

**Neutral Citation No. - 2024:AHC-LKO:37967
Reserved/AFR**

Court No. - 5

Case :- SECOND APPEAL No. - 237 of 2010

Appellant :- Anarkali W/O Late Rampal

Respondent :- Siyawati W/O Late Rampal And Ors.

Counsel for Appellant :- Somesh Tripathi,Alok Kr. Misra,Manoj Kumar Shukla,Mukesh Kumar Sharma,Vinod Kr. Yadav

Counsel for Respondent :-Ankit Srivastava,Mohd. Ali,Ramesh Pandey,Sudeep Seth

Hon'ble Rajnish Kumar,J.

1. Heard, Sri Alok Kumar Mishra alongwith Sri Manoj Kumar Shukla, learned counsel for the appellants, Sri Mohd. Ali, learned counsel for the respondent no.1 and Sri Rajnish Maurya, Advocate holding brief of Sri Ankit Srivastava, learned counsel for the respondent no.2. None appeared on behalf of the respondent no.3, despite sufficient service.

2. This second appeal, under Section 100 of Civil Procedure Code(hereinafter referred to as CPC), has been filed against the judgment and decree dated 05.03.2010 passed by the Additional District Judge, Court No.7,Raibareli in Civil Appeal No.86/2009; Smt.Siyawati versus Smt. Anarkali and others, by means of which the appeal has been allowed and the judgment and decree dated 29.07.2009 passed by the Civil Judge(S.D.), Court No.14, Raebareli in Regular Suit No.411/2002;Siyawati versus Anarkali has been set aside and the suit of the plaintiff-respondent no.1(hereinafter referred to as the respondent no.1) has partly been decreed and the declaration has been made that the respondent no.1-

Siyawati is legally wedded wife of Late Rampal son of Shiv Balak. For rest of the reliefs, the suit of the respondent no.1 has been dismissed with cost. The claim of the defendant-appellant(hereinafter referred to as the appellant) has also been dismissed with cost.

3. The husband of the appellant, Late Rampal was working on the post of peon in Baiswara P.G. College. He died-in-harness on 20.10.1999. The respondent no.1, claiming herself to be the wife of Late Rampal, obtained the succession certificate from the office of the District Magistrate, Raibareli on 25.11.1991. On the basis of the said certificate, she got compassionate appointment on 19.10.2000 in the defendant-respondent no.3 institution(hereinafter referred to as the respondent no.3). The appellant preferred Misc. Case No.76/2000; Anarkali versus Public in General for issuance of succession certificate for release of G.P.F. amount to the tune of Rs.85,642/- and the amount deposited in Saving Bank Account of her husband Late Rampal in the defendant-respondent no.2 Bank(hereinafter referred to as the respondent no.2) to the tune of Rs.5674/-, which was allowed by means of the order dated 26.11.2000. The respondent no.1 moved application under Order 1 Rule 10 C.P.C. in the said succession suit, which was rejected on 22.12.2001. Thereafter, the respondent no.1 filed Regular Suit No.411 of 2002 for declaration to the effect that she be declared the legally wedded wife of Late Rampal and therefore entitled for the G.P.F. amount as well as the amount deposited in the saving bank account of the deceased in State Bank of India, Lalganj Branch. A further declaration was sought to the effect that order passed in Misc. case No.76/2000; Anarkali versus Public in General on 26.11.2001 is null and void alongwith consequential prayer. The appellant, after putting appearance in the suit, filed a written statement denying the averments made in the plaint. She further filed a counter claim for declaration to the effect that the compassionate appointment of the respondent no.1 on 19.12.2000 in the respondent no.3- College as wife of Late Rampal be declared null and void alongwith consequential prayer. The respondent no.3 also filed its written statement admitting that the respondent no.1 has been given appointment on

compassionate ground on the basis of succession certificate issued from the District Magistrate, Raebareli. It has also been admitted that the respondent no.1 and the appellant both had applied for the compassionate appointment.

4. During pendency of the suit, it was amended, therefore the additional written statement was filed by the appellant. The replication to the written statement was filed by the respondent no.1. On the basis of the pleadings of the parties, 8 issues were framed by the trial court, which are extracted here-in-below:-

वाद बिन्दु

1. क्या यह घोषित किये जाने योग्य है कि वादिनी स्व० राम पाल निवासी ग्राम चादा प०, त० लालगंज, रायबरेली की विवाहित पत्नी है एवं स्व० राम पाल की मृत्यु पश्चात जी०पी०एफ० की धनराशि मु० 85642/-रु० एवं बचत खाता सं० 3281, भारतीय स्टेट बैंक शाखा लालगंज, रायबरेली में जमा मु० 56741/-रु० प्राप्त करने की अधिकारिणी है?
 2. क्या यह घोषित किये जाने योग्य है कि सिविल जज सी० डि० रायबरेली द्वारा पारित आदेश दिनांकित 26.11.2000 प्रकीर्ण वाद अ०सं० संख्या 76/2000 अनारकली बनाम हरखास आम निष्प्रभावी है?
 3. क्या कोई वाद कारण उत्पन्न नहीं हुआ?
 4. वादिनी किस अनुतोष को पाने की अधिकारिणी है?
 5. क्या वादिनी का वाद आदेश 7 नियम 11 जा० दी० के प्रावधान के तहत निरस्त होने योग्य है?
 6. क्या वादी ने न्याय शुल्क का आकलन कम किया है?
 7. क्या वाद में पक्षकारों के कुसंयोजन का दोष है?
 8. क्या प्रतिवादिनी सं० 1 अपने काउण्टर क्लेम के आधार पर कोई अनुतोष पाने की अधिकारिणी है?
5. Certain documentary evidences were filed by the respondent no.1 and the appellant, which would be referred at the relevant places. After considering the pleadings of the parties and evidence adduced before the trial court, the trial court dismissed the suit of the respondent no.1 by means of the judgment and order dated 29.07.2009 and decreed the claim of the respondent no.1 and declared that the appointment of the respondent no.1 as wife of Late Rampal in respondent no.3 institution is illegal and void.
6. Being aggrieved by the judgment and decree dated 29.07.2009, the respondent no.1 preferred Civil Appeal No.86 of 2009. The first appellate court after considering the pleadings of the parties and affording opportunity of

hearing to the parties allowed the appeal and set aside the judgment and decree dated 29.07.2009 passed by the trial court and decreed the suit of the respondent no.1 declaring the respondent no.1 as legally wedded wife of Late Rampal and for rest of the prayers dismissed the same. The claim of the appellant has also been dismissed. Hence the instant second appeal has been filed.

7. The appeal was admitted by means of the order dated 17.08.2010 on the substantial question of law nos. 1 and 2 as prayed by the appellant. By means of the order dated 26.02.2013, the substantial question of law no. 2 was not pressed, accordingly, this Court had passed an order that the parties are directed to confine their arguments at the time of hearing on the first substantial question of law only and the second substantial question of law shall be ignored as not pressed. Considering the said orders, by means of the order dated 01.09.2022, this Court formulated one more substantial question of law. By means of the order dated 10.11.2022, this Court formulated one more substantial question of law. As such following substantial questions of law have been formulated by this Court in this second appeal:-

"(i) Whether the suit of the plaintiff respondent could be decreed by the first appellate court in the absence of specific finding that the plaintiff-respondent was the legally wedded wife of late Rampal.

(ii) Whether the first appeal filed by the respondent no.1-Siyawati was maintainable in view of the fact that the suit and counter claim both were decided by the common judgment dated 29.07.2009 by the trial court?

(iii) Whether customary divorce was not prevalent in the family of appellant and family of the respondents and the findings recorded by the lower court regarding customary divorce of appellant with Late Rampal was void and on this count the judgment of the first appellate court cannot be sustained and the judgment and decree of the lower court is liable to be restored.?"

8. Learned counsel for the appellant submitted that the appellant was the legally wedded wife of Late Rampal and remained as such till his death as there was no judicial separation or divorce between them. There was no custom of divorce by chhoda chhutti in their Kuswaha community but without framing any point of determination in this regard, learned first appellate court erred in law as well as

on fact in holding that there was divorce between the appellant and her husband Late Rampal through the custom prevalent in their community, whereas neither any such custom was prevalent in their community nor the same was proved by either of the parties. He also submits that the custom having force of law is only admissible. Therefore unless the custom is proved as per law it cannot be accepted and enforced. Learned first appellate court also failed to consider that the appellant had preferred a suit for maintenance under Section 125 Cr.P.C. against Late Rampal, in which the maintenance was allowed which was regularly paid through cheques and Late Rampal had also filed a suit under Section 25 of the Guardian and Wards Act against the appellant for custody of their minor daughter. He further submitted that first appellate court has recorded contrary findings in regard to the issues no.1 and 2 and has failed to consider the statement on oath of the respondent no.1, who appeared as PW1 that it is true to say that Siyawati was legally wedded wife of Late Rampal till his death, which is in fact the admission on the part of the respondent no.1 and in view of this admission, as per Hindu Law he could not have married another woman during his lifetime. He further submitted that the appellant is nominee in the service book of her husband, which is still intact. The amount of G.P.F. of the husband of the appellant has also been paid to the appellant on the basis of succession certificate issued by the competent court of law. He also submitted that the appellant had filed a counter claim against the suit filed by the respondent no.1 and while dismissing the suit of the respondent no.1, the counter claim of the appellant was allowed but only one appeal was filed against the judgment and decree passed by the trial court therefore it was not maintainable and liable to be dismissed on this ground alone. Thus, the submission of learned counsel for the appellant is that judgment and decree passed by the first appellate court suffers from manifest error of law and findings recorded by it are erroneous and perverse and it is liable to be set aside by this Court.

9. He relies on *Yamanaji H. Jadhav versus Nirmala; (2002) 2 SCC 637, Rameshchandra Rampratapji Daga versus Rameshwari Rameshchandra*

Daga;(2005) 2 SCC 33,State of Andhra Pradesh and Others versus B.Ranga Reddy(Dead) by Legal Representatives and Others;(2020) 15 SCC 681,Rajni Rani and Another versus Khairati Lal and Others;(2015) 2 SCC 682, YamunaBai Anantrao Adhav versus Anantrao Shivram Adhav and another;(1988) 1 SCC 530,Gurdev Kaur and Others versus Kaki and Others;(2007) 1 SCC 546,P.Kishore Kumar versus Vittal K.Patkar;2023(41) LCD 2817, Samar Kumar Roy(Dead) Through Legal Representative(Mother) versus Jharna Bera;(2017) 9 SCC 591, Smt. Shiramabai w/o Pundalik Bhave versus Captain Record Officer for O.I.C. records Sena Corps Abhilekh, Gaya, Bihar State; AIR 2023 SC 3920 and a coordinate Bench judgment of this Court in the case of Smriti Singh Alias Mausami Singh and 3 others versus State of U.P. and Another;Application U/S 482 No.23148 of 2022 .

10. Per contra, learned counsel for the respondent no.1 submitted that the appellant was divorced by her husband late Rampal as per the custom prevalent and recognised in their community, which was proved by the statement of D.W.2 i.e. witness produced by the appellant and after divorce from the appellant, her husband had married to the respondent no.1 in accordance with law and the custom in the community. Therefore it cannot be said that the marriage of respondent no.1 with her husband late Rampal was void. He further submitted that the respondent no.1 was appointed in the respondent no.3 institution on the basis of the succession certificate issued by the District Magistrate under Dying-in-Harness in place of her husband in accordance with law on 28.09.2000. He also submitted that the respondent no.1 has three children out of the wedlock with Late Rampal. Thus, the submission is that the trial court had wrongly and illegally dismissed the suit filed by the respondent no.1, which has rightly and in accordance with law been allowed by the first appellate court after considering the pleadings of the parties and evidence adduced before the trial court. Therefore the judgment and decree passed by the first appellate court does not suffer from any illegality or error. On the basis of above, submission of learned counsel for the respondent no.1 is that the substantial questions of law formulated by this Court does not arise in this

appeal and the appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed with cost.

11. He relies on *Satyender and Others versus Saroj and Others*;2022 Live Law (SC) 679, *State of Andhra Pradesh and Others versus B.Ranga Reddy(Dead) by Legal Representatives and Others*;(2020) 15 SCC 681,*Sri Gangai Vinayagar Temple and Another versus Meenakshi Ammal and Others*;(2015) 3 SCC 624,*Nazir Mohamed versus J.Kamala and Others*;(2020) 19 SCC 57,*Gurdit Singh versus Mst. Angrez Kaur Alias Gej Kaur alias Malanand Others*;1968 AIR 142,,*Badri Prasad versus Deputy Director of Consolidation and Others*; AIR 1978 SC 1557,*Narhari and others versus Shanker and Others*;AIR 1953 SC 419,*Smt. Nirmala and others versus Mamta and others*;FAM No.143 of 2017 of Chattisgarh High Court, Bilaspur,*Loya Padmaja @ Venkateswaramma versus Loya Veera Venkata Govindarajulu*;1999(6) ALD 413 of Andhra Pradesh High Court and *G.Amalorpavam and others versus R.C. Diocese of Madurai and Others*; (2006) 3 SCC 224. .

12. I have considered the submissions of learned counsel for the parties and perused the records.

13. The respondent no.1 filed suit stating that the appellant was the legally wedded wife of Late Rampal. Late Rampal had desolved the marriage with her according to the custom of chhoda chhutti prevalent and recognised in their community 22 years back. Thereafter, he had married with the respondent no.1 about 11-12 years back according to the customary rights and ceremonies prevalent in the community. Therefore the first question to be considered in this case is as to whether the custom of Chhoda Chhutti was prevalent, continuing and recognised in the community of the appellant and her husband or not and if it was prevalent, and continuing and recognised,the marriage of the appellant with Late Rampal was desolved with the said custom of chhoda chhutti or not.

14. As per Section 5 of the Hindu Marriage Act 1955(hereinafter referred to as the Act of 1955), the first condition of the conditions for Hindu Marriage is that

the marriage may be solemnized between two hindus if neither of the party has spouse living at the time of marriage. The exception to it is if a person has got divorce, in accordance with law. Section 13 of the Act of 1955 provides as to how a marriage may be desolved. Therefore a person whose marriage has been desolved in accordance with law is entitled to remarry. Though the customary divorce is not provided under Section 13 of the Act of 1955, however, as per Saving clause provided under Section 29(2), it will not affect any right recognised by custom to obtain dissolution of a Hindu Marriage, as such the customary divorce is permissible, if it is recognised. Section 29(2) is extracted hereinbelow:-

"(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act".

15. The 'custom' has been defined in Sub-section(a) of Section 3 of the Act of 1955, which is extracted hereinbelow:-

3. Definitions.—In this Act, unless the context otherwise requires,—

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

16. In view of above, the expression 'custom' signify any rule which, having been continuously and uniformly observed for a long time and recognised in a community, would obtain the force of law among Hindus, provided that the rule is certain and not unreasonable or opposed to public policy. If it is in regard to a family it is applicable only to a family, where it has not been discontinued by the family. Therefore for claiming a custom as a rule of law, it has to be necessarily pleaded and proved by cogent evidence that the same was ancient and being continuously and uniformly been observed for a long time and recognised in the community of the person(s) claiming it.

17. The Andhra Pradesh High court, in the case of ***Loya Padmaja @ Venkateswaramma versus Loya Veera Venkata Govindarajulu(supra)***, has held

that where there is a custom prevalent in a community either for dissolution or for performance of a marriage which is accepted and recognised the same shall not be affected by any provisions of the Hindu Marriage Act 1955.

18. The Chattisgarh High Court, in the case of ***Smt. Nirmala and others versus Mamta and others(supra)***, has held that for custom to have the colour of a rule of law, it is necessary for the party claiming it to plead and thereafter prove that such custom is ancient. The Court also considered and followed the judgment of the Hon'ble Supreme Court, in the case of ***Gurdit Singh versus Mst. Angrez Kaur(supra)***, in which it has been held that when the existence of custom has been proved in a community to which the parties belong, in such case, the custom of divorce would be saved and would lead to a valid divorce.

19. The Hon'ble Supreme Court, in the case of ***Yamanaji H. Jadhav versus Nirmala(supra)***, has held that as per the Hindu Law administered by courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since the said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore there was an obligation on the trial court to have framed the issue as to whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. The Hon'ble Supreme Court further opined that the lack of sufficient pleading in the plaint or in the written statement would not in our opinion permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. The relevant paragraph 7 is extracted here-in-below:-

“7. In the view that we are inclined to take in this appeal, we do not think it is necessary for us to go into the contentions advanced by the learned counsel for the parties in this case, because we find that the courts below have erroneously proceeded on the basis

that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable for divorce in the community to which the parties to this litigation belong to. As per the Hindu Law administered by courts in India divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. In the instant case, we have perused the pleadings of the parties before the trial court and we do not find any material to show that prevalence of any such customary divorce in the community, based on which the document of divorce was brought into existence was ever pleaded by the defendant as required by law or any evidence was led in this case to substantiate the same. It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognisable by a court unless specifically permitted by law. Therefore, we are of the opinion to do complete justice in this case. It is necessary that the trial court be directed to frame a specific issue in regard to customary divorce based on which the divorce deed dated 26th of June, 1982 has come into existence and which is the subject matter of the suit in question. In this regard, we permit the parties to amend the pleadings, if they so desire and also to lead evidence to the limited extent of proving the existence of a provision for customary divorce (otherwise through the process of or outside court) in their community and then test the validity of the divorce deed dated 26.6.1982 based on the finding arrived at in deciding the new issue.”

20. The Hon'ble Supreme Court, in the case of ***Rameshchandra Rampratapji Daga versus Rameshwari Rameshchandra Daga(supra)***, has declined to accept the registered document of Chhor Chithhi from the previous husband on the ground that the existence of such customary divorce in Vaish community of Maheshwaris has not been established. The Hon'ble Supreme Court has further held that a Hindu marriage can be dissolved only in accordance with the provisions of the Act by obtaining a decree of divorce from the court.

21. In view of above, unless and untill a 'custom' and it's prevalence, continuance for a considerable long time and recognition in the community concerned etc. is specifically pleaded and proved by cogent evidence before the

court of law, in case of dispute, the claim on the basis of said custom cannot be accepted and no right will accrue on the basis of said custom. For proving a custom, not only the custom is required to be pleaded and proved but its prevalence and recognition for a considerable long time through some examples with proof.

22. Adverting to the facts of the present case, this Court finds that only pleading made in the plaint is that Late Rampal had divorced defendant no.1 i.e. the appellant by the custom of chhoda chhutti prevalent and recognised in the community but no pleading has been made as to what was the custom prevalent and since how long time such 'custom' was continuing and recognised in the community of the appellant and her husband with some instances and when there was no pleading it could not have been proved and in fact not proved. Not even a single instance of its existence and observance has been shown. The appellant has specifically denied the pleadings in this regard. It has further been stated in the additional statement that Late Rampal had not divorced the appellant in his life time through any custom or competent court. The trial court, after considering the pleadings of the parties and evidence adduced before it, has held that no divorce had taken place between Late Rampal and Anarkali i.e. the appellant. The respondent no.1, who appeared as P.W.1, has also admitted in his statement on oath that it is correct to say that till the death of Rampal, Anarkali was his legally wedded wife and she would not be able to tell as to whether Anarkali and Rampal were divorced or not. She has stated about divorce of Anarkali and Rampal on the basis of information given by Rampal. D.W.2. Kali Babu has also stated that he knows Anarkali and Late Rampal. They remained as husband and wife throughout his life and there was no divorce between Smt. Anarkali and Rampal through court or community. However, learned appellate court without considering as to whether there was sufficient pleading and proof of custom of divorce through chhoda chhutti in the community of the appellant or not, only considering the plea of the respondent no.1 and on the basis of the evidence of the real brother of Late Rampal, P.W.2 Rajaram and statement of D.W.2-Kali Babu that there is custom

of Chhoda Chhutti in their community without any basis and proof in accordance with law, held that chhoda chhutti as dissolution of marriage was prevalent in the caste and community of the appellant, whereas as to whether it was a custom prevalent and recognised in the community or not has not been proved.

23. Learned appellate court has also failed to consider the admission on the part of the respondent no.1 in regard to continuance of the marital relations between the appellant and Late Rampal till his death. Merely, because the husband and wife were not living together for a long time, it cannot be said that there was divorce between them. Learned appellate court has also failed to consider the admission of Late Rampal recorded in the written statement filed by him in a petition under Section 125 Cr.P.C. filed by the appellant for maintenance. Though it may not be of much evidentiary value but when considered in the light of evidence in the present case, it strengthens it.

24. In view of above, since it could not be pleaded and proved that the custom of chhoda chhutti was prevalent, continuing and recognised in the community of the appellant and Late Rampal, merely on the basis of statement of P.W 2 that Late Rampal had divorced the appellant through Chhoda Chhutti before the community is not sufficient to hold that the appellant and Late Rampal were divorced through the said custom, whereas P.W. 2 also failed to disclose the persons who were present at the time of alleged divorce through the said custom and as to how the custom was performed. Therefore also it could not have been held that there was divorce between the appellant and Late Rampal.

25. Now the question arises that if the 'custom' of Chhoda Chhutti for divorce could not be proved by adducing cogent and convincing evidence by the respondent no.1, as to whether the respondent no.1 could have been said to be legally wedded wife of Late Rampal.

26. Section 5(i) of the Act of 1955 provides that the marriage may be solemnized between any two Hindus if neither party has a spouse living at the time of the marriage. Therefore since the legally wedded wife of Late Rampal

i.e. the appellant was alive throughout his life time, Late Rampal could not have married to any other woman or the respondent no.1. The marriage of Late Rampal with the respondent no.1 even if held, cannot be said to be a legal and valid marriage in the eyes of law, giving her status of legally wedded wife of Late Rampal and benefits and rights of same. Section 11 of the Act of 1955 provides about void marriages, according to which any marriage solemnized in contravention of conditions specified in clauses (i), (iv) and (v) of section 5 is void. Therefore even if the marriage was solemnized by Late Rampal during subsistence and life of the appellant, who was admittedly the legally wedded wife of Late Rampal throughout her life time, the marriage would be void.

27. Even otherwise, it has to be seen as to whether the marriage of the respondent no.1 with Late Rampal was in accordance with Hindu law or not. Sub-Section (i) of Section 7 of the Act of 1950 provides that the Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. Sub-Section (2) provides where such rites and ceremonies include the 'Saptapadi' (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. Therefore one who claims that he/she was married in accordance with the rites and ceremonies of Hindus, if a dispute is raised, he/she will have to plead and prove what were the rites and ceremonies and as to whether such rites and ceremonies include 'Saptapadi' or not and if includes, the 'Saptapadi' was performed or not. Normally the 'Saptapadi' before the sacred fire is an essential ceremony in Hindus and in absence of such ceremony, the Hindu marriage cannot be said to have been performed in accordance with law.

28. In regard to the claim of marriage of the respondent no.1 with Late Rampal, respondent no.1 has pleaded in his plaint that Rampal was of the caste of respondent no.1 and he had married to the respondent no.1 in accordance with the customs prevalent in their community and their marriage was recognised by their family community and society. However, there is no pleading that what were the customary rights and ceremonies in the family and

community of Late Rampal and the respondent no.1. It has also not been pleaded as to whether 'Saptapadi' was included in the rights and ceremonies of the family and community of the respondent no.1 and Late Rampal or not, and if it was included, as to whether it had taken place or not. The respondent no.1 in his statement on oath recorded on 28.03.2007 has stated that she had married with Rampal 15-16 years back. It has also been pleaded that respondent no.1 and Late Rampal were living together as husband wife during their life time and their relationship as husband and wife was recognised by their family and community but it cannot be said on the basis of these pleadings and evidence on record that they were legally wedded in accordance with law. P.W.2 and P.W.3 also could not prove it.

29. The Hon'ble Supreme Court, in a recent judgment of ***Dolly Rani versus Manish Kumar Chanchal; Transfer Petition (C) No(s).2043/2023***, has held that there has to be hindu marriage in accordance with Section 7 of the Act in-as-much as there must be a marriage ceremony which has taken place between the parties in accordance with the said provision. Although the parties may have complied with the requisite conditions for a valid hindu marriage as per Section 5 of the Act but in absence of there being a Hindu marriage in accordance with Section 7 of the Act i.e. solemnization of such marriage there would be no hindu marriage in accordance with law. It has further been held that in absence of any Hindu marriage as per the provisions of law, the man and woman cannot acquire status of being husband and wife to each other. It has further been held that there should not only be compliance of the conditions as prescribed under Section 5 of the said Act but also the couple must solemnize a marriage in accordance with Section 7 of the Act and the critical conditions for solemnizing a hindu marriage should be assiduously, strictly and religiously followed. The Hon'ble Supreme Court has also held that where a Hindu Marriage is not performed in accordance with the applicable rites or ceremonies such as saptapadi when included, the marriage will not be construed as a Hindu marriage. In other words, for a valid marriage under the Act, the requisite ceremonies have to be performed and there must be proof of performance of the

said ceremony when an issue/controversy arise. Unless the parties have undergone such ceremony, there would be no Hindu marriage according to Section 7 of the Act.

30. The Hon'ble Supreme Court, in the case of ***Yamuna Bai Anantrao Adhav versus Anantrao Shivram Adhav and another(supra)***, has held that so far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party and held that the marriage of a woman in accordance with Hindu Rites with a man having a living spouse is a complete nullity in the eye of law. The relevant paragraphs 3 and 7 are extracted hereinbelow:-

"3. For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) have to be examined. Section 11 of the Act declares such a marriage as null and void in the following terms:

" 11. Void marriages-Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5. "

*Clause (1)(i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. A reference was made to Section 12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in Section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories of marriage and is not applicable to one solemnised in violation of s. 5(1)(i) of the Act. Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void-*ipso jure*, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16, which is quoted below, also throw light on this aspect:*

" 16. Legitimacy of children of void and voidable marriages.-(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been

dissolved instead of being annulled, shall be deemed to be their legitimate child not withstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under [Section 12](#), any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Sub-section (1), by using the words underlined above clearly, implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by [Section 12](#), sub- section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Section 11 and [12](#). It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception."

7. Lastly it was urged that the appellant was not informed about the respondent's marriage with Lilabai when she married the respondent who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either. The appellant cannot rely on the principle of estoppel so as to defeat the provisions of the Act. So far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party."

31. A coordinate Bench of this Court, in the case of ***Smriti Singh Alias Mausami Singh and 3 others versus State of U.P. and Another(supra)***, has held that it is well settled that the word solemnize means in connection with a marriage, to celebrate the marriage with proper ceremonies and in due form and unless the marriage is celebrated or performed with proper ceremonies and due form, it cannot be said to be solemnized. If the marriage is not a valid marriage, according to the law applicable to the parties, it is not a marriage in the eyes of law. The court has also held that saptapadi ceremony under the Hindu law is one of the essential ingredients to constitute a valid marriage, therefore if it is not performed, the marriage cannot be said to be legal and valid marriage.

32. The Hon'ble Supreme Court, in the case of ***Badri Prasad versus Deputy Director of Consolidation and Others(supra)***, has held that strong presumption arises in favour of wedlock where the partners have lived for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Therefore there was heavy burden on the respondent no.1 who was seeking to deprive the relationship of the appellant with Late Rampal to prove divorce between them

in accordance with law and the marriage of the respondent no.1 with Late Rampal in accordance with law with due compliance of rites and ceremonies, which she has failed to do.

33. The Hon'ble Supreme Court, in the case of ***Smt. Shiramabai versus Captain Record Officer for O.I.C. records Sena Corps Abhilekh, Gaya, Bihar State(supra)***, has held that it is no longer res intergra that if a man and woman cohabit as husband and wife for a long duration, one can draw a presumption in their favour that they were living together as a consequence of a valid marriage and this presumption can be drawn under Section 114 of the Evidence Act. The court has further held that no doubt, the said presumption is rebuttable and can be rebutted by leading unimpeachable evidence and when there is any circumstance that weakens such a presumption, courts not to ignore the same. The burden lies heavily on the party who seeks to question the cohabitation and to deprive the relationship of a legal sanctity. Therefore merely relying the separate living of the appellant and Late Rampal for a long period is not sufficient to presume that there was a divorce between them and in absence of proof of the marriage of respondent no.1 with Late Rampal in accordance with law, which has been disputed by the appellant, it cannot be said that there was divorce between the appellant and late Rampal and if divorce between the appellant and Late Rampal could not be proved, he could not have married in view of Section 5(i) of the Act of 1955 and the marriage in contravention of the said statutory provision would be void under Section 11 of the Act of 1955. Even otherwise the respondent no.1 has failed to prove her marriage with Late Rampal in accordance with law. Thus, this Court is of the view that learned appellate court has committed grave illegality and error in holding that the appellant was divorced with Late Rampal and the respondent no.1 was married to him without considering and recording any finding as to whether the respondent no.1 was married with Late Rampal in accordance with law, therefore the same is not sustainable in the eyes of law. Thus the substantial questions of law no.3 and 1 are answered accordingly.

34. The Hon'ble Supreme Court, in the case of ***Samar Kumar Roy(Dead) Through Legal Representative(Mother) versus Jharna Bera(supra)***, has held that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either de jure or de facto, it is clear that the civil court's jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law.

35. The Hon'ble Supreme Court, in the case of ***P.Kishore Kumar versus Vittal K.Patkar(supra)***, has held that the decision rendered by the first appellate court, not being in violation of the settled position of law, ought not to have been interfered with. The relevant paragraph 28 is extracted hereinbelow:-

"28. The first appellate court having examined the facts in extenso, the High Court ought not to have interfered with the findings rendered therein by virtue of being, in second appeal, a court of law. As was astutely said by this Court in Gurdev Kaur vs. Kaki, a second appellate court is not expected to conduct a "third trial on facts" or be "one more dice in the gamble." The decision rendered by the first appellate court, not being in violation of the settled position of law, ought not to have been interfered with. With utmost respect to the High Court, we are constrained to observe that the question framed by it could be regarded as one of law, if it all, but did not merit the label of a substantial question of law so as to warrant interference with the first appellate decree under section 100 of the CPC."

36. Similar view has been taken by the Hon'ble Supreme Court, in the case of ***Gurudev Kaur and Others versus Kaki and Others(supra)*** and held that It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble".

37. The appellant had filed the counter claim in the suit filed by the respondent no.1. The suit of the respondent no.1 was dismissed by the trial court against the appellant and the counter claim filed by the appellant was allowed and the declaration was made that the appointment of the respondent no.1 in respondent no.3 institution on 19.10.2000 is illegal and void by means of a common judgment and decree dated 29.07.2009. However, the respondent no.1 had filed only one appeal challenging the judgment and decree passed by the trial court, which has been allowed with cost and the judgment and decree passed by the trial court has been set aside. The suit of the respondent no.1 has been partly

decreed with cost declaring her as legally wedded wife of Late Rampal. However, the suit of the respondent no.1 for rest of the prayers and counter claim of the appellant has been dismissed. Thus in view of the second substantial question of law formulated by this Court, the question arises as to whether the first appeal filed by the respondent no.1 was maintainable or not against the common judgment and decree dated 29.07.2009 passed by the trial court.

38. Order VIII Rule 6-A CPC makes a provision for counter claim by the defendant in a suit filed against him claiming any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. Whether such counter-claim is in the nature of a claim for damages or not and such counter-claim should not exceed the pecuniary limits of the jurisdiction of the Court. Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. Rule 6-A is extracted hereinbelow:-

“6A. Counter-claim by defendant.

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

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

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints”

39. As per Rule 6-D of Order VIII CPC, if in any case in which the defendants sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with. Thus, the

counter claim filed under the aforesaid provision would be in fact a cross suit claiming relief against the plaintiff . However, the same can be decided alongwith the suit by common judgment and decree.

40. The Hon'ble Supreme Court, in the case of ***Satyender and Others versus Saroj and Others(supra)***, has held that the counter-claim cannot exceed the pecuniary limits of the jurisdiction of the court, and that such counter-claim must be instituted before the defendant has delivered his defence or before the time limit for delivering his defence has expired. More importantly, such a counter claim must be against the plaintiff.

41. Section 96 CPC provides Appeal from original decrees. It provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction of the Court authorized to hear appeals from the decisions of such Court. It also lies against the original decree passed ex parte. Therefore the appeal can be filed against a decree. Section 96 is extracted here-in-below:-

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

(2) An appeal may lie from an original decree passed ex pane.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

1[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed 2[tен thousand rupees].”

42. The ‘decree’ as defined in Sub-section (2) of Section 2 CPC means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Sub-section (2) of Section 2 is extracted hereinbelow:-

“(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

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

(b) any order of dismissal for default.

Explanation A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final”

43. The Hon'ble Supreme Court, in the case of ***Narhari and others versus Shanker and Others(supra)***, has held that it is now well settled that where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up as determining factor is not the decree but the matter in controversy because the two decrees in substance are one.

44. The Hon'ble Supreme Court, in the case of ***Rajni Rani and Another versus Khairati Lal and Others(supra)***, has held that a Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. The relevant paragraphs 9 to 9.6 and 25 are extracted here-in-below:-

“9. To appreciate the controversy in proper perspective it is imperative to appreciate the scheme relating to the counter-claim that has been introduced by CPC (amendment) Act 104 of 1976 with effect from 1.2.1977.

9.1 Order 8, Rule 6A deals with counter-claim by the defendant.

Rule 6A(2) stipulates thus:-

“6-A(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.”

9.2. Rule 6A(3) enables the plaintiff to file a written statement. The said provision reads as follows:-

“6-A(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.”

9.3. Rule 6A(4) of the said Rule postulates that

“6-A(4) The counter-claim shall be treated as a plaint and governed by rules applicable to a plaint.

9.4 Rule 6-B provides how the counter-claim is to be stated and Rule 6C deals with exclusion of counter-claim.

9.5 Rule 6-D deals with the situation when the suit is discontinued. It is as follows:-

“ 6D. Effect of discontinuance of suit. – If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.”

9.6 . On a plain reading of the aforesaid provisions it is quite limpid that a counter-claim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counter-claim shall remain alive for adjudication. For making a counter- claim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counter-claim. The plaintiff is obliged to file a written statement and in case there is default the court can pronounce the Judgment against the plaintiff in relation to the counter-claim put forth by the defendant as it has an independent status. The purpose of the scheme relating to counter-claim is to avoid multiplicity of the proceedings. When a counter-claim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim. The seminal purpose is to avoid piece-meal adjudication. The plaintiff can file

an application for exclusion of a counter-claim and can do so at any time before issues are settled in relation to the counter-claim. We are not concerned with such a situation.

25. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under [Article 227](#) of the Constitution of India. Ergo, the order passed by the High Court is indefensible.”

45. The Hon’ble Supreme Court, in the case of ***Sri Gangai Vinayagar Temple and Another versus Meenakshi Ammal and Others(supra)*** which is in regard to the applicability of the principles of res judicata under Section 11 CPC, has held that principles of res judicata would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment. It has also been observed that procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. It has further been held that the decree not assailed thereupon metamorphoses into the character of a “former suit”. If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit/ The relevant paragraph nos. 25 to 27 are extracted here-in-below:-

*25. On the issue of applicability of res judicata in cases where two or more suits have been disposed of by one common judgment but separate decrees, and where the decree in one suit has been appealed against but not against the others, various High Courts have given divergent and conflicting opinions and decisions. The High Court of Madras and erstwhile High Courts of Lahore, Nagpur and Oudh have held that there could be no res judicata in such cases whereas the High Courts of Allahabad, Calcutta, Patna, Orissa and erstwhile High Court of Rangoon have taken contrary views. It should also be noted that there are instances of conflicting judgments within the same High Court as well. The decision of Tek Chand, J. in Full Bench Judgment of the Lahore High Court in Lachhmi vs. Bhulli and Full Bench Judgment of the Madras High Court in [Panchanda Velan vs. Vaithinatha Sastrial](#) and of the Oudh High Court in *B. Shanker Sahai v. B. Bhagwat Sahai* appear to be the leading decisions against the*

applicability of *res judicata*. Without adverting to the details of those cases, it is sufficient to note that the hesitancy or reluctance to the applicability of the rigorous of *res judicata* flowed from the notion that [Section 11](#) of the Code refers only to “suits” and as such does not include “appeals” within its ambit; that since the decisions arrived in the connected suits were articulated simultaneously, there could be no “former suit” as stipulated by the said section; that substance, issues and finding being common or substantially similar in the connected suits tried together, non-filing of an appeal against one or more of those suits ought not to preclude the consideration of other appeals on merits; and that the principle of *res judicata* would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment.

26. On the other hand, the verdict of Full Bench of the Allahabad High Court in *Zaharia vs. Debia* and decisions of the Calcutta High Court in [Isup Ali vs. Gour Chandra Deb](#) and of the Patna High Court in *Mrs. Getrude Oastes vs. Mrs Millicent D'Silva* are of the contrary persuasion. These decisions largely proceeded on the predication that the phraseology “suit” is not limited to the Court of First Instance or Trial Court but encompasses within its domain proceedings before the Appellate Courts; that non-applicability of *res judicata* may lead to inconsistent decrees and conflicting decrees, not only due to multiplicity of decrees but also due to multiplicity of the parties, and thereby creating confusion as to which decree has to be given effect to in execution; that a decree is valid unless it is a nullity and the same cannot be overruled or interfered with in appellate proceedings initiated against another decree; that the issue of *res judicata* has to be decided with reference to the decrees, which are appealable under [Section 96](#) of the CPC and not with reference to the judgment (which has been defined differently), but with respect to decrees in [the CPC](#); that non-confirmation of a decree in appellate proceedings has no consequence as far as it reaching finality upon elapsing of the limitation period is concerned in view of the Explanation II of [Section 11](#), that provides that the competence of a Court shall be determined irrespective of any provisions as to right of appeal from the decision of such Court; and that [Section 11](#) of the CPC is not exhaustive of the doctrine of *res judicata*, which springs up from the general principles of law and public policy.

27. Procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the Courts by [Section 151](#) of the CPC, as clarified by this Court in [Chitivalasa Jute Mills vs. Jaypee Rewa Cement](#). In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a “former suit”. If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been

referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. Statutory law and processal law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the Tenant diligently filed an appeal against the decree at least in respect of O.S. 5/78, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all."

46. The Hon'ble Supreme Court, in the case of ***State of Andhra Pradesh and Others versus B.Ranga Reddy(Dead) by Legal Representatives and Others(supra)*** has held that it is the decree against which an appeal lies in terms of Section 96 of the Code. Decree in terms of Section 2(2) of the Code means formal expression of an adjudication conclusively determining the rights of the parties and even in terms of Order 41 Rule 33 of the Code, the Appellate Court has the jurisdiction to pass any order which ought to have been passed or made in proceedings before it.

47. In view of above, though every decree is required to be challenged on being aggrieved after paying the required court fees. However, in case one appeal is filed challenging the common judgment and decree passed in the main suit and counter-claim paying required court fees, it will not vitiate the proceedings on this ground.

48. Adverting to the facts of the present case and on perusal of the records of the first appellate court, this Court finds that the appeal was filed by the respondent no.1 with prayer for allowing the appeal by setting aside the judgment and decree of the counter claim passed by the lower court and decree the suit of the appellant, i.e. the respondent no.1 in this appeal, with cost. On filing the appeal, office reported that sufficient court fees has been filed and it is within the territorial jurisdiction and limitation. Thus, both the decrees passed in the main suit filed by the respondent no .1 as well as counter claim of the appellant were challenged by the respondent no.1 by filing sufficient court fees. Therefore it cannot be said that the appeal was not maintainable and only one decree was challenged and the other was not challenged and merely because only one appeal was filed it would not vitiate the proceedings. Even otherwise, if there was any objection in this regard, the same could have been raised at the thresh-

hold, when the appeal was filed and the appellant had appeared in the appeal on caveat and since it was not raised, it cannot be raised at this stage. However, it doesn't affect the merits of the case or jurisdiction of the court, therefore it cannot be a ground for reversing or modifying the decree in view of Section 99 CPC and it is a settled law that the first appeal is in continuation of the proceedings of the suit. Thus, the Second substantial question of law is answered accordingly.

49. One of the issues raised by learned counsel for the respondents was that no substantial question of law arises in this case and the factual findings recorded by the appellate court cannot be interfered by this Court. The Hon'ble Supreme Court, in the case of *Nazir Mohamed versus Kamala and Others(supra)*, has held that whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. Thus this Court is of the view that the substantial questions of law were rightly and in accordance with law have been formulated, which have been answered by this Court after considering the rival contentions.

50. Learned counsel for the respondent, relying on the case of *G.Amalorpavam and others versus R.C. Diocese Of Madurai & Ors(supra)*, had submitted that the first appellate court is a final court of facts and the findings of fact recorded by it cannot be challenged before the High Court in second appeal. This case is not applicable on the facts and circumstances of the case because the first appellate court has failed to consider the legal issues involved in the case, which are substantial, as dealt by this Court in this judgment.

51. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that the first appellate court has allowed the appeal wrongly and illegally without considering the legal issues involved in the case. Therefore in view of the aforesaid findings recorded by this Court in regard to the substantial questions of law no.(3) and (1) formulated by this Court, it is not sustainable. Thus the appeal is liable to be allowed and the judgment and decree passed by the first appellate court is liable to be set aside.

52. The Second Appeal is, accordingly, **allowed**. The judgment and decree dated 05.03.2010 passed by the Additional District Judge, Court No.7,Raibareli in Civil Appeal No.86/2009; Smt.Siyawati versus Smt. Anarkali and others is hereby set aside. No order as to costs.

(Rajnish Kumar,J.)

Order Date :- 17.05.2024/Akanksha