

IN THE HIGH COURT OF BOMBAY AT GOA
MISC.CIVIL APPLICATION NO. 903 OF 2019.
IN
STAMP NUMBER MAIN NO. 2540 OF 2019.

FR. JOSE CAETANO D'COSTA
AND ANR.,

... Applicants.

Versus

JOSINHO @ JOSE COLACO
AND 4 ORS.

... Respondents.

Shri J. E. Coelho Pereira, Senior Advocate with Shri S. Karpe, Advocate for the applicants.

Shri A. Kakodkar and Ms. A. Godinho, Advocates for the respondent nos.1,3 and 5.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 22nd January 2020

P.C.

Introduction:

A sues B. B enters appearance and wants the trial court to reject the plaint. He asserts that the plaint suffers from the statutory limitations as mentioned in Order 7 Rule 11 of the Code of Civil Procedure (“the Code”). The trial court accepts B’s version and rejects the plaint. It is a deemed decree. In the first appeal, A succeeds; the first appellate court concludes that the trial court has wrongly rejected the plaint.

2. Now B wants to question the appellate court's decision. What should he do? Should he file an appeal from order, a revision, or a second appeal?

Facts:

3. The applicants are the defendants in Regular Civil Suit No.69/2013/B before the Civil Judge, Senior Division, Quepem. The respondents are the plaintiffs, who sued the applicants for permanent injunction. In that suit, the applicants applied under Order 7 Rule 11 of Code. They wanted the trial Court to reject the plaint. On 3.9.2014, the trial Court allowed it.

4. Aggrieved, the respondents, as the plaintiffs, filed Regular Civil Appeal No.151/2014 before the District Court, South Goa. In fact, the District Court allowed the Regular Civil Appeal, through its judgment, dated 8.3.2019. That is, the Appellate Court has reversed the trial Court's order; it resulted in the restoration of the suit. So, this time, the defendants have approached this Court.

5. The defendants, first, filed a second appeal, with Stamp Number Main No.1360/2019. Later, they applied to this Court for its leave to withdraw the unnumbered second appeal and to re-present it as a revision under Section 115 of Code. The Court granted the leave. As a result, the defendants filed the revision with 39 days delay. Both the revision petition

and the delay condonation application are yet to be numbered. At this juncture, the plaintiffs, as the respondents, have objected to the defendants' revision application.

Arguments:

Objection:

Respondents:

6. Shri A. Kakodkar, the learned counsel for the respondents-plaintiffs, maintains that against an appellate court's judgment under Order 7, Rule 11 Code, only a second appeal lies—not a revision or an application from order. To elaborate, Shri Kakodkar has argued that the applicants-defendants first, rightly, filed a second appeal but later, on their own, applied to this Court to convert the second appeal into a revision. As this Court was disinclined, they requested the Court to allow them to withdraw the second appeal and represent that as a revision. He stresses that the plaintiffs never objected to the maintainability of the second appeal, in the first place.

7. To support his contentions that only a second appeal lies against the Appellate Court's judgment under Order 7 Rule 11 of Code, Shri Kakodkar has relied on *Dayaram @ Dinesh Kumar v. Manohar Netam*^[1], *Narayanan v. Kumaran*^[2], *Tirath Singh v. Ram Chand*^[3], *Cotton Syndicate v.*

¹ Judgment, dt.7.12.2017, of Chattisgarh High Court.

² (2004) (4) SCC 26

³ AIR 1915 Lahore 8

Malawa Mal-Shiv Ram Das^[4], and *Basheshar Nath Goela v. Bidhi Chand*^[5].

Petitioner:

8. Shri J. E. Coelho Pereira, the learned Senior Counsel for the applicants-defendants, maintains that either an appeal from order or a revision lies, but not a second appeal. According to him, this Court has taken a consistent view that it must be either a revision or an appeal from order. At any rate, Shri Pereira contends that the doctrine of merger applies, and the trial Court's order got merged with the Appellate Court's judgment. So it resulted in the dismissal of the defendant's application under Order 7, Rule 11 of the Code. Then, only a revision lies against the appellate judgment. In the alternative, Shri Pereira has argued that after setting aside the trial Court's order, the Appellate Court remanded the matter. And that remand was under Order 43, Rule 23. Any order of remand under this Rule, Shri Pereira points out, amounts to an appealable order. He invokes the doctrine of merger to his aid, too.

9. To support his contentions Shri Pereira has relied on *Mrs. Angelica L. Fernandes v. Mrs. Antonia Michelle Abel*^[6], *Board of Trustees v. Radhya Shyam Gond*^[7], *Kunhayammed v. State of Kerala*^[8], *Sadhu Singh v.*

⁴ [] AIR 1929 Lahore 83

⁵ [] AIR 1937 Lahore 380

⁶ [] Judgment, dated 29.6.2011, of High Court of Bombay at Goa.

⁷ [] Judgment, dt.07.03.2019, of High Court of Calcutta

⁸ [] (2000) 6 SCC 359

Dharam Dev^[9], *Ruben Vasco Da Gama v. Cannon Fr. Santana Jacinto Dos Remedios Faleiro*^[10], and *Sir Madhaorao Ganesh Deshpande v. Keshao Gajanan Huddar*^[11].

Discussion:

10. The hair-splitting dispute is about the remedy at the third tier of adjudication under Order 7 Rule 11 of the Code. Is it much ado about nothing? We shall see.

11. The trial Court allowed the defendants' application under Order 7, Rule 11 of Code. It is an appealable order, for Section 2 (2) of the Code defines "decree" as "deemed to include the rejection of a plaint." So, rightly, the plaintiffs filed a first appeal. Had the first appeal been dismissed, the trial Court's original order of rejecting the plaint would have remained intact. Then, the plaintiffs could have filed a second appeal. But that was not to be.

12. Here, the first Appellate Court reversed the trial Court's order. So, now, the plaint stood restored. Against this judgment of reversal, what remedy lies? According to the defendants, a revision lies; but according to the plaintiffs, a second appeal lies.

13. True, the applicants, first, filed a second appeal. Later, they withdrew the second appeal and filed a revision. It was with the Court's

⁹ [1981] 1 SCC 510

¹⁰ [Judgment, dated 4.1.2017, of High Court of Bombay at Goa.

¹¹ [AIR 1941 Nagpur 304

leave, though. Now, faced with the respondents' objection, they assert that either a revision or an appeal from order should be an appropriate remedy, but not a second appeal. That means, we must now examine what lies against a "reversed judgment" of the first Appellate Court: a revision under Section 115 of Code, a Second Appeal under Section 100 of the Code, or an Appeal from Order under Order 43, Rule 1 (u) of the Code?

Statutory Scheme:

14. Section 2 (2) of the Code, the lexical provision, defines "decree".

To the extent relevant, it reads:

(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 . . . "

(italics supplied)

15. As we shall see, Section 2 (2) of the Code employs a legal fiction and treats the rejection of a plaint as an appealable decree. That means, if an application under Order 7, Rule 11 of the Code is allowed, against that order, an appeal lies. On the contrary, if that application is rejected, only a revision lies against it. That revision must be under Section 115 of the Code because "if [the order] had been made in favour of the party applying for revision, [it] would have finally disposed of the suit."

16. Now, let us consider Section 96 of the Code. It mandates that an appeal shall lie from every decree passed by any Court exercising original jurisdiction. And the provision, to the extent relevant, reads:

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* to the Court authorized to hear appeals from the decisions of such Court.

(2) . . . ; (3) . . . ; (4) . . .”

(italics supplied)

17. Indisputably, the trial Court passed the decree under Order 7, Rule 11 the Code, exercising its original jurisdiction. And, therefore, the respondents, as the plaintiffs, appealed against that decree before the first Appellate Court. Now, the question is, against a judgment in the first appeal, should there be a different remedial recourse based on the outcome?

18. According to the applicants, we should look at how the first appellate Court’s judgment affects the case. If it confirms the trial Court’s order under Order 7, Rule 11 of the Code, the plaint stands rejected; the deemed decree, too, remains undisturbed. So, against that judgment, only a second appeal lies. They also contend that if the first appellate court reverses the trial Court’s order, it results in the restoration of the suit. And it should, then, be treated as if the plaint had never been rejected. That means, the trial Court’s rejection merges with the first Appellate Court’s reversal. So the decree disappears; the deeming provision, too,

stands dissipated. Thus, only a revision lies, for the application under Order 7, Rule 11 is deemed to have been rejected at the outset. Is that so?

19. Section 100 of the Code deals with second appeals. According to this provision, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court. The provision, to the extent relevant, reads:

100. Second appeal.—(1) Save as 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 the High Court*, if the High Court is satisfied that the case involves a substantial question of law.
...

(italics supplied)

20. Here, the first Appellate Court is the District Court; it is subordinate to the High Court. So an appeal shall lie to the High Court from the District Court's judgment in the first appeal. But if any other provision of the Code or "any other law for the time being in force" has provided otherwise, then recourse to Section 100 may not be possible. Are there any such exceptions? In fact, the defendants cite the doctrine of merger as the exception. They also assert that with the reversal, the deemed decree has disappeared.

21. And the defendants bring into reckoning another proposition. According to them, the first Appellate Court set aside the trial Court's order (the rejection of plaint), restored the suit, and "remanded the

matter” to the trial Court. So they want us to look at Sections 104, 105, and Order 43, Rule 23 of the Code, too.

22. Section 104 of the Code lays down the broad parameters about the appealable orders. In Clause (i), it makes appealable “any order made under rules from which an appeal is expressly allowed by rules.” And Order 43, Rule 1 enlists the orders against which an appeal lies. For our purpose, Rule 1(u) assumes importance: It classifies as appealable “an order under rule 23 or rule 23A of Order XVI remanding a case, where an appeal would lie from the decree of the Appellate Court.”

23. Now, let us examine Order XLI, which deals with appeals from the original decrees. Rule 23 under this Order mandates thus:

23. Remand of case by Appellate Court.—Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

24. At times, the trial court may dispose of the suit on a preliminary point. In the appeal, the trial court’s decree may get reversed. Then, the appellate court either decide the case on the merits on its own or remand the matter to the trial court. While remanding, the appellate court may further direct what issue or

issues the trial court should try in the case remanded. Does rejection of plaintiff amount to a decision on a preliminary point? We shall see.

The Precedential Position:

25. Both the parties cited decisions supporting all the three remedies against the First Appellate Court's judgment: Revision, Appeal From order, and Second Appeal. Let us examine them.

(A) An Appeal From Order Lies:

(a) Sir Madhaorao Ganesh Deshpande:

26. In *Sir Madhaorao Ganesh Deshpande*, the suit was for declaration. "At a somewhat advanced stage in the suit," the appellant objected to the suit maintainability. The objection was on the grounds of pecuniary jurisdiction. The trial Court found the suit as undervalued and wanted the plaintiff to pay the balance Court fee. When he had not paid it, it rejected the plaintiff under O. 7, R. 11 of the Code. On appeal, the Appellate Court agreed with the trial Court on the valuation but felt that the plaintiff "was not liable to pay Court-fees on the value of the improvements." It has also felt that the trial Court "ought to have extended time to enable the plaintiff" to pay the deficit Court fee. With the first finding, the second one—the extension of time—has become *non sequitur*, though.

27. The defendant appealed to the High Court under Order 43, Rule 1(u) of the Code—an Appeal from Order—but not under Section 100 of the Code. The plaintiff raised a preliminary objection: “the remand order was not under O. 41, R. 23 of the Code,” so no appeal would lie under O. 43, R. 1(u). The Nagpur High Court distinguished *Basheshar Nath* (discussed below) as a decision that concerned the rejection of the plaint for non-compliance with Section 80 of the Code; it could not be regarded as one falling under O. 7, R. 11.

28. That said, *Madhaorao Ganesh Deshpande* wondered “why rejection of a plaint cannot be regarded as a preliminary point in an appeal from the rejection of a plaint.” It referred to a Madras High Court judgment in *Raman Nayar v. Krishnan Nambudripad*^[12], and its own decision in *Govindav. Baliram*^[13], and found “no strong reason with due respect to the view taken in *Basheshar Nath* to depart from the opinion expressed in the aforesaid case.” Then, *Madhaorao Ganesh Deshpande* has held:

“When an appeal is preferred against an order rejecting a plaint which has the force of a decree and the Appellate Court sets aside that order it has to remand the case for the trial of the issues arising in the case. The order of remand could not be made under any other provision of law except under O. 41, R. 23 of the Code. Consequently the lower Appellate Court's order remanding the suit must be treated as one under O. 41, R. 23 of the Code, so as to give a right of appeal to the aggrieved party under O. 43, R. 1(u). I therefore do not see my way to accede to the contention raised on behalf of the plaintiff that an appeal does not lie.”

¹² [] AIR 1922 Mad 505 (FB)

¹³ [] AIR 1930 Nag 295

29. So *Madhaorao Ganesh Deshpande* has felt that the Appellate Court's reversing the trial Court's rejection of plaint amounts to a remand. And against the order of remand only an appeal under Order 43, Rule 1(u) of the Code lies.

(b) *Mrs. Angelica L. Fernandes v. Mrs. Antonia Michelle Abel*¹⁴]:

30. In this case, too, the trial Court rejected the plaint under Order 7, Rule 11 of the Code. On appeal, it was reversed. The question was whether an appeal from order under Order 43, Rule 1(u) C.P.C. is maintainable?

31. A learned Single Judge of this Court has held that an appeal from order would lie. The Court has felt that "in such matters the facts and circumstances must be looked at carefully; there [is] case law on the subject, but one must always see if the facts in the case at hand and in the factual matrix of the case-law to be similar." After discussing the case law and after noting that "there are no other express provisions in the C.P.C. that speaks of remand of cases back to the trial Court," the Court has concluded that an appeal from an order was the only remedy. In that process, it has held that Section 151 of the Code, too, does not apply.

32. In fact, *Angelica L. Fernandes* has followed the case holding of *Madhaorao Ganesh Deshpande* of Nagpur High Court.

(B) A Revision Lies:

¹⁴ [Goa High Court

(a) *Radhya Shyam Gond*:

33. In *Radhya Shyam Gond*, the Calcutta High Court notes that Section 2(2) enumerates only the rejection of a plaint to be a decree, but not the refusal to reject a plaint. Then it notes that “there are several instances when an appeal may not culminate in a decree but may reach fruition in an order. One such example is an order of remand passed in a Title Appeal against a regular decree of the trial Court.” According to *Radhya Shyam Gond*, if “the Appellate Court passes such an order, the same is not appellable, since the appeal does not culminate in a decree.” In this context, it eventually holds that the expression ‘decree’ as contemplated in Section 100 of the Code must mean a decree as defined in Section 2 of the Code. “Since a refusal to reject a plaint is not a decree under Section 2 of the Code,” the order refusing to reject the plaint cannot be appellable as a decree.

34. In fact, *Radhya Shyam Gond* took note of *Shamsher Singh v. Rajinder Prashad*^[15]. But it has felt that the Supreme Court in *Shamsher Singh* “did not decide, or even render any finding in the nature of *obiter dictum*, pertaining to the question which has arisen” in *Radhya Shyam Gond*. Incidentally, the counsel concerned did not bring to the Court's notice its own decision in *Braja Lal Mitra v. Upendra Krishna Mitra*^[16].

¹⁵ [] AIR 1973 SC 2384

¹⁶ [] (1907) 6 C.L.J. 214

(C) A Second Appeal Lies:

(a) *Tirath Singh v. Ram Chand*¹⁷]:

35. To begin with, before Lahore High Court, the question in *Tirath Singh* was about the remedy against an Appellate Court's reversal judgment under Order 7, Rule 11 of the Code. It has relied on Calcutta High Court's judgment in *Braja Lal Mitra*. As seen from the record, in *Braja Lal Mitra*, the trial Court rejected the plaint. The Appellate Court reversed the trial Court's order and directed the trial Court to proceed with the trial of the suit on the merits. The question, then, was about the nature of the First Appellate Court's judgment. Could it be treated as an order of remand under Order 41, R. 23 of the Code? Calcutta High Court has held that the First Appellate Court's judgment "does not come under O. 41, R. 23, and that no appeal lies therefrom."

36. So, under identical circumstances, *Tirath Singh* has concluded that *Braja Lal Mitra* applies to the facts before it on all fours. So it has held thus: the First Appellate Court's order reversing the trial Court's order under Order 7 Rule 11 is not an appealable order.

(b) *Malawa Mal-Shiv Ram Das*:

37. In *Malawa Mal-Shiv Ram Das*, the trial Court framed two issues: (1) Has it got the jurisdiction to hear the suit, and (2) is the suit barred by time? But it rejected the suit on the ground that there was no cause of

¹⁷ [] AIR 1915 LAH 8

action. The order, therefore, must be held to have been passed under O. 7, R. 11 of the Code. On appeal, the Appellate Court found that the plaintiff had the cause of action. It could have sent back the matter to the trial Court. Instead, the Appellate Court decided it on the merits, for there was evidence on record. Against this decision, the defendant appealed.

38. The plaintiff raised a preliminary objection that no Second Appeal lies. But Lahore High Court followed its previous decision in *Tirath Singh*. Besides, it has relied on a Full Bench decision in *Lal Chand Mangal Sen v. Behari Lal Mehar Chand*^[18]. Thus, Lahore High Court once again reiterated that a Second Appeal lies against the First Appellate Court's order holding that the plaint reveals a cause of action.

39. In this case, there is an interesting development. The respondent, lastly, contended that the First Appellate Court drew no decree sheet. So the judgment must be treated as a nullity. As a matter of record, the Appellate Court, later, prepared a decree sheet and "sent the case back" for trial. In this context, *Malawa Mal-Shiv Ram Das* has held that though the order rejecting a plaint is appealable as a decree, it may not be essential for the Court to draw up a decree-sheet in such a case. "The usual practice is not to do so." According to Lahore High Court, "the order is appealable in itself as a decree."

(c) *Basheshar Nath Goela:*

¹⁸ [] A.I.R. 1924 Lah. 425

40. In *Basheshar Nath Goela*, the trial Court rejected the plaint under O. 7, R. 11(d) of the Code, holding that Section 80 of the Code barred the suit. On appeal, the District Judge reversed this decision and “remanded the case under O. 41, R. 23 of the Code, for decision on its merits.” The defendant appealed to the Lahore High Court under O. 43, R. 1(u) of the Code. *Basheshar Nath Goela*, then, reiterated that an Appellate Court’s order setting aside a trial Court’s order rejecting a plaint, and directing it to proceed with the trial of a suit on its merits is not an order under O. 41, R. 23 of the Code. That is, it is not an appealable order under Rule 1(u) of Order 43.

(d) *Dayaram @ Dinesh Kumar*:

41. In *Dayaram @ Dinesh Kumar* the question was whether a revision lies against an order under Order 7 Rule 11, that is, rejection of plaint. The High Court of Chhattisgarh has finally held that an order rejecting the plaint would be a decree under Section 2 (2) of the Code, for there is a finality to that particular issue, and there has been a formal expression of adjudication after hearing both sides on that particular issue. So it concluded that against the rejection of a plaint under Order 7 Rule 11 of the Code, appeal is the remedy for the plaintiff. If the first appeal is dismissed, a second appeal lies. But *Dayaram* has not dealt with what remedy should lie if the appeal is allowed.

(d) The Prerequisite of a Remand Order:

(a) Narayanan:

42. A suit was decreed, but on appeal the First Appellate Court set aside the decree and remanded the matter. This remand was challenged before the High Court in an appeal from order. When the matter reached the Supreme Court, the principal question before it in *Narayanan* was whether an appeal under Order 43, Rule 1(u) should be heard only on the grounds enumerated under Section 100 of the Code. That is, whether the appellant under Order 43, Rule 1(u) could agitate questions of fact as in a First Appeal.

43. In this context, *Narayanan* has observed that an order of remand is possible only in those cases in which the Appellate Court could have as well passed a decree based on the adjudication which occasioned the remand. In other words, the test is whether an appeal would lie if the order of remand were to be treated as a decree but not as a mere order. It has finally held it to be “quite safe to adopt that appeal under Order 43 Rule 1 clause (u) should be heard only on the grounds enumerated under Section 100 of the Code.”

(b) Ruben Vasco Da Gama:

44. This case, too, concerns the scope of remand. This Bench of the Bombay High Court has relied on *Narayanan* to trace the contours of the remand. It needs no elaboration.

(e) The Doctrine of Merger:

Kunhayammed:

45. In this celebrated case on the doctrine of merger, the Supreme Court has held that the logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree or order passed by an inferior court, tribunal, or authority was subjected to a remedy available under the law before a superior forum, though the decree or order under challenge continues to be effective and binding, its finality is put in jeopardy. Once the superior Court has disposed of the lis before it either way—whether the decree or order under appeal is set aside, modified, or simply confirmed—it is the decree or order of the superior Court that is final and binding; it subsumes the decree or order passed by the Court, Tribunal, or the Authority below. This doctrine, however, is not of universal or of unlimited application.

Sadhu Singh:

46. Section 3 of the Punjab Pre-emption (Repeal) Act barred Courts from passing a decree in any suit for pre-emption. But in *Sadhu Singh*, a

competent Civil Court passed a decree before Section 3 was introduced. Pending the appeal, that provision was enforced. In that context, the Supreme Court has held that a decree challenged in appeal, the proceedings stand reopened. And the appellate hearing is a re-hearing of the whole subject matter. When the decree is passed in appeal, the first decree merges in the appellate decree. So Section 3 applies. As a result, it affirms the doctrine of merger.

Law applied to the facts:

Decree:

47. Section 2 (2) defines “decree” to be the formal expression of an adjudication which conclusively determines the rights of the parties on all or any of the matters in controversy in the suit. The decree may be either preliminary or final. That is, (i) there must be adjudication; (ii) that adjudication must be in a suit; (iii) it must determine the rights of parties over the matter in dispute; (iv) the determination of the right must be conclusive; and (v) this determination must result in a formal expression. And that formal expression is the decree.

48. By statutory command and by judicial interpretation, Courts have categorised certain instances of adjudication as decrees and certain others as mere orders. C. K. Thakker, in his *Code of Civil Procedure*^[19], has enlisted those instances, a couple of them being an order of abetment of

¹⁹ [] EBC, 1st Ed., Vol. 6, p.1105

suit, dismissal of appeal as time-barred, and rejection of plant. Similarly, the learned author enlists orders which are not decrees: An order dismissing an appeal for default, an order of remand, an order rejecting plaintiff in order to be presented to the proper Court are a few such instances. Granted, it needs no reiteration that a decree can be preliminary, final, or partly preliminary and partly final.

Deemed Decree:

49. Section 2 (2) has employed legal fiction to treat certain orders as decrees. Thus a decree is “deemed to include the rejection of a plaintiff and the determination of any question within section 144” of the Code. Similarly, adjudications under Order 21, Rule 58, Rule 98, or Rule 100 are deemed decrees. That said, it also keeps out of this legal fiction (a) any adjudication from which an appeal lies as an appeal from an order, and (b) any order of dismissal for default. True, an order rejecting a plaintiff does not preclude the plaintiff from presenting a fresh plaintiff on the same cause of action, yet the Code specifically deems it to be a decree. On the other hand, an order returning a plaintiff to be presented to the proper court is an appealable order.

The Remedial Scheme Under the Code:

50. For any person, right to adjudication, as a part of his or her grievance redressal, is an inalienable right: *Ubi jus ibi remedium*. That

adjudication done at the first instance, no party has an inherent right to challenge that decision. For this remedial right, however, one can look to the statute. Thus, an appeal, a reference, a revision, or a review is statute specific; it needs to be conferred by the statute. Of course, certain remedial recourses—but not an appeal—is a matter of the Courts’ inherent powers; for example, Section 151 of the Code.

51. Thus, the Code provides for these remedial measures:

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

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

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

Appeals from Orders: Ss.104-108 and Order 43

Appeals by Indigent Persons: Order 44

Appeals to Supreme Court: Ss 109, 112 and Order 45

(B) Reference: Section 113 and Order 46

(C) Review: Section 114 and Order 47

(D) Revision: Section 115^[20]

Appealable Orders:

52. Indeed, Section 2 (2) of the Code defines “decree” and creates legal fiction, too, extending the definition to orders that should not have been decrees by any reckoning. What cannot be a decree must be an order either appealable or revisable. That is, the Code has, first, provided for appeals from decrees: First Appeal under Section 96 read with Order 41 and Second Appeal under Section 100. Also it has, then, provided for

²⁰ [] C. K. Takwani’s *Civil Procedure*, EBC., 8th Ed., p.713

appeals from orders: Sections 104 to 108 read with Order 43. Thus, if any adjudication leads to an order, and if that order can be challenged in “an appeal from order”, that appealable order is not a ‘decree.’ Thus come to fore the appealable orders. Of course, the revisable orders are the residuary.

53. From Section 104 and Rule 1 of Order 43, we find that adjudication, mostly interlocutory, leads to appealable orders. Two of them are an order under Order 7, Rule 10, returning (not rejecting) the plaint, and an order of remand (in appealable cases) under Order 41, Rule 23 or 23-A.

The Powers of the Appellate Court:

54. In an appeal, as Section 96 mandates, no decree shall be reversed or substantially varied, nor can a case be remanded, unless the finding affects the merits of the case or the jurisdiction of the Court. The only procedural exception is the non-joinder of a necessary party. Section 107 of the Code enumerates the powers of the Appellate Court: (a) to determine a case finally; (b) to remand a case; (c) to frame issues and refer them for trial; (d) to take additional evidence or to require such evidence to be taken. As sub-section (2) of Section 107 clarifies, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original

jurisdiction in the suits instituted before them. Of course, these powers can be statutorily curtailed or controlled.

Remand:

55. Order 41, Rule 23 provides for remand of a case by the Appellate Court. Sometimes the trial Courts may dispose of the suits on a preliminary point. In the appeal, often the trial Court's decree gets reversed. Then, after the reversal, the Appellate Court may remand the case to the trial court and "may further direct what issue or issues shall be tried in the case so remanded." On the other hand, the trial Court occasionally disposes of the suit "otherwise than on a preliminary point." If the decree is reversed in the appeal and if the Appellate Court considers it necessary to remand the matter, it may do so. Then, it will have all the powers as it has under Rule 23: to remand the matter with directions that determine the scope of the remand.

56. Thus, remand is a matter of practice—a prudent practice, at that—rather than of a statutory compulsion. First, the powers of the Appellate Court are coextensive with those of the trial Court; the Appellate Court can do all that the trial Court does—including taking evidence. But given the practical difficulties, it usually remands the matter either for a *de novo* trial or with directions as to the scope of adjudication after the remand. In other words, for the Appellate Court to remand the

matter, first, it must have the entire dispute before it and, second, it must be capable of adjudicating on its own without recourse to remand.

57. That said, a decree after the trial Court's rejecting the plaint is a decree only because of the legal fiction. Once a plaint is rejected, there remains no case pending. But then comes into existence a case about a case: a meta case. A decree under Order 7, Rule 11 of the Code does not "conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit." The plaint rejected, the suit ceases to exist. The plaint rejection, at any stage, wipes off all the developments in the suit and the very suit disappears. If the plaintiff chooses to file a fresh suit on the same cause of action, the earlier suit after the rejection of the plaint renders itself a still born one. But if the plaintiff questions the rejection in an appeal, until that challenge concludes, the suit based on the rejected plaint remains comatose. If the appeal is allowed, the suit gets revived.

58. Applying that analogy, I may note that after the rejection of the plaint what goes before the Appellate Court is not the dispute raised in the suit; it is the dispute about the very suit. So if the Appellate Court holds that the plaint was wrongly rejected, what goes back to the trial court is not what the appellate court is capable of deciding itself either under Rule 23 or Rule 23-A of Order 41. It, in fact, tells the trial Court to resurrect

the suit. The case comes out of its comatose condition. To apply the concept of remand, first, there is no adjudication on the dispute the suit presents to the Court.

Second Appeal:

59. As Section 100 mandates, “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.

60. In *Ravi Veeraraghavulu v. Bomma Devara Venkata Narasimha*^[21], proceedings arose under the Madras Rent Recovery Act. It provides for “one appeal only from the order of the Collector to the Zillah Judge.” So the respondent in the Second Appeal asserted that the Act did not provide for a Second Appeal. At that time, as per the procedural law governing the Civil Courts in India outside the Presidency towns, a special appeal lay to the Sudder Court from the courts subordinate to it. Later, legislation substituted the High Court for the Sudder Court, and the District Judge for the Zillah Judge, but the subordination of the one to the other continued. The Privy Council examined the provisions of Act XIV. of 1882 and held that an appeal would lie from the order of the District Judge to the High Court unless that right is taken away by express legislation or by some express provision of law. In fact, Sections 584 and

²¹ [] AIR 1914 PC 87

585 of Act XIV of 1882 were the precursors to Section 100 of the present Code.

61. In another case, certain zamindars maintained claims under the Madras Forest Act 1882. The claims were dismissed by the Forest Settlement Officer. Against that dismissal, an appeal lay to the District Court, but the appeal, too, was dismissed. The zamindars filed a Second Appeal. The High Court entertained the Second Appeal. Before the Privy Council the Government contended that the Madras Forest Act provided for no second appeal. Then, in *Secy. of State for India v. Chellikani Rama Rao*^[22], the Privy Council brushed aside that objection. According to it, “when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country.” That accepted, with regard to ordinary civil courts’ procedure, orders, and decrees, “the ordinary rules of the Civil Procedure Code apply.”

62. Under Section 8 of the Partition Act, an order for sale made by the court under Sections 2, 3, or 4 is a deemed decree. Thus, the trial Court’s order directing sale under Section 3 was a decree. Against this order lies a First Appeal. After that, the aggrieved person filed a Second Appeal. A preliminary objection was taken. But the Rajasthan High Court

22 [] AIR 1916 PC 21

in *Baldeo Das v. Kishanlal*^[23] has held that against the First Appellate Court's judgment and decree, a Second Appeal lies.

63. In *Gurbachan Kaur v. Swaran Singh*^[24], the legal proceedings were taken out under the Hindu Marriage Act. Section 28 of that Act provides for an appeal against the trial Court's judgment and decree "under any law for the time being in force." The respondent, in the Second Appeal, insisted that a Second Appeal could lie only from a decree. According to him, proceedings under Section 13 of the Hindu Marriage Act do not amount to a suit; so the order passed in those proceedings cannot constitute a 'decree' within the meaning of Section 2(2) of the Code. The Allahabad High Court has referred to a host of precedents on that point to hold that the Second Appeal is maintainable. *Gurbachan Kaur* has held that if Section 28 of the Act has conferred on a party a right of appeal to the District Judge, he cannot be deprived of a right to appeal to the High Court.

64. If we come back to the case before us, first, Section 2 (2) employs a legal fiction and makes rejection of plaint a decree—a deemed one though. That said, the deeming provision does not make the rejection of a plaint any the less a decree. It is a decree proper. That fiction endures. True, the trial Court's refusal to reject a plaint is not a decree.

²³ [] AIR 1971 RAJ 42

²⁴ [] AIR 1978 ALL 255

65. So in most instances, the argument is that once the Appellate Court reverses the trial Court's finding on the rejection of plaintiff, the doctrine of merger applies. That is, the trial Court's rejection disappears. What remains to be challenged is the Appellate Court's order "refusing to reject the plaintiff." And that refusal is not a decree—not even a deemed one. For them, the Appellate Court's order amounts to a remand. That is, after the Appellate Court refuses to reject the plaintiff, it remands the matter. Yet, some others contend that the Appellate Court's order is an interlocutory order amenable to the High Court's revisional jurisdiction under either Section 115 of the Code or under Article 227 of the Constitution.

66. To answer those contentions, I may note that once the Code provides for a first appeal to a regular Appellate Civil Court—but not to a *persona designata*—the remedial provisions as contained in the Code apply in their entirety. Under Section 100 of the Code, "an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court." This mandate suffers two limitations: (1) There must have been an express provision in the Code or any other law in force that no such appeal lies; (2) the High Court must be satisfied that the case involves a substantial question of law. The result of appeal before the First Appellate Court does not alter this position.

67. The doctrine of merger applies vis-a-vis the parties. That is, what binds them is the order or judgment passed at the higher echelons, for there cannot be two binding judicial directives, conflicting or otherwise. As to the remedial mechanisms, the higher Court examines the verdict of the lower Court and, after the adjudication, it subsumes the lower Court's verdict. Adjudicatory hierarchy and administrative hierarchy are two different things, though. Sometimes the appeal avenues depend on the outcome of the adjudication; it is usually before the courts of first instance and the statute provides for it. Two examples are rejection of the plaint and non-rejection of the plaint; setting aside an *ex parte* decree and refusing to set aside the *ex parte* decree. But that is possible, I may stress, only because the Code provides for it.

68. As Section 100 of the Code mandates, absent any statutory mandate altering the appeal avenues, the recourse to the remedies as set out in the Code should be taken. We cannot, I may deferentially note, misapply the doctrine of merger—a common law principle, at best—to upset any statutory scheme. Indeed, the Supreme Court in *Kunhayammed* has held that “the doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system.”

69. On the concept of remand as applied by certain High Courts to the Appellate Court's reversal judgments, I am afraid they fail to cross the precedential rubric, besides falling short of sound legal reasoning. As the Supreme Court has held in *Narayanan*, an order of remand is possible only in those cases in which the Appellate Court could have as well passed a decree based on the adjudication which occasioned the remand.

70. In this context, we may profitably refer to *The Province of Madras v. Laxmi Amma*^[25]. In that case, the plaintiffs sought a declaration that the decree the defendants secured would not bind them. But they did not pay sufficient court fee. So the plaint was rejected. In appeal, it was reversed. The lower Appellate Court "remanded the suit" to the trial Court. The Government filed an appeal under Order 41, Rule 23 of the Code. Then, the respondents raised a preliminary objection that no appeal lies. The Government, however, maintained that the Appellate Court's order reversing the rejection of plaint is nothing but remand under Order 41, Rule 23 of the Code. It cited *Madhorao* to support its contention. But the Madras High Court differed. According to *Laxmi Amma*, Order 41, Rule 23 deals with two types of cases: (1) where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point, and (it) where the Appellate Court in reversing or setting aside a decree under appeal deems it necessary in the interests of justice to

²⁵ [1945] 1 MLJ 259

remand the case. It went on to observe that the case of plaintiff rejection falls within neither category. The suit was not disposed of on a preliminary point. No point, neither preliminary nor final, presents itself for Court's consideration. In fact, the Court, by rejecting the plaintiff, refused to consider the suit—not to speak of the points it raised.

71. *Laxmi Amma* took note of *Madhorao* but held that a preliminary point or issue would not include an order rejecting a plaintiff; for the order was not one concluding the suit. The suit had never been taken up for trial; and the suit could not be disposed of until the plaintiff had been accepted. It might also perhaps be said, *Laxmi Amma* further reasons, that since the rejection of a plaintiff is deemed under Section 2(2) of the Code to be a decree, Section 100 of the Code would apply and give a right of Second Appeal. A civil miscellaneous appeal would however be admissible only if the provisions of Order 41, Rule 23 were complied with. Then, *Laxmi Amma* felt it anomalous for the Code to provide for an appeal [under Order 41, Rule 1(u)] when an order refusing to reject a plaintiff is not made appealable, in the first place. *Laxmi Amma* has eventually held that the High Court could, under those circumstances, interfere in revision under Section 115 of the Code, though.

The Last Word: Shamsheer Singh:

72. A mortgagor secured a decree and took out execution proceedings for the sale of the mortgaged property. The respondents filed a suit for a declaration that the mortgage executed by their father in the appellant's favour is void. On the plaint, the respondents paid a fixed court-fee. The appellant raised a preliminary objection: The suit was not properly valued for court fees and jurisdiction. The trial Court tried it as a preliminary issue. It held that proviso to Section 7 (iv)(c) of the Court Fees Act required the respondents to pay more court fee. The court-fee not having been paid, the trial Court rejected the plaint. In the first appeal, the High Court held that no additional Court fee need be paid; it reversed the trial court's verdict.

73. Aggrieved, the appellant-defendant took the matter to the Supreme Court in appeal. There, the respondents raised a preliminary objection against the appeal. The Supreme Court in *Shamsher Singh* repelled that objection. It has, first, noted that the plaint was rejected under Order 7 Rule 11 Code. Such an order amounts to a decree under Section 2(2), and there is a right of appeal open to the plaintiff. Furthermore, in a case in which the Supreme Court has granted special leave, the question whether an appeal lies or not does not arise. Then, it has further observed:

“Even otherwise a second appeal would lie under section 100 of the Code on the ground that the decision of the first appellate court on the

interpretation of Section 7(iv)(c) is a question of law. There is thus no merit in the preliminary objection.”

(Italics supplied)

Conclusion:

74. To conclude, I may note that conflicting as the precedential position is, the Supreme Court’s *Shamsher Singh* clinches the issue. It is a judgment of unquestionable efficacy, and it binds me. I reckon only a second appeal lies against an Appellate Court’s judgment reversing the trial Court’s findings and holding that a plaint suffers no legal infirmity under Order 7, Rule 11 of the Code.

75. So the Registry will treat this Revision as a Second Appeal, as it was originally filed, and list the matter for further adjudication. The appellants are free to place before the Court any additional substantial questions of law. The respondents, too, have all their defences intact in the matter.

76. Thus, the Court accepts the respondents’ objections and, as a result, treats this Revision as a Second Appeal.

No order on costs.

DAMA SESHADRI NAIDU, J.

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