribunal can function, it goes without saying that before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen."52 (emphasis supplied)

(d) Exercise of jurisdiction not vested by laic: Clause (a)

Where a subordinate court exercises jurisdiction not vested in it by law, a revision lies. In such cases, a subordinate court assumes jurisdiction which it does not possess by misconstruing statutory provisions or by wrongly assuming existence of preliminary or collateral facts which do not exist. The High Court in such cases will interfere with the orders passed by a subordinate court.53

The following cases have been held to be cases of unauthorised assumption of jurisdiction by the subordinate court: (i) where the lower court assumes jurisdiction which it does not possess on account of the pecuniary or territorial limits or by reason of the subject-matter of the suit;54 or (ii) entertains an appeal from an order which is not appealable;55 or (iii) entertains a suit or appeal which it has no jurisdiction to entertain;56 or (iv) makes an order which it has no jurisdiction to make;57 or (v) grants an injunction without considering whether a prima facie case is made out;58 or (vi) allows withdrawal of a suit on a

52 Mohd. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572 at p. 584: AIR 1979 SC 404 at p. 412. See also Author's, Lectures on Administrative Law (2008) Lecture VII.

53 S. Rama Iyer v. Sundaresa Ponnapoondar, AIR 1966 SC 1431: (1966) 3 SCR 474; Pandurang Mahadeo v. Annaji Balwant, (1971) 3 SCC 530: AIR 1971 SC 2228; Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492:1959 Supp (1) SCR 733; Ujjam Bai v. State of U.P., AIR 1962 SC 1621: (1963) 1 SCR 778; Raja Anand Brahma v. State of U.P., AIR 1967 SC 1081: (1967) 1 SCR 373; Shrisht Dhawan v. Shaw Bros., (1992) 1 SCC 534.

54 Keshardeo Chamria v. Radha Kissen Chamria, supra; Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492: 1959 Supp (1) SCR 733; D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh, (1969) 3 SCC 807: AIR 1971 SC 2324; Kuldip Singh v. State of Punjab, AIR 1956 SC 391 at p. 399:1956 SCR 125.

55 Narasinga Gowda v. Subramanya Saralava, AIR 1972 Mys 346; Avirah Ouseph v. Karthiyayanr Amma Ammukutty, AIR 1965 Ker 179.

56 Ibid, United Bank of India v. Ram Raj Goala, (1980) 1 LLJ 290.

57 Renuka Batra v. Grindlays Bank Ltd., AIR 1980 Punj 146; Bai Moti Vela v. Bai Ladhi Vela, AIR 1974 Guj 52; Delhi Financial Corpn. v. Ram Parshad, AIR 1973 Del 28.

58 Bihar SEB v. Jawahar Lal, AIR 1976 Pat 323; Vellakutty v. Karthyayani, AIR 1968 Ker 179.

ground not contemplated under Order 23 Rule l;59 or (vii) directs a subordinate court to try a suit not triable by it;60 etc.

(e) Failure to exercise jurisdiction: Clause (b)

A revision also lies where a subordinate court has failed to exercise jurisdiction vested in it by law. A court having jurisdiction to decide a matter, thinks erroneously under a misapprehension of law or of fact that it has no such jurisdiction and declines to exercise it; the High Court can interfere in revision.61

The following cases have been held to be cases of failure to exercise jurisdiction by a subordinate court: (i) refusal by the court to summon the deponent of an affidavit for cross-examination;62 or (ii) failure of the executing court to construe the decree;63 (iii) failure on the part of the court in considering the principles for the grant of ad interim injunction and refusing to grant it;64 or (iv) refusal to entertain or rejection of a plaint, application, memorandum of appeal or review application on the erroneous view that it has no jurisdiction to entertain;65 or

(v) rejection of a counterclaim on the ground that the original suit is dismissed for default;66 or (vi) refusal to make a reference under Order 46 Rule 7;67 or (vii) an erroneous interpretation of statutory provisions as obligatory instead of directory;68 etc.

(f) Exercise of jurisdiction illegally or with material irregularity: Clause (c) Finally, a revision also lies where the subordinate court has acted in the exercise of its jurisdiction illegally or with material irregularity.

But then, what is meant by the expressions "illegally" and "material irregularity"? Though no precise definition or meaning can be given

59 Ramrao Bhagwantrao v. Babu Appanna, AIR 1940 Bom 121 (FB); Paira Ram v. Ganesh Dass, AIR 1967 Punj 237; Jagdish Chander v. Karam Chand, AIR 1968 Del 181.

60 Nizakat Ali v. Shaukat Husain, AIR 1943 All 300; Vuppuluri Atchayya v. Kanchumarti Venkata, AIR 1915 Mad 1223 (FB).

61 Joy Chand v. Kamalaksha, AIR 1949 PC 239: (1948-49) 76 IA 131; Kasturi & Sons (P) Ltd. v. N. Salivateswaran, AIR 1958 SC 507:1959 SCR 1; Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492:1959 Supp (1) SCR 733; State of M.P. v. Azad Bharat Finance Co., AIR 1967 SC 276:1966 Supp SCR 473.

62 Sripathi Rajyalakshmi v. Sripati Seetamahalakshmi, AIR 1973 AP 203.

63 Bhavan Vaja v. Solanki Hanuji Khodaji, (1973) 2 SCC 40: AIR 1972 SC 1371.

64 Chandrama Singh v. Yasodanandan Singh, AIR 1972 Pat 128; Sankara Pillai v. Inez Rosario, AIR 1971 Ker 27.

65 Kasturi & Sons (P) Ltd. v. N. Salivateswaran, AIR 1958 SC 507: 1959 SCR 1; Ram Niranjan Prasad v. Chhedilal Saraf, AIR 1976 Pat 90; Munikrishna Reddy v. S. K. Ramaswami, AIR 1969 Mad 389; Pratap Chandra Biswas v. Union of India, AIR 1956 Ass 85; Vasant Jaiwantrao v. Tukaram Mahadaji, AIR 1960 Bom 485.

66 Lingaraju Maharana v. Motilal Brothra, (1973) 39 Cut LT 611.

67 Cantonment Board v. Phulchand, AIR 1932 Nag 70.

68 State of M.P. v. Azad Bharat Finance Co., AIR 1967 SC 276:1966 Supp SCR 473.

to these words, after referring to the leading cases69, the Supreme Court observed in the case of Keshardeo v. Radha Kissen70, "The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."71 They do not refer to the decision arrived at but the manner in which it is reached. In that case, the Supreme Court approved the following observations of the Privy Council in the leading case of Rajah Amir Hassan Khan v. Sheo Baksh Singh72:

"The question then is, did the judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

(emphasis supplied)

In Malkarjun Bin Shidramappa v. Narhari Bin Shivappa73 also, the Privy Council observed, "It (the lower court) made a sad mistake it is true; but a court has jurisdiction to decide wrong as well as right."74 In D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh75, the Supreme Court observed:

"The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the court to try the dispute itself... . The words 'illegally' and 'with material irregularity' as used in this clause [cl. (c)] do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting

69 Rajah Amir Hassan v. Sheo Baksh Singh, (1883-84) 11 IA 237: ILR (1885) 11 Cal 6 (PC); Balakrishna Udayar v. Vasudeva Aiyar, AIR 1917 PC 71: (1916-17) 44 IA 261; N.S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board, AIR 1949 PC 156; Joy Chand v. Kamalaksha, AIR 1949 PC 239: (1948-49) 76 IA 131; Narayan Sonaji v. Sheshrao Vithoha, AIR 1948 Nag 258.

70 AIR 1953 SC 23:1953 SCR 136.

71 Ibid, at p. 28 (AIR). See also Satyanarayan v. Mallikarjun Bhavanappa, AIR 1960 SC 137 at p. 142: (1960) 1 SCR 890; Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi, AIR 1959 SC 492 at pp. 497-98: 1959 Supp (1) SCR 733; M.K. Palaniappa v. A. Pennuswami, (1970) 2 SCC 290; Ratilal v. Ranchhodbhai, AIR 1966 SC 439.

72 (1883-84) 11 IA 237: ILR (1885) 11 Cal 6 (PC).

73 (1899-1900) 27 IA 216: ILR (1901) 25 Bom 337 (PC).

74 Ibid, at p. 225 (IA).

75 (1969) 3 SCC 807: AIR 1971 SC 2324.

the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with."76
(emphasis supplied)
In the following cases, it has been held that the court had exercised its jurisdiction illegally or with material irregularity: (i) where it decides a case without considering the evidence on record;77 or (ii) decides on evidence not legally taken or otherwise inadmissible;78 or (iii) decides a case without recording reasons for its judgment;79 or (iv) does not apply its mind to the facts and circumstances of the case;80 or (v) fails to follow a decision of the High Court to which it is subordinate;81 or (vi) follows a decision which does not apply to the facts of the case;82 or (vii) decides a case in the absence of the party or without giving an opportunity of being heard to the party whose rights are adversely affected by such decision;83 or (viii) in framing issues wrongly places burden of proof;84 or (ix) orders the execution of a decree which is not executable;85 or (x) orders attachment before judgment in absence of any material to support such order or without following the procedure under Order 38;86 or (xi) grants or refuses to grant temporary injunction without considering and applying the provisions of Order 39;87 or (xii) confirms an execution sale under Order 21 Rule 92 without disposing of an application to set aside the sale under Order 21 Rule 90;88 or (xiii) passes a decree on the compromise by the guardian ad litem without enquiring whether it was for the benefit of the minor;89 or (xiv) proceeds with the later suit ignoring the provisions of Section 10 of the Code;90 or (xv) consolidates two suits for hearing without consent of parties even though the parties are not common and the issues are also different;91

76 Ibid, at pp. 811-12 (SCC): at pp. 2327-28 (AIR).
77 Shambhu Dayal v. Basdeo Sahai, AIR 1970 All 525; Kochrabhai v. Gopalbhai, AIR 1973 Guj 29 (FB).
78 Ramnath Singh v. Ram Bahadur, AIR 1973 All 290.
79 Ratna Devi v. Vidya Devi, AIR 1977 NOC 146 (All).
80 Ajantha Transports (P) Ltd. v. T.V.K. Transports, (1975) 1 SCC 55: AIR 1975 SC 123; Probodh Kumar v. Mohit Kumar, AIR 1978 Cal 505.
81 Rajeshwar Dayal v. Padam Kumar, AIR 1970 Raj 77.
82 Tila Mohammad v. Municipal Committee, AIR 1941 Pesh 76.
83 Hardeva v. Ismail, AIR 1970 Raj 167: ILR 1970 Raj 20:1970 Raj LW 316 (FB); Vankar Kuber v. Vankar Lilaben, (1979) 20 Guj LR 584:1979 Hin LR 559; Ratna Devi v. Vidya Devi, supra.
84 Bihar SEB v. Jawahar Lal, AIR 1976 Pat 323.
85 Shah Mohd. Khan v. Hanwant Singh, ILR (1898) 20 All 311.
86 Vasu v. Narayanan, AIR 1962 Ker 261. See also supra, Pt. II, Chap. 11.
87 Ibid, see also supra, Pt. II, Chap. 11.
88 Nirendra Nath v. Birendra Nath, AIR 1942 Cal 480.
89 Hardeo Bakhsh Singh v. Bharath Singh, AIR 1935 Oudh 287.
90 Mugli v. Khaliq Dar, AIR 1979 J&K 84.
91 Minor Bhopo v. Mani, AIR 1961 Guj 192: (1961) 2 Guj LR 179.

or (xvi) omits to draw up a decree in accordance with the judgment;92 or (xvii) orders for the appearance of a pardanashin lady in public;93 or (xviii) erroneously shuts out the evidence of a party;94 or (xix) does not consider condonation of delay under Section 5 of the Limitation Act, 1963;95 or (xx) remands a case after framing issues which do not arise in the case;96 or (xxi) admits additional evidence in appeal without considering the provisions of Order 41 Rule 27 of the Code;97 or (xxii) acts in violation of Section 113 of the Code by holding an Act of Parliament to be ultra vires;98 or (xxiii) accepts a plaint without court fees;99 or (xxiv) makes an order ignoring an earlier order passed by the court;100 or (xxv) grants a relief not prayed for by a party,101 etc.

17. ALTERNATIVE REMEDY

Exercise of revisional jurisdiction is in the discretion of the court and no party can claim it "as of right". Before exercising revisional powers, the High Court may consider several circumstances and decide whether power under Section 115 of the Code should be exercised in favour of the applicant before the court. One of the factors which the court usually considers is availability of an alternative remedy to the aggrieved party. Where such aggrieved party has alternative and efficacious remedy, the court may not entertain a revision under Section 115 of the Code.102

18. OTHER LIMITATIONS OF REVISIONAL JURISDICTION

It should, however, be remembered that exercise of revisional jurisdiction by the High Court is discretionary and the High Court is not bound to interfere merely because the conditions laid down in clause (a), (b) or (c) of Section 115 are satisfied.103 An applicant invoking the revisional

92 Baliram v. Manohar, AIR 1943 Nag 204; Sidhnath v. Ganesh Govind, (1912) 37 Bom 60.

93 Gyarsibai v. Mangilal, AIR 1958 MP 25.

94 Conceicao Antonio Fernandes v. Dr. Arfanode L.P. Furtado, AIR 1975 Goa 27.

95 Seva Samaj Sanchalak v. State of Kerala, AIR 1972 Ker 184; Bhaktipada Majhi v. v. SDO, AIR 1971 Cal 204.

96 Brijlal v. Tikhu, AIR 1956 HP 37; Hemsingh v. Motisingh, AIR 1955 Raj 127.

97 Seth Kunjilal v. Shankar Nanuram, AIR 1943 Nag 289.

98 Delhi Financial Corpn. v. Ram Parshad, AIR 1973 Del 28.

99 Chandappa v. Sadruddin Ansari, AIR 1958 Mys 132.

100 State of Bihar v. Bhagwati Singh, AIR 1976 Pat 295.

101 Saida Begam v. Sabir Ali, AIR 1962 All 9.

102 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497: (1964) 4 SCR 409; Printers (Mysore) (P) Ltd. v. Pothan Joseph, AIR 1960 SC 1156; Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687: AIR 1977 SC 577; Municipal Corpn. of Delhi v. Suresh Chandra, (1976) 4 SCC 719: AIR 1977 SC 2621.

103 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497 at p. 501: (1964) 4 SCR 409; Brij Gopal v. Kishan Gopal, (1973) 1 SCC 635 at p. 638: AIR 1973 SC 1096 at pp. 1097-98;

visional jurisdiction of the High Court must, therefore, show not only that there is a jurisdictional error but also that the interests of justice call for interference.104 At the same time, however, it cannot be overlooked that the revisional powers under Section 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice.105 As a general rule, where substantial justice has been done by the order of the lower court, the High Court will not interfere with it in revision notwithstanding the fact that the reasons for the order are not correct or the order is improper or irregular.105 On the other hand, where the order passed by a lower court results in grave injustice or hardship or substantial failure of justice, the High Court will interfere.106 Again, the High Court will generally not interfere in favour of a party who has an alternative remedy available against the order passed by the lower court,107 or who suppresses material facts from the court,108 or who is not vigilant about his rights and where there is great and unexplained delay and laches on the part of the applicant.109

It is submitted that the following observations of Shah, J. (as he then was) in the case of Major S.S. Khanna v. Brig. F.J. Dillon110 lay down the general principles regarding the ambit and scope of the revisional powers of the High Court under Section 115 of the Code and, therefore, require to be quoted:

"That is not to say that the High Court is obliged to exercise its jurisdiction when a case is decided by a subordinate court and the conditions in clause (a), (b) or (c) are satisfied. Exercise of jurisdiction is discretionary, the High Court is not bound to interfere merely because the conditions are satisfied. The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal from the ultimate order or decree in the proceeding or by a suit, and the general equities of the case being served by the order

Rami Manprasad v. Gopichand, (1973) 4 SCC 89 at pp. 93-94: AIR 1973 SC 566.

104 Ibid, see also Indian Agricultural Research Institute v. Vidya Sagar, AIR 1973 HP 29; Lonand Grampanchayat v. Ramgiri Gosavi, AIR 1968 SC 222 at pp. 223-24: (1967) 3 SCR 774.

105 Kedarnath Mattulal v. Baboolal, AIR 1976 MP 62; D.V. Shindagi v. Saraswatibai, AIR 1969 Mys 77; Shah Jagmohandas v. Jamnadas, AIR 1965 Guj 181: (1965) 6 Guj LR 49.

106 Food Corpn. of India v. Birendra Nath, AIR 1978 Cal 264; Orugunati Ranganayakamma v. Maduri Lakshminarasamma, AIR 1979 AP 8.

107 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497 at p. 501: (1964) 4 SCR 409.

108 Jitendra Nath v. Tarakchandra, AIR 1947 Cal 28; Welcom Hotel v. State of A.P., (1983) 4 SCC 575: AIR 1983 SC 1015.

109 Sita Bai v. Vidhyawati, AIR 1972 MP 198; Ram Narayan v. Rajeshwari Devi, AIR 1978 All 214; T.N. Mahajan v. Junta Steel & Metal Coop. Industrial Society Ltd., AIR 1976 Punj 324; Jaichand Lal v. Gopal Prasad, AIR 1973 Pat 441.

110 AIR 1964 SC 497: (1964) 4 SCR 409.

made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction."111 (emphasis supplied)

The proviso to sub-section (1) of Section 115, as amended by the Code of Civil Procedure (Amendment) Act, 1999 expressly states that the High Court shall not vary or reverse any order passed in the course of a suit or other proceedings except where the order, if it had been made in favour of the applicant, it would have finally disposed of the suit or other proceedings.112

Again, sub-section (2) now prohibits the High Court from interfering in revision if an appeal against the order or decree sought to be reversed lies to the High Court or to any court subordinate to the High Court.113

Sub-section (3) as inserted by the Amendment Act of 1999 clarifies that mere filing to revision in the High Court would not operate as stay of suit or other proceedings before the court where such suit or proceedings are pending unless such stay is granted by the High Court.

19. FORM OF REVISION

No particular form of revision is prescribed in the Code. Such petition, however, must contain grounds as to error of jurisdiction covered by Section 115 of the Code.114

20. LIMITATION

The period of limitation for preferring a revision application is ninety days from the decree or order sought to be revised.115

21. SUO MOTU EXERCISE OF POWER

Normally, a High Court will exercise revisional powers on the application of an aggrieved party, but in appropriate cases where the conditions laid down in this section are satisfied, it may suo motu (of its own motion) call for any record and pass necessary orders. There is no bar on the power of the High Court in exercising revisional jurisdiction unless a prayer is made by a party. A person other than a party to a

111 Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497 at p. 501 (per Shah, J.). See also Brij Gopal v. Kishan Gopal, (1973) 1 SCC 635 at p. 638: AIR 1973 SC 1096 at pp. 1099-98; Rami Manprasad v. Gopichand, (1973) 4 SCC 89 at p. 98: AIR 1973 SC 566; Manick Chandra v. Debdas Nandy, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446.

112 Proviso to S. 115 (1); see also Ram Narayan v. Rajeshwari Devi, AIR 1978 All 214; Food Corpn. of India v. Birendra Nath, AIR 1978 Cal 264; Ram Narain v. Seth Sao, AIR 1979 Pat 174.

113 Khem Chand v. Hari Singh, AIR 1979 Del 7.

114 For Model Revision, see, Appendix "F".

115 Art. 131, Limitation Act, 1963.

proceeding can also bring illegality or irregularity to the notice of the High Court.116

In Swastik Oil Mills Ltd. v. CST117, the Supreme Court stated, "Whenever a power is conferred on an authority to revise an order, the authority is entitled to examine the correctness, legality and propriety of the order and to pass such suitable orders as the authority may think fit in the circumstances of the particular case before it. When exercising such powers, there is no reason why the authority should not be entitled to hold an enquiry or direct an enquiry to be held and, for that purpose, admit additional material. The proceedings for revision, if started suo motu, must not, of course, be based on a mere conjecture and there should be some ground for invoking the revisional powers. Once those powers are invoked, the actual interference must be based on sufficient grounds, and, if it is considered necessary that some additional enquiry should be made to arrive at a proper and just decision, there can be no bar to the revising authority holding a further enquiry or directing such an enquiry to be held by some other appropriate authority."118

22. REVISION UNDER OTHER LAWS

Revisional jurisdiction under Section 115 CPC is limited to "errors of jurisdiction". In other statutes, however, revisional powers may not be confined or circumscribed to errors of jurisdiction only. Thus, where revisional powers can be exercised to decide "legality" or "propriety", or "correctness" of the decision, the jurisdiction is wider than the jurisdiction under Section 115 CPC. The scope of revisional jurisdiction thus depends upon the language of the statute conferring jurisdiction on the court.119

23. INTERLOCUTORY ORDERS

Interim or interlocutory orders fall into two classes:

(i) Interlocutory orders which are appealable; and

(ii) Interlocutory orders which are non-appealable.

The orders falling under the former class are appealable under Section 104 and, hence, no revision lies, whereas the orders falling under the

116 Swastik Oil Mills Ltd. v. CST, infra; Percy Wood v. Samuel, AIR 1943 Nag 333; Avirah Ouseph v. Karthiyayanr Amma Ammukutty, AIR 1965 Ker 179; Katragadda China v. Chiruvella Venkanraju, AIR 1954 Mad 864 (FB); Sarat Chandra v. Narasingha Patra, AIR 1988 Ori 4; State of Kerala v. N. Avinasiappan, (2004) 1 SCC 344.

117 AIR 1968 SC 843: (1968) 2 SCR 492.

118 Ibid, at pp. 845-46 (AIR).

119 Rajbir Kaur v. S. Chokesiri and Co., (1989) 1 SCC 19: AIR 1988 SC 1845. For detailed discussion and case law, see, Author s, Code of Civil Procedure (Lawyers' Edn.) Vol. II at pp. 685-86.

latter class are subject to revision under Section 115, if the conditions laid down in the section are fulfilled.120

24. DEATH OF APPLICANT

The provisions of Order 22 do not apply to revision applications. A revision, therefore, does not abate on the death of the applicant or on account of failure on the part of the applicant to bring on record the heirs of the deceased opponent.121

25. DOCTRINE OF MERGER

Revisional jurisdiction is a part of appellate jurisdiction of the High Court. Revision is but one of the modes of exercising powers conferred by a 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. Hence, when the aid of the High Court is invoked on the revisional side, it is because it is a superior court. The doctrine of merger, therefore, applies to orders passed in revision and the order passed by a subordinate court gets merged in the order passed by the High Court.122

26. PROCEDURE

No specific or express procedure is prescribed in the Code which is required to be followed in revision. Grounds of revision can be couched as in an appeal. They should, however, contain objections as to jurisdiction.123 Ordinarily a certified copy of the order impugned should be filed in the revision.124 No cross-objections can be filed in revision.125 But if the High Court feels that a particular finding recorded by the subordinate court is uncalled for, it can interfere suo motu.126 Once a revision is admitted, it ought to have been decided on merits.127 It

120 Khushro S. Gandhi v. N.A. Guzder, (1969) 1 SCC 358: AIR 1970 SC 1468.

121 Nathooram v. Karbansilal, AIR 1983 AP 278; Totonio v. Maria, AIR 1975 Goa 2; Mohd. Sadaat Ali v. Corpn. of City of Lahore, AIR 1949 Lah 186 (FB); S.M.A. Samad v. Shahid Hussain, AIR 1963 Pat 375.

122 Shankar Ramchandra v. Krishnaji Dattatreya, (1969) 2 SCC 74: AIR 1970 SC 1; S.K. Saldi v. U.P. State Sugar Corpn. Ltd., (1997) 9 SCC 661: AIR 1997 SC 2182; State of Madras v. Madurai Mills Co. Ltd., AIR 1967 SC 681: (1967) 1 SCR 732; S. Shanmugavel Nadar v. State of T.N., (2002) 8 SCC 361: AIR 2002 SC 3484.

123 S. 115(1)(a), (b), (c); see also Rawalpindi Theatres (P) Ltd. v. Patanjal, AIR 1967 Punj 241.

124 Mahesh Chander v. Darshan Knur, AIR 1982 NOC 69 (Delhi); Shafiq Ahmad v. Shah Jehan Begum, AIR 1981 Del 202.

125 Venkatarama v. Ramaswami, AIR 1952 Mad 504: (1951) 2 Mad LJ 32.

126 Jia Lal v. Mohan Lal, AIR 1960 J&K 22; Pattammal v. Krishnaswami Iyer, AIR 1928 Mad 794.

127 Hukumchand Amolikchand Lodge v. Madhava Balaji, 1984 Supp SCC 600: AIR 1983 SC 540.

should not be dismissed on the ground that it ought not to have been admitted.128 If the High Court holds that revision is not maintainable or is barred by limitation, it should not make any observations on merits.129

27. DISMISSAL IN LIMINE

Where several contentions have been raised by the applicant, normally, a High Court should not dismiss the revision in limine (summarily) by one word ("Dismissed"). It should record reasons in brief.130

28. RECORDING OF REASONS

Where the parties are present before the High Court and specific pleas as to error of jurisdiction has been raised, the High Court should not dismiss the revision summarily without recording reasons.131

There is another reason also as to why the High Court should pass speaking order. Absence of reasons deprives the Supreme Court from knowing the reasons and circumstances which weighed with the High Court in dismissing the revision in limine. The necessity to give reasons, however brief, in support of its conclusion is too obvious to be emphasised. Obligation to record reasons introduces clarity and excludes, or at any rate minimizes, the chances of arbitrariness and enables the higher forum to test correctness and relevance of those reasons. If no reasons are recorded, the order is liable to be set aside.132

29. LETTERS PATENT APPEAL

No letters patent appeal lies from an order made in the exercise of revisional jurisdiction.133

128 Ibid, see also Mohd. Ibrahim v. State Transport Appellate Tribunal, (1971) 1 Mad LJ 76; National Fertilizers Ltd. v. Municipal Committee, Bhatinda, AIR 1982 Punj 432; J.P. Ojha v. R.R. Tandan, AIR 1962 All 485.

129 Narendra Babu v. Vidya Sagar, AIR 1965 SC 338: AIR 1978 All 415.

130 Harbans Sharma v. Pritam Kaur, (1982) 3 SCC 386 (2); Fauja Singh v. Jaspal Kaur, (1996) 4 SCC 461; Dev Pal Kashyap v. Ranjit Singh, (2000) 9 SCC 420; Kauslialya Devi v. Mohinder Lal, (2000) 9 SCC 417; see also infra, "Recording of reasons".

131 Ibid, see also Fauja Singh v. Jaspal Kaur, (1996) 4 SCC 461; Dev Pal Kashyap v. Ranjit Singh, (2000) 9 SCC 420.

132 Ibid, see also Harbans Sharma v. Pritam Kaur, (1982) 3 SCC 386 (2). For detailed discussion and case law, see, Author's, Lectures on Administrative Law (2008) Lecture VI; see also, V.G. Ramachandran, Law of Writs (2006) Vol. I, Pt. II, Chap. 6.

133 J&K Coop. Bank v. Shams-ud-din Bacha, AIR 1970 J&K 190; Munikrishna Reddy v. S. K. Ramaswami, AIR 1969 Mad 389; Sukhendu v. Hare Krishna, AIR 1953 Cal 636.

30. REVISION

A Single Judge of the High Court cannot be said to be a court subordinate to the High Court. Hence, no revision lies against an order passed by a Single Judge of the High Court.134

134 Debendra Nath v. Bibudhendra, (1916) 43 Cal 90; Jamna Doss v. A.M. Sabapathy, ILR (1911) 36 Mad 138.

Part Four
Execution

PART IV

1

Execution in General

SYNOPSIS

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1. EXECUTION: MEANING

THE TERM "execution" has not been defined in the Code. In its widest sense, the expression "execution" signifies the enforcement or giving effect to a judgment or order of a court of justice.1 Stated simply, "execution" means the process for enforcing or giving effect to the judgment of the Court.2 In other words, execution is the enforcement of decrees and orders by the process of the court, so as to enable the decree-holder to realise the fruits of the decree.3 The execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by the judgment, decree or order.4

2. NATURE AND SCOPE

A files a suit against B for Rs 10,000 and obtains a decree against him. Here A is the judgment-creditor or decree-holder. B is the judgment- debtor, and the amount of Rs 10,000 is the judgment-debt or the decretal amount. Since the decree is passed against B, he is bound to pay Rs 10,000 to A. Suppose in spite of the decree, B refuses to pay the decretal amount to A, A can recover the said amount from B by executing the

1 Halsbury's Laws of England (4th Edn.) Vol. 17 at p. 232; Concise Oxford English Dictionary (2002) at p. 497; Shorter Oxford Dictionary (1990) Vol. 1 at p. 669; P.R. Aiyar, Advanced Law Lexicon (2005) Vol. II at pp. 1702-03.

2 Overseas Aviation Engineering, In re, (1962) 3 All ER 12: 1963 Ch D 24 (per Lord Denning).

3 Sreenath Roy v. Radhanath Mookerjee, ILR (1882) 9 Cal 773 at p. 776; Ghosh v. Banerjee, 79 CWN 76; State of Rajasthan v. Rustamji Savkasha, AIR 1972 Guj 179.

4 Overseas Aviation Engg. (G.B.) Ltd., In re, (1962) 3 WLR 594:1963 Ch D 24: (1962) 3 All ER 12 (CA).

decree through the judicial process. The principles governing execution of decrees and orders are dealt within Sections 36 to 74 (substantive law) and Order 21 of the Code (procedural provisions). Order 21 contains 106 Rules and is the longest of all orders in the Code.

3. EXECUTION PROCEEDINGS UNDER CPC

In Ghan Shyam Das v. Anant Kumar Sinha5, dealing with the provisions of the Code relating to execution of decrees and orders, the Supreme Court stated, "So far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of Order 21 of the Code take care of different situations providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors, as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the civil court. The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes and the judge, being entrusted exclusively with administration of justice, is expected to do better.6 (emphasis supplied)"

4. LAW COMMISSION'S VIEW

The Law Commission considered the difficulties realized by the decree-holders after obtaining decree from a competent court of law. It also went into the reasons for unsatisfactory state of affairs and made several recommendations and suggestions.7

5. SCHEME OF EXECUTION: IMPORTANT HEADS

The subject of execution of decrees and orders may be discussed under the following heads:

(1) Courts which may execute decrees
(2) Application for execution
(3) Stay of execution
(4) Mode of execution
(5) Arrest and detention

5 (1991) 4 SCC 379: AIR 1991 SC 2251.

6 Ibid, at p. 383 (SCC): at pp. 2253-54 (AIR). Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731: AIR 1973 SC 528; Court of Wards v. Coomar Ramaput, (1872) 14 MIA 605:17 WR 195 (PC); Shyam Singh v. Collector, Distt. Hamirpur, 1993 Supp (1) SCC 693; Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd., (1999) 2 SCC 325: AIR 1999 SC 882; Kuer Jang Bahadur v. Bank of Upper India Ltd., AIR 1925 Oudh 448; Vigneshwar v. Gangabai Kom Narayan, AIR 1997 Kant 149.

7 Law Commission's Fourteenth Report (1958) at p. 431; Law Commission's Twenty- seventh Report (1964) at pp. 174-210; Law Commission's Fifty-fourth Report (1973) at pp. 72-92.

(6) Attachment of property
(7) Questions to be determined by executing court
(8) Adjudication of claims
(9) Sale of property
(10) Delivery of possession, and
(11) Distribution of assets.

PART IV
2
Courts which may execute Decrees

SYNOPSIS

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1. GENERAL

SECTION 38 of the Code enacts that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 37 defines the expression "court which passed a decree" while Sections 39 to 45 provide for the transfer for execution of a decree by the court which passed the decree to another court, lay down conditions for such transfer and also deal with powers of executing court. All these sections, therefore, need to be read together.

2. COURT PASSING A DECREE: SECTION 37

Section 37 defines the expression "court which passed a decree". The section enlarges the scope of the expression "court which passed a decree" with the object of giving greater facilities to a decree-holder to realise the fruits of the decree passed in his favour.1 The following courts fall within the said expression:

(i) The court of first instance [illegible]

(ii) The court of first inst[illegible]

1 Kasturi Rao v. Mehar[illegible], (1997) 2 Mad LJ 78.

(iii) Where the court of first instance has ceased to exist, the court which would have jurisdiction to try the suit at the time of execution; and
(iv) Where the court of first instance has ceased to have jurisdiction to execute the decree, the court which at the time of execution would have had jurisdiction to try the suit.2

3. COURTS BY WHICH DECREES MAY BE EXECUTED: SECTION 38

A decree may be executed either by the court which passed it, or by the court to which it is sent for execution.3 A court which has neither passed a decree, nor a decree is transferred for execution, can execute it.4

Where the court of first instance has ceased to exist or ceased to have jurisdiction to execute the decree, the decree can be executed by the court which at the time of making the execution application would have jurisdiction in the matter.5

Sometimes a peculiar situation arises. Suppose court A passed a decree, and thereafter a part of the area within the jurisdiction of court A is transferred to court B. In such a situation the following two questions arise:

(a) whether court A continues to have jurisdiction to entertain an application for execution? and
(b) whether court B (to which the area is transferred) can also entertain an application for execution without a formal transmission of the decree from court A to court B?

The first question must now be answered in the affirmative after the pronouncement of the Supreme Court in the case of Merla Ramanna v. Nallaparaju6, wherein the court held:

"[I]t is settled law that the court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another court."7 But with regard to the second question, there were conflicting decisions. The High Court of Calcutta8, on the one hand, had taken the view that in this situation both the courts (A and B) would be competent

2 Mahijibliai Mohanbhai v. Patel Manibhai, AIR 1965 SC 1477 at pp. 1484-85: (1965) 2 SCR 436; Ramankutty Guptan v. Avara, (1994) 2 SCC 642.
3 S. 38.
4 Ghantesher v. Mndan Mohan, (1996) 11 SCC 446: AIR 1997 SC 471.
5 Merla Ramanna v. Nallaparaju, AIR 1956 SC 87: (1955) 2 SCR 938.
6 Ibid.
7 Ibid, at p. 93 (AIR).
8 Latchman Pundeh v. Maddan Mohun, ILR (1881) 6 Cal 513; Jahar v. Kamini Debi, ILR (1901) 28 Cal 238; Udit Narain v. Mathura Prasad, ILR (1908) 35 Cal 974.

to entertain an application for execution; the High Court of Madras9, on the other hand, had taken a contrary view by holding that in the absence of an order of transfer by the court which passed the decree (court A), that court alone can entertain an application for execution and not the court to whose jurisdiction the subject-matter has been transferred (court B). The Supreme Court in Merla Ramanna6 referred to the above conflict of decisions but left the point open and did not express any final opinion as to which of the two views is correct by observing thus, "It is not necessary in this case to decide which of these two views is correct"; because according to the Supreme Court even assuming that the opinion expressed in the Madras case10 was correct since the transferee court had no inherent lack of jurisdiction, the objection to it ought to have been taken at the earliest opportunity and as it was not taken at that stage, it must be deemed to have been waived and cannot be raised at any later stage of the proceedings.11 (emphasis supplied)

The Explanation added to Section 37 by the Amendment Act of 1976 gives effect to the Calcutta view and makes it clear that both the courts would be competent to entertain an application for execution of a decree.

4. TRANSFER OF DECREE FOR EXECUTION: SECTIONS 39-42, ORDER 21 RULES 3-9

As stated above, a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 39 provides for the transfer of a decree by the court which has passed it and lays down the conditions therefor.

As a general rule, the court which passed the decree is primarily the court to execute it, but such court may send the decree for execution to another court either sno motu (of its own motion)12 or on the application of the decree-holder if any of the following grounds exists:13

(i) The judgment-debtor actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such court; or

(ii) The judgment-debtor does not have property sufficient to satisfy the decree within the local limits of the jurisdiction of the

9 Ramier v. Muthu Krishna Ayyar, AIR 1932 Mad 418: ILR (1932) 55 Mad 801.

10 Ramier v. Muthu Krishna Ayyar, AIR 1932 Mad 418: ILR (1932) 55 Mad 801.

11 Merla Ramanna v. Nallaparaju, AIR 1956 SC 87 at p. 93: (1955) 2 SCR 938.

12 S. 39(2).

13 S. 39(1); see also Firm Hansraj Nathuram v. Firm Lalji Raja & Sons, AIR 1963 SC 1180: (1963) 2 SCR 619; Lalji Raja & Sons v. Firm Hansraj Nathuram, (1971) 1 SCC 721: AIR 1971 SC 974; Narhari Shivram v. Pannalal Umediram, (1976) 3 SCC 203: AIR 1977 SC 164.

court which passed the decree but has property within the local limits of the jurisdiction of such other court; or
(iii) The decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of such other court; or
(iv) The court which passed the decree considers it necessary for any other reason to be recorded in writing that the decree should be executed by such other court.
The provisions of Section 39 are, however, not mandatory14 and the court has discretion in the matter which will be judicially exercised by it.15 The decree-holder has no vested or substantive right to get the decree transferred to another court. The right of the decree-holder is to make an application for transfer which is merely a procedural right.16 By the Amendment Act of 1976, sub-section (3) has been added to Section 39. It clarifies that the transferee court must have pecuniary jurisdiction to deal with the suit in which the decree was passed. Likewise, sub-section (4) of Section 39, as added by the Code of Civil Procedure (Amendment) Act, 2002 further clarifies that the court passing the decree has no power to execute such decree against a person or property outside the local limits of its territorial jurisdiction.

5. EXECUTION OF FOREIGN DECREES IN INDIA: SECTIONS 43 TO 44-A

A combined reading of Sections 43 to 44-A shows that Indian courts have power to execute the decrees passed by (1) Indian courts to which the provisions of the Code do not apply;17 (2) the courts situate outside India which are established by the authority of the Central Government;18 (3) revenue courts in India to which the provisions of the Code do not apply;19 and (4) superior courts of any reciprocating territory.20

14 Laxmi Narain v. Firm Ram Kumar Suraj Bux, AIR 1971 Raj 30; Tarachand v. Misrimal, AIR 1970 Raj 53; Manmatha Pal v. Sarada Prosad, AIR 1939 Cal 651 at pp. 654-55.
15 Manmatha Pal Choudhury v. Sarada Prosad Nath (ibid.).
16 Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354 at pp. 360, 363: AIR 1981 SC 416.
17 S. 43; see also Raj Rajendra Sardar Moloji Nar Singh v. Shankar Saran, AIR 1962 SC 1737: (1963) 2 SCR 577.
18 Ibid, see also Raj Rajendra Sardar Moloji Nar Singh v. Shankar Saran, AIR 1962 SC 1737: (1963) 2 SCR 577.
19 S. 44.
20 S. 44-A.

6. EXECUTION OF INDIAN DECREES IN FOREIGN TERRITORY:

SECTION 45

Section 45 deals with a converse case. It provides for the execution in foreign territory of the decrees passed by Indian courts in certain circumstances.21

7. EXECUTION OF DECREE AT MORE THAN ONE PLACE

The Code does not prevent a decree-holder from executing a decree simultaneously at more than one place against the property of the judgment-debtor.22 Such power, however, should be exercised sparingly and in exceptional cases after issuing notice to the judgment-debtor.23

8. PROCEDURE IN EXECUTION

Where a decree is sent for execution to another court, the court which passed the decree shall send a decree to such court with (i) a copy of the decree; (ii) a certificate of non-satisfaction or part-satisfaction of the decree; and (iii) a copy of an order for the execution of the decree, or if no such order is passed, a certificate to that effect.24 The court executing the decree, on receiving the copies of the decree and other certificates, shall cause the same to be filed without further proof.25 Such court shall have the same powers in executing the decree as if it had been passed by itself.26 Such court shall certify to the court which passed the decree the fact of such execution or the circumstances attending its failure to execute it.27 Where the court to which the decree is sent for execution is a district court, it may be executed by itself or transferred by it to any subordinate court of competent jurisdiction.28 Where such court is a High Court, the decree shall be executed as if it had been passed by itself in the exercise of its original jurisdiction.29 Where a decree is sent for execution in another State, it shall be executed by such court and in such manner as may be prescribed by rules in force in that State.30 Where immovable property forms one estate or tenure and is situate within the territorial jurisdiction of two or more

21 See also Kishendas v. Indo-Carnatic Bank Ltd., AIR 1958 AP 407.
22 Prem Lata v. Lakshman Prasad, (1970) 3 SCC 440: AIR 1970 SC 1525.
23 Ibid, see also Lakshman Hari v. V.G. Virkar, AIR 1939 Bom 258.
24 R.6.
25 R.7.
26 S. 42. See also Jai Narain v. Kedar Nath, AIR 1956 SC 359: 1956 SCR 62; Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354: AIR 1981 SC 416.
27 S. 41.
28 R.8.
29 R. 9.
30 S. 40.

courts, any of such courts has jurisdiction to attach and sell the whole of such estate or tenure.31

9. POWERS OF TRANSFEROR COURT

Once a court which has passed a decree transfers it to another competent court, it would cease to have jurisdiction and cannot execute the decree.32 It is only a transferee court to which an application for execution would lie. The limitation, however, is to the extent of the transfer and not in respect of other matters.33

10. POWERS OF TRANSFEREE COURT

Once a decree is transferred for execution to another court, the transferee court shall have all powers to execute the decree as if it had been passed by the transferee court itself.34 After the transfer of a decree, it is the transferee court which will decide all questions arising in execution proceedings.35 Its jurisdiction remains till it certifies to the transferor court of the execution of the decree.36

11. POWERS OF EXECUTING COURT

Section 42 of the Code expressly confers upon the court executing a decree sent to it the same powers as if it had been passed by itself.37 It is thus power and duty of the executing court to see that the defendant gives the plaintiff the very thing the decree directs and nothing more or nothing less.38

At the same time, the Code requires that the court executing the decree does not exercise power in respect of the matters which could be determined only by the court which passed the decree.39 To put it differently, the powers to be exercised by the executing court relate to procedure to be followed in execution of a decree and do not extend to substantive rights of the parties. The executing court cannot convert itself into the court passing the decree40

31 R. 3; see also, R. 5.
32 Maharajah of Bobbili v. Narasaraju, AIR 1916 PC 16: (1915-16) 43 IA 238.
33 Ibid, see also Merla Ramanna v. Nallaparaju, AIR 1956 SC 87: (1955) 2 SCR 938; S. Sundara Rao v. B. Appiah Naidu, AIR 1954 Mys 1.
34 Ss. 41-42; see also Merla Ramanna v. Nallaparaju, AIR 1956 SC 87: (1955) 2 SCR 938; Jonalagadda v. Shivaramakrishna, AIR 1944 Mad 144.
35 Ibid, see also Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354: AIR 1981 SC 416.
36 Ibid, see also Sital Prasad v. Clements Robson & Co., AIR 1921 All 199.
37 S. 41(1), (2), (3).
38 Jai Narain v. Kedar Nath, AIR 1956 SC 359 at p. 363:1956 SCR 62 (per Bose, J.).
39 S. 42(4).
40 Jai Narain v. Kedar Nath, supra; see also infra, "General Principles"; Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731: AIR 1973 SC 528.

12. GENERAL PRINCIPLES

With regard to the powers and duties of executing courts, the following fundamental principles should be borne in mind:

(1) As a general rule, territorial jurisdiction is a condition precedent to a court executing a decree, and, therefore, no court can execute a decree in respect of property situate entirely outside its local jurisdiction.41

(2) An executing court cannot go behind the decree. It must take the decree as it stands and execute it according to its terms. It has no power to vary or modify the terms.42 It has no power to question its legality or correctness.43 This is based on the principle that a proceeding to enforce a judgment is collateral to the judgment and, therefore, no inquiry into its regularity or correctness can be permitted in such a proceeding44

(3) In case of inherent lack of jurisdiction, the decree passed by the court is a nullity and its invalidity could be set up wherever and whenever it is sought to be enforced, whether in execution or in collateral proceedings45 In such a case, there is

41 S. 39(4); see also Prem Chand v. Mokhoda Debi, ILR (1890) 17 Cal 699; Bhagwati Prasad v. Jai Narain, AIR 1958 All 425; Tarachand v. Misrimal, AIR 1970 Raj 53; Ittyavira Mathai v. Varkey Varkey, AIR 1964 SC 907 at p. 910: (1964) 1 SCR 495; Delhi Cloth and General Mills Co. Ltd. v. Ramjidas, AIR 1982 Cal 34; Mohd. Naseem v. Chaman Ara, (1998) 7 DLT 130. For detailed discussion about "Territorial Jurisdiction", see supra, Pt. II, Chap. 4.

42 C.F. Angadi v. Y.S. Hirannayya, (1972) 1 SCC 191: AIR 1972 SC 239; State of Punjab v. Krishan Dayal Sharma, AIR 1990 SC 2177; Hiralal Moolchand v. Barot Raman Lal, (1993) 2 SCC 458: AIR 1993 SC 1449; V. Ramaswami v. Kailasa Thevar, AIR 1951 SC 189:1951 SCR 292; State of M.P. v. Mangilal Sharma, (1998) 2 SCC 510: AIR 1998 SC 743.

43 V. Ramaswami Aiyengar v. Kailasa Thevar, AIR 1951 SC 189 at p. 192: 1951 SCR 292; Topanmal v. Kundomal, AIR 1960 SC 388 at pp. 390-91; Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, (1970) 1 SCC 670: AIR 1970 SC 1475; Nagindas v. Dalpatram, (1974) 1 SCC 242 at pp. 252-53: AIR 1974 SC 471 at p. 477; Sunder Dass v. Ram Prakash, (1977) 2 SCC 662 at p. 667: AIR 1977 SC 1201 at p. 1204; SBI v. Indexport Registered, (1992) 3 SCC 159 at p. 169: AIR 1992 SC 1740.

44 Basant Singh v. Tirloki Nath, AIR 1960 Punj 610; Hira Lal v. Kali Nath, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; Urban Improvement Trust v. Gokul Narain, (1996) 4 SCC 178: AIR 1996 SC 1819; Bhawarlal v. Universal Heavy Mechanical Lifting Enterprises, (1999) 1 SCC 558.

45 Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; Hira Lal v. Kali Nath, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; Bombay Gas Co. Ltd. v. Gopal Bhiva, AIR 1964 SC 752 at p. 755: (1964) 3 SCR 709; Kaushalya Devi v. K.L. Bansal, (1969) 1 SCC 59 at pp. 60-61: AIR 1970 SC 838 at p. 839; Sunder Dass v. Ram Prakash, supra: Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354: AIR 1981 SC 416; Hiralal Moolchand v. Barot Raman Lal, (1993) 2 SCC 458; Chiranjilal v. Jasjit Singh, (1993) 2 SCC 507; Urban improvement Trust v. Gokul Narain, supra; Jaipur Development Authority v. Radhey Shyam, (1994) 4 SCC 370.

no question of going behind the decree, for really in the eye of the law there is no decree at all.46

(4) Inherent lack of jurisdiction, however, must appear on the face of the record.47 Hence, if the decree on the face of it discloses some material on the basis of which the court could have passed the decree, it would be valid. In such a case, the executing court must accept and execute the decree as it stands and cannot go behind it. To allow the executing court to go behind that limit would be to exalt it to the status of a superior court sitting in appeal over the decision of the court which has passed the decree48

(5) A decree which is otherwise valid and executable, does not become inexecutable on the death of the decree-holder or of the judgment-debtor and can be executed against his legal representatives.49

(6) When the terms of a decree are vague or ambiguous, an executing court can construe the decree to ascertain its precise meaning.50 For this purpose, the executing court may refer not only to the judgment, but also the pleadings of the case.51

(7) An executing court can go into the question of the executability or otherwise of the decree and consider whether, by any subsequent developments, the decree has ceased to be executable according to its terms.52

46 Sunder Dass v. Ram Prakash, supra; Surinder Nath v. Union of India, 1988 Supp SCC 626 at p. 634: AIR 1988 SC 1777; S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1 at p. 2: AIR 1994 SC 853; Bhawarlal v. Universal Heavy Mechanical Lifting Enterprises, (1999)
1 SCC 558.

47 Hira Lal v. Kali Nath, supra; Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, supra.

48 Nagindas v. Dalpatrain, supra, at pp. 252-53 (SCC): at p. 477 (AIR); K.K. Chari v. R.M. Seshadri, (1973) 1 SCC 761: AIR 1973 SC 1311; Sabitri Dei v. Sarat Chandra Rout, (1996) 3 SCC 301.

49 Parbati Debi v. Mahadeo Prasad, (1979) 4 SCC 761: AIR 1979 SC 1915; V. Uthirapathi v. Ashrab Ali, (1998) 2 SCC 727: AIR 1998 SC 1168.

50 V. Ramaswami v. Kailasa Thevar, AIR 1951 SC 189 at p. 1921:1951 SCR 292; Topanmal Chhotamal v. Kundomal Gangaram, AIR 1960 SC 388 at p. 390; Bhavan Vaja v. Solanki Hanuji Khodaji, infra; Surinder Nath v. Union of India, supra.

51 Bhavan Vaja v. Solanki Hanuji Khodaji, (1973) 2 SCC 40: AIR 1972 SC 1371 at p. 1374; Topanmal v. Kundomal, AIR 1960 SC 388.

52 Jai Narain v. Kedar Nath, AIR 1956 SC 359 at p. 363:1956 SCR 62; Haji Sk. Subhan v. Madhorao, AIR 1962 SC 1230 at p. 1235:1962 Supp (1) SCR 123; Sudhir Kumar v. Baldev Krishna, (1969) 3 SCC 611: (1970) 3 SCR 114; Vidya Sagar v. Sudesh Kumari, (1976) 1 SCC 115: AIR 1975 SC 2295; Bai Dosabai v. Mathurdas Govinddas, (1980) 3 SCC 545 at pp. 552-54: AIR 1980 SC 1334 at pp. 1339-41; Tiko v. Lachman, 1995 Supp (4) SCC 582; Maguni Charan v. State of Orissa, (1976) 2 SCC 134: AIR 1976 SC 1121.

(8) A decree which becomes inexecutable by operation of law, may become executable by virtue of a subsequent amendment in the statute and can be executed after such amendment.53
(9) The executing court has power to mould the relief granted to the plaintiff in accordance with the changed circumstances.54
(10) The court executing the decree transferred to it has the same powers in executing such decree as if it had been passed by itself.55

53 Dularey Lodh v. ADJ, Kanpur, (1984) 3 SCC 99 at pp. 103, 106: AIR 1984 SC 1260; Narhari Shivram v. Pannalal Umediram, (1976) 3 SCC 203: AIR 1977 SC 164.
54 Yashpal Singh v. ADJ, (1992) 2 SCC 504 at p. 506; Haji Sk. Subhan v. Madhorao, AIR 1962 SC 1230 at p. 1237:1962 Supp (1) SCR 123.
55 S. 42. See also supra, Jai Narain v. Kedar Nath; Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354: AIR 1981 SC 416.

PART IV
3
Application for Execution

SYNOPSIS

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1. GENERAL

EXECUTION is the enforcement of a decree by a judicial process which enables the decree-holder to realise the fruits of the decree passed by a competent court in his favour. All proceedings in execution commence with the filing of an application for execution. Such application should be made to the court which passed the decree or, where the decree has been transferred to another court, to that court.1 Rules 10-25 and 105- 106 of Order 21 deal with execution applications.

2. WHO MAY APPLY?: RULE 10

The following persons may file an application for execution:

(i) Decree-holder.2

(ii) Legal representative of the decree-holder, if the decree-holder is dead.3

(iii) Representative of the decree-holder.4

1 Desk Bandhu Gupta v. Savkasha, AIR 1972 Guj 179; Ghulam Nabi v. Gaffer Wagey, AIR 1983 J&K 67:1982 Kash LJ

2 R. 10.

3 S. 146; see also Ram n Pal, (1999) 3 SCC 644: AIR 1999 SC 1694; Jugalkishore v. Raw Cotton Co. Ltd., AIR 1955 S

4 S. 146; see also ibid.

(iv) Any person claiming under the decree-holder.5
(v) Transferee of the decree-holder, if the following conditions are satisfied6:
(a) the decree must have been transferred by an assignment in writing or by operation of law;
(b) the application for execution must have been made to the court which passed the decree;
(c) notice and opportunity of hearing must have been given to the transferor and the judgment-debtor in case of assignment by transfer.
The provision of giving a notice is mandatory and in the absence of it, all the proceedings in the execution would be void.7 The object of issuing a notice is to determine once and for all and in the presence of the parties concerned the validity or otherwise of the assignment or transfer.8
(vi) One or more of the joint decree-holders, provided the following conditions are fulfilled:9
(a) the decree should not have imposed any condition to the contrary;
(b) the application must have been made for the execution of the whole decree; and
(c) the application must have been for the benefit of all the joint decree-holders;
(vii) Any person having special interest.
In the case of a decree in a representative suit, a person represented in such suit may apply for execution, even if he is not on record.10 A real beneficiary may also maintain an execution application.11 In a partition suit, the defendant is also a decree-holder to the extent of his share and can file an application for execution.12 A receiver appointed by a court may apply for execution on behalf of the decree-holder.13 An insolvent may make such an application before he is adjudicated an

5 S. 146; see also Ram Murti Devi v. Ralla Ram, AIR 1987 HP 1 (ibid.).
6 S. 49, O. 21 R. 16; see also Dhani Ram v. Lala Sri Ram, (1980) 2 SCC 162: AIR 1980 SC 157; Padmanabhan Pillai v. Sulaiman Kunju, AIR 1987 Ker 125.
7 See infra, "Notice against execution".
8 Brajabashi v. Manik Chandra, AIR 1927 Cal 694; Ramapai v. Thrinethran, 1954 KLT 434.
9 R. 15.
10 Swaminatha v. Kumarsummi, AIR 1923 Mad 472; Ghulam Nabi v. Gaffer Wagey, AIR 1983 J&K 67:1982 Kash LJ 423.
11 Babu Satyendra Narain v. Wahiduddin Khan, AIR 1940 Pat 472.
12 Chunilal v. Mulchand, AIR 1923 Bom 23: (1923) 46 Bom 937.
13 Jugalkishore v. Raw Cotton Co. Ltd., AIR 1955 SC 376:1955 SCR 1369.

insolvent.14 An agent of the decree-holder can maintain an application for execution.15

3. WHO CANNOT APPLY?

A person who is neither a decree-holder nor has a right to execute a decree cannot apply for execution of decree.16 Similarly, a third party or a stranger has no right to apply for execution even if he is a beneficiary under a compromise.17 In absence of transfer of interest by a trustee in favour of beneficiary, the latter cannot invoke Section 146 of the Code.18 A receiver appointed by a court may file execution application. But if he is dead, his son cannot continue the proceedings.19

4. AGAINST WHOM EXECUTION MAY BE TAKEN OUT

Execution may be taken out against the following persons:

(i) Judgment-debtor.20

(ii) Legal representatives of the judgment-debtor, if the judgment- debtor is dead.21 (They shall, however, be liable to the extent of the property of the deceased judgment-debtor which has come to their hands.)22

(iii) Representative of or the person claiming under the judgment- debtor.23

(iv) Surety of the judgment-debtor.24

5. TO WHOM APPLICATION MAY BE MADE

An application for execution may be filed in the court which passed the decree, or in the court to which the decree has been transferred for execution.25 Where territorial jurisdiction of a court is transferred after passing a decree, an execution application may be filed either in the court which had passed the decree, or in the court to which territorial jurisdiction was transferred.26

14 Sankaranarayana Ayyar Firm v. Yegnalakshmi Ammal, AIR 1939 Mad 196.

15 Lilavati v. Municipal Corpn. of Greater Bombay, (1966) 68 Bom LR 868:1967 Mah LJ 112.

16 Babu Satyendra Narain v. Wahiduddin Khan, AIR 1940 Pat 472.

17 Abidunnissa Khatoon v. Amirunnissa Khatoon, ILR (1877) 2 Cal 327 (PC).

18 Baisnab Das v. Bholanath, (1984) 88 CWN 860.

19 Krishnaswami Naicker v. Naranappa Naicker, AIR 1959 Mad 209.

20 S. 50, Or. 21 R. 15; see also Jagdish Dutt v. Dharam Pal, (1999) 3 SCC 644: AIR 1999 SC 1694; Kaikhushroo v. C.P. Syndicate Ltd., AIR 1950 FC 8:1949 FCR 501.

21 Ss. 50, 52, 53.

22 S. 53.

23 S. 146.

24 S. 150.

25 S. 38; see also Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131.

26 Merla Ramanna v. Nallaparaju, AIR 1956 SC 87: (1955) 2 SCR 938.

6. CONTENTS OF APPLICATION: RULE 11

Except in the case of a money decree, every application for execution shall be in writing, signed and verified by the applicant or by some other person acquainted with the facts of the case. It shall contain the necessary particulars like the number of the suit, the names of the parties, the date of the decree, the amount of the decree, etc.27

Where an application is made for attachment of movable property belonging to a judgment-debtor but not in his possession, the application for execution must be accompanied by an inventory of the property to be attached, containing a reasonably accurate description of the same.28 Where the application is for the attachment of growing crop it shall specify the time at which it is likely to be harvested.29

Where the application is for attachment of immovable property of the judgment-debtor, it shall contain (a) the description of such property sufficient to identify the same; and (b) the specification of the judgment-debtor's share or interest therein.30

Where the application is for arrest and detention in prison of the judgment-debtor, it shall state or be accompanied by an affidavit stating the grounds on which arrest is applied for.31

Where the application is for the attachment of land, registered in the office of the Collector, the court may require the applicant to produce a certified extract from such register.32

7. FORM

An application for execution shall be in Form No. 6 of Appendix E to the First Schedule. But even if an application is not in the proper form, the defect is not vital or material.33

8. PROCEDURE ON RECEIVING APPLICATION

(a) Admission: Rule 17

Rule 17 prescribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the court to ascertain whether the execution application complies with the requirements of Rules 11 to 14. If they are complied with, the court must admit

27 R. 11.
28 R. 12.
29 R. 45(1).
30 R. 13.
31 R.11-A.
32 R. 14.
33 Ashalata Debi v. Jadu Nath Roy, AIR 1954 SC 409: (1955) 1 SCR 150; Jugalkishore v. Raw Cotton Co. Ltd., AIR 1955 SC 376:1955 SCR 1369; Mohanlal Goenka v. Benoy Krishna, AIR 1953 SC 65:1953 SCR 377; Jiwani v. Rajmata Basantika Devi, 1993 Supp (3) SCC 217: AIR 1994 SC 1286.

and register the application. If they are not complied with, the court shall allow the defect to be remedied then and there or within a time fixed by it. If the defect is not remedied within that period, the court shall reject the application. The provisions of this rule are procedural and they should be interpreted liberally.34

(b) Hearing of application: Rules 105-106

Rules 105 and 106 have been inserted by the Amendment Act of 1976. Rule 105 provides that the court before which an application is pending may fix a date for hearing of such application. When the application is called out for hearing and the applicant is not present, the court may dismiss the application. On the other hand, if the applicant is present and the opposite party is not present, the court may hear the application ex parte and pass such order as it thinks fit.

Rule 106 lays down that if the application is dismissed for default or an ex parte order is passed under Rule 105, then the aggrieved party may apply to the court to set aside such order. The court shall set aside such order if sufficient cause is shown.

An order rejecting an application under Rule 106(1) is appealable.35

(c) Notice of execution: Rule 22

Rule 22 provides for the issue of show-cause notices to persons against whom execution is applied for in certain cases. As a general rule, the law does not require any notice to be issued for execution.

In the following cases, however, such notice must be issued:

(i) Where an application is made two years after the date of the decree; or more than two years after the date of the last order made on any previous application for execution; or

(ii) Where an application is made against the legal representative of the judgment-debtor; or

(iii) Where an application is made for the execution of a decree passed by a court of reciprocating territory;36 or

(iv) Where an application is made against the assignee or receiver of insolvent judgment-debtor; or

(v) Where the decree is for payment of money and the execution is sought against the person of the judgment-debtor;37 or

34 Jiwani v. Rajmata Basantika Devi, 1993 Supp (3) SCC 217: AIR 1994 SC 1286; Jugalkishore v. Raw Cotton Co. Ltd., AIR 1955 SC 376:1955 SCR 1369; Mohanlal Goenka v. Benoy Krishna, AIR 1953 SC 65:1953 SCR 377.

35 Or. 43 R. 1 (ja); see also V.A. Narayana v. O.RM.M.SV.M. Meyyappa, AIR 1975 Mad 36.

36 S. 44-A; see also Jharkhand Mines & Industries Ltd. v. Nand Kishore, AIR 1969 Pat 228.

37 S. 37.

(vi) Where an application is made against a person who has furnished security or given a guarantee for the performance of a decree or for the restitution of property or for the payment of money, to render him personally liable or to sell his property;38 or
(vii) Where an application is made by the transferee or assignee of the decree-holder.39
The underlying object of giving notice to the judgment-debtor is not only to afford him an opportunity to put forward objections, if any, against the maintainability of the execution application but also to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him.40
The provision is not ultra vires Article 14 of the Constitution.41 Issue of a notice under Rule 22 is intended to safeguard the interest of the judgment-debtor. It is a fundamental part of the procedure touching upon the jurisdiction of the executing court to take further steps in execution. It is, therefore, mandatory and is a condition precedent to the validity of execution proceedings.42
Omission to give notice is a defect which goes to the root of the proceedings and renders them null and void and without jurisdiction unless the judgment-debtor waives such notice.43
Sub-rule (2) of Rule 22, however, empowers the court to dispense with such notice, if it would cause unreasonable delay or would defeat the ends of justice.44 But where a notice is dispensed with, the reasons for such dispensation should be recorded.45

38 S. 145; see also Amar Chand v. Bhano, 1995 Supp (1) SCC 550: AIR 1995 SC 871.
39 R. 16.
40 Erava v. Sidramappa Pasare, (1897) 21 Bom 424 (FB); Lall v. Rajkishore, AIR 1933 Pat 658; Ramsaran Sah v. Deonandan Singh, AIR 1957 Pat 433; A.K. Narayanan Nambiar v. State of Kerala, AIR 1964 Ker 158; Satyanarain Bajoria v. Ramnarain Tibrewal, (1993) 4 SCC 414: AIR 1994 SC 1583; Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131.
41 Thota Pichayya v. Govt. of A.P., AIR 1957 AP136:1956 AnWR 322.
42 Raghunath Das v. Sundar Das, AIR 1914 PC 129: (1913-14) 41 IA 251; Chandra Nath v. Nabadwip Chandra, AIR 1931 Cal 476; Odhavji v. Sakarchand, AIR 1949 Bom 63 (FB); Bandu Hari v. Bhagya Laxman, AIR 1954 Bom 114; Fakhrul Islam v. Bhubaneshwari Kuer, AIR 1929 Pat 79; Ajab Lal Dubey v. Hari Charan Tiwari, AIR 1945 Pat 1 (FB); Satyanarain Bajoria v. Ramnarain Tibrewal, (1993) 4 SCC 414 at p. 420; Desh Bandhu Gupta v. N.L. Anand, infra.
43 Raghunath Das v. Sundar Das Khetri (ibid.); A.K. Narayanan Nambiar v. State of Kerala, supra; Bandu Hari v. Bhagya Laxman (ibid.); Rajagopala Aiyar v. Ramanujachariyar, AIR 1924 Mad 431 (FB); Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131 at pp. 144-45.
44 Raghunath Das v. Sundar Das Khetri (ibid.); Jharkhand Mines & Industries Ltd. v. Nand Kishore Prasad, supra; Rajagopala Aiyar v. Ramanujachariyar (ibid.); A.K. Narayanan Nambiar v. State of Kerala, supra.
45 Satyanarain Bajoria v. Ramnarain Tibrewal, (1993) 4 SCC 414: AIR 1994 SC 1583; Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131; Raghunath Das v. Sundar Das, AIR 1914 PC

There is, however, conflict of opinion as to the effect of omission to record reasons by the court. According to some High Courts, it is a mere irregularity and does not invalidate the proceedings.46 While, according to some other High Courts, it is a defect which goes to the very root of the matter and renders all the proceedings void for want of jurisdiction.47

(d) Procedure after notice: Rule 23

If the person to whom the notice is issued under Rule 22 does not appear or does not show cause against execution, the court shall, unless it sees any cause to the contrary, issue process for the execution of the decree.48 But where such person offers his objections against the execution of the decree, the court shall consider them and pass such order as it thinks fit49

9. LIMITATION

The period of limitation for the execution of a decree (other than a decree granting a mandatory injunction) is twelve years from the date of the decree.50 The period of limitation for the execution of a decree for mandatory injunction is three years from the date of the decree.51

10. EXECUTION APPLICATION AND RES JUDICATA

As stated above,52 even before the Amendment Act of 1976, the doctrine of res judicata was judicially held applicable to execution proceedings. Explanation VII to Section 11 as added by the Amendment Act of 1976 now specifically provides that the provisions of res judicata will apply to execution proceedings also.

But before an earlier decision can operate as res judicata, the execution application must have been heard and finally decided by the Court.53 Hence, if an execution application is dismissed for default

129: (1913-14) 41 IA 251; Jharkhand Mines & Industries Ltd. v. Nand Kishore Prasad, supra; P.R. Srinivasa v. M.D. Narayana, AIR 1918 Mad 645.

46 Yakub Harunkhan v. Mahadev Narayan, AIR 1932 Bom 509; Manindra Chandra v. Rahatannessa Bibi, AIR 1931 Cal 555; Kamala Dutta v. Ballygunge Estates (P) Ltd., AIR 1974 Cal 75: 77 CWN 839; Rajagopala Aiyar v. Ramanujachariyar, AIR 1924 Mad 431 (FB); Chacko Pyli v. Iype Varghese, AIR 1956 TC147: ILR 1955 TC 823:1955 KLT 739 (FB).

47 U. Nyo v. U. Po Thit, AIR 1935 Rang 42; Mansaram v. Kamarali, AIR 1954 Nag 78.

48 Rr. 23(1), 24, 25; Desh Bandhu Gupta v. N.L. Anand, supra.

49 R. 23(2).

50 Art. 136, Limitation Act, 1963.

51 Art. 133, Limitation Act, 1963.

52 Supra, Pt. II, Chap. 2.

53 Pulavarthi Venkata v. Valluri Jagannadha, AIR 1967 SC 591: (1964) 2 SCR 310; Shivashankar Prasad v. Baikunth Nath, (1969) 1 SCC 718: AIR 1969 SC 971.

of appearance,54 or for non-prosecution,55 or as being premature,56 or as being belated,57 or on the ground that it is not pressed,58 or is not maintainable,59 the order will not operate as res judicata and a fresh execution application on the same ground for the same prayer is not barred.

54 Shivashankar Prasad v. Baikunth Nath (ibid.).
55 Ibid, see also Jagadeo Nawasji v. Coop. Society Mahalungi No. 2, AIR 1951 Nag 210.
56 Brij Behari Lal v. Phunni Lal, AIR 1938 All 377; Taluqdar Khan v. Khairulnisa, AIR 1928 Oudh 38.
57 G.B. Solano v. Kumari Umeshwari, AIR 1938 Pat 216.
58 Firm Lachiram Santhokchand Ameechand v. Firm Tarachand Jayarupji, AIR 1937 Mad 289.
59 Ameena Amma v. Sundaram Pillai, (1994) 1 SCC 743; see also supra, Pt. II, Chap. 2.

PART IV
4 Stay of Execution

SYNOPSIS

1. When court may stay execution?: Rule 26 607
2. Staying of order and quashing of order: Distinction 608
3. Revival of execution proceedings: Rule 27 608
4. Stay of execution pending suit: Rule 29 608
5. Order of injunction and order of stay: Distinction 610

1. WHEN COURT MAY STAY EXECUTION?: RULE 26

PROVISIONS for stay of execution of a decree are made in Rule 26 of Order 21. This rule lays down that the executing court shall, on sufficient cause being shown and on the judgment-debtor furnishing security or fulfilling such conditions, as may be imposed on him, stay execution of a decree for a reasonable time to enable the judgment- debtor to apply to the court which has passed the decree or to the appellate court for an order to stay execution.

The power to stay execution of a decree by a transferee court is not similar to the power of the court which passes a decree. Whereas the transferor court can grant absolute stay, the transferee court can stay execution for a reasonable time to enable the judgment-debtor to apply to the transferor court or to the appellate court to grant stay against the execution. Such order can be made on the application of the judgment-debtor. A transferee court cannot invoke inherent powers to grant stay.1

Where the judgment-debtor applies for stay of execution, the transferee court must obtain security from the judgment-debtor or impose such conditions as it may think fit. The provision is thus mandatory and imperative.2

1 Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731: AIR 1973 SC 528.
2 Or. 21 R. 26(3).