

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Amrita Sinha

And

The Hon'ble Justice Kausik Chanda

CO 3904 of 2017

**The Deputy Director, Employees' State Insurance Corporation
Vs.**

Ward Memorial Church School and Anr.

For the Petitioner	: Mr. Probal Kr. Mukherjee, Sr. Adv., Mr. Shiv Chandra Prasad, Adv.
For the O.P. No.1.	: Mr. Sounak Bhattacharya, Adv., Mr. Sounak Mondal, Adv., Mr. Abhirup Halder, Adv., Mr. Anirban Saha Roy, Adv.
For the State	: Mr. S.N. Mookherjee, Ld. Adv. General,
Amicus Curiae	: Mr. Bhaskar Ghose, Sr. Adv., Mr. Rwitendra Banerjee, Adv.
Hearing concluded on	: 13 th July, 2023
Judgment on	: 19 th September, 2023

Soumen Sen, J.: The question which has been framed for the reference is as follows:

“Whether the remedy lies by filing Second Appeal, if the Revisional Court reverses the order of the Trial Court refusing to reject the plaint, as a corollary effect the plaint is rejected in view of the definition of “decree” given under Section 2(2) of the Code.”

2. The genesis of the reference is an order passed by the first Appellate Court, by which the judgment of the trial court was reversed.

3. The facts that are necessary for better appreciation of the reference are stated below.

4. A notice was issued by the Deputy Director, Employees State Insurance Corporation (in short, 'Corporation'), regarding implementation of the Employees' State Insurance Act, 1948 (in short 'the said Act, 1948') and payment of contribution under Section 40 of the said Act, Ward Memorial Church School (in short, 'School') challenged the notice and filed a Civil Suit being T.S. No.327 of 2012 before the 2nd Court, Civil Judge, Junior Division, at Midnapore. The Corporation filed an application for rejection of the plaint on the ground that the notice can only be challenged before the Employees' Insurance Court and the Civil Court has no jurisdiction to decide the subject matter of the dispute.

5. The learned Civil Judge vide an Order No.6 dated 26th July, 2013 allowed the application for rejection under Order 7 Rule 11(d) CPC and the suit was thus, dismissed.

6. The School being aggrieved by the aforesaid order filed an appeal under Section 96 read with Order 41 Rule 1 CPC being Title Appeal No. 86 of 2013 before the learned Additional District Judge, 7th Court, Paschim Midnapore. The 1st Appellate Court allowed the appeal vide an order dated 20th July, 2017 and the judgment and order of the trial court was set aside. The First Appellate Court held that Civil Court has jurisdiction to adjudicate

the dispute raised by the School and the learned Trial Court was directed to decide the dispute within a time frame specified in the said order.

7. The Corporation challenged this order by a Civil Revision filed under Article 227 of the Constitution of India. After considering the judgments of the Hon'ble Division Bench of this Court in **Suraj Mull Gouti vs. Sumati Gouti & Ors.** reported at **2005(2) WBLR Cal 296**, **Amal Chandra Mondal vs. Anita Biswas & Anr.** reported at **2006(2) CalLJ 180** and **Surajmal Jain v. Prabir Kumar Sett** reported at **1980(2) Cal LJ 161** Hon'ble Justice Harish Tandon was of the view that the decisions in **Suraj Mull Gouti** (*supra*) and **Amal Chandra Mondal** (*supra*) are in conflict with **Surajmal Jain** (*supra*). The observations of Justice Tandon relevant to the issue are stated below:

"This Court, therefore, notices a conflicting view on the proposition whether the nature of the order is the sole and primary factor to ascertain the remedy available to an aggrieved person or it would be dependent upon the nature of the proceeding filed before the Court and the power vested under relevant provisions is exercised; to be more precise, whether an appeal or revision would be the remedy if the nature of the order is such which comes within the purview of the aforesaid provisions of the Code or it is the proceeding itself filed before the Court would be the guiding factor to decide the remedy to the aggrieved person.

Naturally an order passed by the District Judge under Section 115A of the Code is not an appealable one nor a letters patent appeal lies if such jurisdiction is exercised by the High Court under Section 115 of the Code. Whether a second revisional application lies against the order of the District Judge under Section 115A is yet a debatable question, but it does not impinge upon or fetters the power of superintendence exercised by the High Court under Article 227 of the Constitution of India. The

primary object to exercise of power of superintendence is to keep all the subordinate Courts within the precinct or boundaries of law. If the order is passed under Section 115A of the Code by the District Judge reversing the order of the Trial Court having a resultant effect that the suit is held to be non-maintainable, yet such order is passed exercising a power conferred under Section 115A of the Code and in my opinion the nature of jurisdiction exercised by the Court below should be the determining factor for further remedy.

In the other given situation, if the Appellate Court exercises power conferred upon it under Section 96 of the Code and decides a dispute, which if exercised by the Court of original jurisdiction, the remedy lies by way of a revision; such order in my opinion should be treated as an order passed by the Court of Appeal below provided the appeal is otherwise competent under the Code of Civil Procedure and the remedy provided in the Code against such appellate order should be the proper remedy available to the aggrieved person.

There is hardly any dispute that in view of the nature of an order passed under Order VII Rule 11 of the Code, more particularly the definition of “decree” given in Section 2(2) thereof, the appeal lies before the Appellate Court as such order neither comes within the peripheral limit of Section 104 nor under Order XLIII Rule 1 of the Code, but under Section 96 thereof. It is not always necessary that the formal decree is to be drawn up if the Code expressly provides that such order would be a deemed decree, the appeal can be maintainable before the appellate forum.

In the instant case the Appellate Court, who is in seisin of the appeal filed under Section 96 of the Code, reversed the order of the Court of original jurisdiction, which is otherwise competent under the Code of Civil Procedure itself and in view of Section 100 of the Code an appeal must lie before the High Court.

There is a conflicting view taken in the Division Bench decision operating in the field and several provisions of the Code of Civil Procedure have not been considered in proper perspective.

The question, which this Court feels, requires consideration and to be answered by the Larger Bench is:

‘Whether the remedy lies by filing Second Appeal, if the Revisional Court reverses the order of the Trial Court refusing to reject the plaint, as a corollary effect the plaint is rejected in view of the definition of “decree” given under Section 2(2) of the Code’. (emphasis supplied)

8. The earlier Larger Bench presided over by Hon’ble Justice Sanjib Banerjee presently the Chief Justice of the Meghalaya High Court made the following observations in the order dated 20th January, 2020:

“It is apparent that the reference in the question to revisional court may be erroneous as the rejection of the plaint was carried by way of an appeal by the plaintiff and the appellate court reversed the rejection. There are several judgments which are of relevance in the context, including the judgments reported at (2005)2 WBLR (Cal) 296; AIR 1970 SC 1; 2006 (2) CLJ 180; 1980 (2) CLJ 161 and 2016 (2) CHN (Cal) 49. The question is of some importance and there are several views floating in the form of divergent orders. In order that a consistent practice is followed hereinafter, it is necessary to conclusively answer the principal issue raised and some others in the periphery. Let a notice be issued to the President of the Bar Association for the Bar Association being represented in course of the reference, if interested. The Bench also requests Mr. Bhaskar Ghosh, Senior Advocate, to assist the court to answer the reference.”

9. This matter has been assigned to this bench on 2nd November, 2022.

10. In the reference, the State is represented by the learned Advocate General, Mr. Bhaskar Ghosh, Sr. Advocate as amicus, Mr. Probal Mukherjee, Sr. Advocate on behalf of Corporation and Mr. Sounak Bhattacharyya on behalf of School.

11. Mr. Soumendra Nath Mookherjee, Advocate General appearing on behalf of the State has submitted that the reference must be answered in the affirmative.

12. This is for the following reasons:

a) An order of a Court rejecting a plaint is deemed to be decree within the meaning of Section 2(2) of the Code of Civil Procedure, 1908(CPC). This is clear from a plain reading of Section 2(2) of the CPC which provides as follows:

2. In this Act, unless there is anything repugnant in the subject or context,

(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". (emphasis supplied)

b) An order rejecting a plaint passed by a court of the first instance being a decree, a first appeal against such order would lie under section 96 of the CPC.

c) However, an order refusing to reject a plaint passed by the Trial Court would not be a decree within the meaning of Section 2(2) of the CPC. Therefore, such order would not be appealable under Section 96 of the CPC. An order refusing to reject a plaint would also not be appealable under Section 104 or Order 43 Rule 1 of the CPC. Since no appeal lies against such an order, a revisional application under section 115A of the CPC may be made against such an order on satisfying the requirements of the provision.

d) If the Court while deciding the revisional application under Section 115A reverses the order of the Trial Court and thereby rejects the plaint, such an order would amount to a decree within the meaning of Section 2(2) of the CPC. Furthermore, such an order passed in revision would be considered as an order passed by a superior court in exercise of its general appellate jurisdiction.

e) Therefore, an order passed under Section 115 of the CPC rejecting a plaint would tantamount to a decree passed in appeal.

f) Section 100 of the CPC provides a remedy of filing a second appeal 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.

g) Hence, it can be said that the remedy lies by filing Second Appeal to the High Court, if the Revisional Court reverses the order of the Trial Court refusing to reject the plaint.

13. The learned Advocate general has relied upon the following decisions in support of his submission:

- i) ***Suraj Mull Gouti v. Sumati Gouti & Ors.***, reported in **2005(2) WBLR (Cal) 296** at paragraphs 6 to 10
- ii) ***Shankar Ramchandra Abhyankar v. Kirishnaji Dattaraya Bapat***, reported at **AIR 1970 SC 1**.
- iii) ***Amal Chandra Mondal v. Anita Biswas & Anr.***, reported at **2006 (2) Cal LJ 180** at paragraphs 3 to 5, 21 to 24
- iv) ***Uttam Chand Surana v. Prabir Guha***, reported at **2016(2) CHN (Cal) 49** at paragraphs 6 to 16
- v) ***Annapurna Dassi v. Sarat Chandra Bhattacharjee***, reported at **38 CWN 1063**
- vi) ***Bibhas Mohan Mukherjee & Ors. v. Hari Charan Banerjee & Ors.***, reported at **AIR 1961 Cal 491** at paragraphs 7, 16 and 19.

14. Mr. Advocate General has submitted that an identical issue came up for consideration in ***Suraj Mull Gouti*** (*supra*). The learned Trial Court held the suit to be maintainable. A revisional application was preferred against the said order. The Revisional Court held that the suit was not maintainable and thereby dismissed the suit. Before the Hon'ble Division

Bench the question arose whether a second appeal would lie from the order of the Revisional Court and in deciding the said issue it was held that the order of the Revisional Court dismissing the suit would be a decree under Section 2(2) of the CPC and the order passed by the Revisional Court would be considered to have been passed by the first appellate court below, notwithstanding the fact that such finding was arrived at not in an appeal but in exercise of power of revision. On such reasoning the court held that a regular second appeal would be maintainable.

15. Mr. Advocate General has also referred to the observation made by the Hon'ble Supreme Court in ***Shankar Ramchandra Abhyan Kar vs. Kirishnaji Dattaraya Bapat*** reported at **AIR 1970 SC 1** in order to emphasise that the jurisdiction exercised under Section 115 of the CPC is a part of the general appellate jurisdiction.

16. Mr. Advocate General has submitted that the Learned Single Judge in the order dated 11th December, 2017 has placed reliance on the decision in ***Surajmal Jain*** (*supra*) to say that the said decision presents a conflicting view in the present case.

17. It is submitted that the said judgment may not be considered to be relevant for the following reasons:

- i. The said decision was not concerned with the question of whether an order rejecting a plaint under Order 7 Rule 11 of the CPC was appealable.

- ii. The said case was only concerned with Order 21 Rule 103 of the CPC.
- iii. The said case did not lay down any proposition that orders passed under Order 21 Rule 103 which are deemed to be decrees, would not be appealable under Section 96 or Section 100 of the CPC. The said case was only concerned with the classification of such an appeal.

18. On the basis of the aforesaid submission it is contended that the decision in **Surajmal Jain** (*supra*) is in no manner in conflict with the position that an order passed by a revisional court rejecting the plaint would be a decree and thus, second appeal would lie therefrom. It has been pointed out by the learned Advocate General that the said decision was duly distinguished on similar grounds in **Uttam Chand Surana** (*supra*) at paragraphs 11 to 13.

19. Mr. Bhaskar Ghosh, learned Senior Counsel has submitted that the argument of the learned Advocate General is required to be accepted. It is an accepted principle of law as clearly laid down almost 60 years back by the Full Bench in **Bibhash Mohan Mukherjee & ors.** (*supra*) that the remedy available to an aggrieved party being dissatisfied with the order of the 1st Appellate Court in reversing the judgment of the trial court and thereby restoring the suit, a second appeal would lie under Section 100 CPC. Mr. Ghosh has submitted that **Surajmal Jain** (*supra*) is essentially a case relating to adjudication under Order 21 Rule 58 CPC and Order 21 Rule 98 and 100 of CPC. The issue was whether an appeal arising out of an

adjudication in such proceedings require admission under Order 41 Rule 11 of the Code of Civil Procedure.

20. Mr. Ghosh submits that three judgments referred by Justice Tandon would be relevant in considering the reference as they are arising out of an order passed under Order 7 Rule 11 CPC. They are:

1. *Suraj Mull Gouti vs. Sumati Gouti & Ors.*; 2005(2) WBLR (Cal) 296

2. *Amal Chandra Mondal Vs. Anita Biswas & Ors.*; 2006 (2) CLJ 180

3. *Uttam Chand Surana Vs. Prabir Guha*; 2016 (2) CHN Cal 49

21. Mr. Ghosh has submitted that the decision of the full Bench in ***Bibhas Mohan Mukherjee*** (*supra*) is a clear authority for the proposition that the second appeal would lie and the reference is to be answered in the affirmative. It is submitted that in the said decision, it has been clearly held that if the order of dismissal amounts in law to be an order rejecting the plaint under Order 7 Rule 11, it is appealable as a “decree” within the meaning of Section 2(2) CPC.

22. Mr. Ghosh in this regard, has specifically referred to the observation of Justice P.N. Mookherjee in paragraph 19 of the decision.

23. Mr. Ghosh has also referred to the decision of the Hon’ble Supreme Court in ***Shamsher Singh vs. Rajinder Prashad & Ors.***, reported in **AIR 1973 SC 2384**, paragraph 3, in support of his submission that an order rejecting a plaint under Order 7 Rule 11 CPC is appealable as a decree and when the order is reversed in appeal a second appeal would lie under Section 100.

Submission made by Mr. Sounak Bhattacharyya on behalf of the School.

24. Mr. Sounak Bhattacharyya appearing on behalf of the School has submitted that the factual matrix of the Division Bench judgments in **Suraj Mull Gouti** (*supra*) and **Amal Chandra Mondal** (*supra*) are quite different from the factual matrix of the present Civil Revisional Application.

25. It is submitted that although there may be difference of opinion expressed in the said Division Bench judgments but in the given facts and circumstances there was no requirement for a reference to the Special Bench. It is submitted that in **Suraj Mull Gouti** (*supra*) the first miscellaneous appeal was directed against an order dated 6th August, 2004 passed by the Additional District Judge, 13th Court, Alipore, 24-parganas (South) in Civil Revision Case No. 304 of 2001 thereby setting aside Order No. 17 dated 11th May, 2001 passed by the Learned Civil Judge, 2nd Court, Junior division, Sealdah in Title Suit No. 619 of 2000.

26. In the suit, the respondents took a preliminary objection that the suit was not maintainable. The learned Trial Judge by an order dated 11th May, 2001 held that the suit was maintainable.

27. Being dissatisfied, the respondents preferred a revisional application under Section 115(A) of the Code of Civil Procedure before the learned Revisional Court below and by the order impugned in the said Revisional Court had arrived at a conclusion that the suit is not maintainable and accordingly dismissed the suit.

28. Being dissatisfied, a First Miscellaneous Appeal was filed.

29. In ***Amal Chandra Mondal*** (*supra*) the plaintiff/appellant filed a Title Suit No. 52 of 2002 in the Court of the learned Civil Judge, Junior Division, Bongaon against the defendants/respondents praying for a decree declaring the right, title and interest of the appellant in the suit property and for permanent injunction restraining the respondents from entering the suit property and from disturbing the peaceful possession of the appellant in the suit property. It appears that the defendants-respondents are the two daughters of the plaintiff. The plaintiff/appellant has alleged that the plaintiff purchased two adjacent plots of Bastu land in the name of his wife in the years 1973 and 1978 and the plaintiff had built a pucca dwelling house on the said land and that the plaintiff's wife was only a 'Benamdar' but the actual owner of the property is the plaintiff himself. The plaintiff has further alleged that the defendants-respondents, sometime in the year 2002, tried to enter into the plaintiff's property and declared that they are the present owners of the suit property having purchased the same from their mother. The plaintiff has alleged that the deeds through which the defendants are claiming title to the suit property are forged deeds and that the plaintiff's wife, who was suffering from cancer at the material time, was not at all in a position to execute any such deeds, the plaintiff has challenged such deeds through which the defendants are claiming title to the suit property.

30. The learned trial Court by an order dated 27th February, 2002 granted an ad-interim order of injunction directing the defendants not to

interfere with the present position of the suit property and not to disturb the status quo position as regards the possession, user and nature and character of the suit property till the disposal of the injunction-petition. It appears that the defendants-respondents filed a petition alleging that the suit filed by the plaintiff/appellant is not maintainable on various grounds and prayed for hearing of the said petition and also for dismissal of the said suit on the ground of non-maintainability. The learned Trial Court by an order dated 17th March, 2003 decided the question of maintainability as a preliminary issue and held that the suit is maintainable.

31. The defendants challenged the said order by filing a civil revision being C.R. No. 49 of 2003. The learned Additional District Judge, by an order dated February 27, 2004 allowed the said civil revision and set aside the order dated 17.03.2003. Being aggrieved the plaintiff filed an application under Article 227 of the Constitution of India (C.O. No. 703 of 2004) in this Court.

32. Mr. Bhattacharyya submits that on a conjoint reading of both the judgments, it appears that the connected suits were held to be maintainable by the Learned Trial Judge. Thereafter, a civil revisional application was preferred under Section 115A of CPC before the Learned District Judge. The question arose before both the Hon'ble Division Benches as to whether a second appeal or a second miscellaneous appeal would lie before the Hon'ble High Court from the order of the Learned District Judge.

33. Therefore, the facts of the said two judgments are quite different from the facts of the present revisional application before this Special

Bench. In the present case, the suit was dismissed under Order 7 Rule 11(d) of CPC on the ground of non-maintainability without framing any issue and recording any evidence. The first Appellate Court reversed the judgment of the trial court on a preliminary point of maintainability, restored the suit and remanded the suit to the Trial Court in exercise of its power under Order 41 Rule 23 of CPC to be decided on merits. An order passed by the first Appellate Court in exercise of the power under Order 41 Rule 23 is appealable in terms of Order 43 Rule 1(u) of CPC. When the first Appellate Court had disposed of the appeal on the preliminary point of maintainability or jurisdiction of civil court without going into the merits of the suit and remanded the suit for trial before the Learned Trial Judge, it has certainly exercised its power under Order 41 Rule 23 of the Civil Procedure Code. An order under Order 41 Rule 23 of Civil Procedure Code is appealable in terms of Order 43 Rule 1(u) and a first miscellaneous appeal will lie from such an order.

34. When an application under Order 7 Rule 11(d) of the Code of Civil Procedure is allowed by the Ld. Trial Judge and the suit is dismissed and the said order is affirmed by the First Appellate Court, the order of the First Appellate Court assumes the character of the decree in terms of Section 2(2) of the Code of Civil Procedure and a Second Appeal will lie from such a decree.

35. Mr. Probal Mukherjee learned Sr. Advocate representing the Corporation has submitted that an appeal arising out of an order rejecting a plaint being a deemed decree is appealable as first appeal under Section 96

of the Code of Civil Procedure. However, when a Revisional Court rejects a plaint, in substance, an application filed under Order 7 Rule 11 is being allowed. Under such circumstances, the remedy by way of a writ petition under Article 227 of the Constitution could be availed, although, if the plaint had been rejected by the trial court i.e. court of original jurisdiction, it would have resulted in a right of appeal under Section 96 CPC per Justice B. N. Nagarathna in ***Frost International Limited vs. Milan Developers & Builders Private Limited***; 2022(8) SCC 633 (paragraph 31).

36. Mr. Mukherjee has submitted that if the order passed is a decree or a deemed decree under law no revision lies under Section 115 of the Code of Civil Procedure in view of the specific bar under Section 2(2) thereof and it is only appealable under Section 96 read with Order 41 of the Court. What is to be seen is the effect of the order and not the process by which a decision is arrived at as held in ***Rishabh Chand Jain & Anr. vs. Ginesh Chandra Jain*** reported in 2016(6) SCC 675 and 678.

37. Mr. Mukherjee submits that in ***Sameer Singh & Anr. vs. Abdul Rab & Ors.***, reported in 2015 (1) SCC 379 and 384 the Hon'ble Supreme Court has held an order passed under Order 21 Rules 98 to 100 CPC is a decree as per the provisions contained under Order 21 Rule 103 CPC and, therefore, an appeal would lie and a writ petition challenging such order was not maintainable.

38. Order 21 Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as

if it were a decree. Thus, it is a deemed decree. If a court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot be elevated to the status of a decree.

39. Mr. Mukherjee has relied upon the decision of the Hon'ble Supreme Court in ***Rajni Rani vs. Khairati Lal***, reported in **2015(2) SCC 682 at page 687** to show the essential elements of a decree and to emphasise that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that court is concerned. When an order is final determining the rights of the parties it will fall within the definition of a decree under Section 2(2) read with Section 47 and would be an appealable order.

40. Mr. Mukherjee has also referred to the decision of the Hon'ble Supreme Court in ***Mangluram Dewangan vs. Surendra Singh***, reported in **2011(12) SCC 773 at page 780** to show the nature of the order which can be considered to be a decree under Section 2(2) of the Code. The said judgment was also relied upon to show the difference between a "decree" appealable under Section 96 and an "order" appealable under Section 104 as stated in paragraph 12 of the said judgment.

41. Mr. Mukherjee submits that the said decision has authoritatively held the nature of order that would pass the test of a "decree" or an order.

42. Mr. Mukherjee has submitted that a party aggrieved by any appellate judgment and order arising out of the deemed decree of rejection of plaint, has a recourse by way of second appeal under Section 100 of the Code of Civil Procedure, 1908 since such appellate order, reversing or affirming conclusively, decides a lis finally and hence a 'decree' within the meaning of Section 2(2) of the Code of Civil Procedure, 1908.

43. The reference along with peripheral issues are required to be answered on appreciation of the scope and effect of Section 2(2) of CPC along with related sections namely, Sections 96, 100 and 104 read with Order 41 Rule 1 and Order 43 CPC. The Code has clearly defined the decree in Section 2(2) to include determination on any preliminary matter and the said definition is extended to an order rejecting a plaint although it may not be a decision on merits and the rights of the parties are being not adjudicated finally. However, it would still be considered as a decree by reason of Section 2(2) C.P.C and hence would be appealable under section 96 CPC as an appeal from original decree. It is treated as decree as the effect of the order is non-denial of the reliefs and virtually dismissal of the suit. It is a decree as, obviously, "it amounts to a refusal of any relief to the plaintiff in the particular suit and thus decides the familiar issue, always involved in a suit, namely, whether the plaintiff is entitled to any relief therein, against the plaintiff" per Lahiri, Chief Justice in ***Bibhas Mohan Mukherjee*** (*supra*).

44. This has been very lucidly and succinctly stated by Hon'ble Justice P.N. Mookherjee in His Lordship's concurrent judgment in ***Bibhas Mohan Mukherjee*** (*supra*) in paragraph 19:

“19. Even otherwise, that is, treating the order in question as one of dismissal of the suit, as distinguished from an order of mere rejection of the plaint, it will, in my opinion, still be a decree, as, obviously, it amounts to a refusal of any relief to the plaintiff in the particular suit and thus decides the familiar issue, always involved in a suit, namely, whether the plaintiff is entitled to any relief therein, against the plaintiff. The dismissal, therefore, would be a decree within the main part of the definition section, Section 2(2), of the Code also. I do not think that the above view would be opposed to any of the recognised decisions under Section 2(2) of the Code, provided the distinction is borne in mind that what is held here to be the "decree" is not the order, -- the interlocutory order, as it may well be termed without impropriety, - - deciding the issue of court-fee (and valuation), but the ultimate or final dismissal of the suit and that dismissal which, under the law, disposes of that particular suit, may well be held to be a decree, though the decision on a particular issue, as distinguished from the dismissal of the suit, obviously stands on a different footing and has quite rightly, more often than not, been differently construed, and provided, further, it is remembered that dismissal of the suit for non-payment of court-fee is not a "dismissal for default", which is excluded, -- and expressly excluded, -- from the definition of "decree" under Section 2(2) of the Code, as such dismissal of the suit is not, in my opinion, "an order' of dismissal for default" within the meaning of the said section and must always be distinguished and kept distinct and separate from the same.”
(emphasis supplied)

45. The definition of “decree” in Section 2(2) “shall be deemed to include the rejection of a plaint”.

46. The word “deemed” is used in modern legislations in different senses and not always for the purpose of creating a fiction but at times to accommodate which is obvious. The rejection of a plaint has the natural consequence of the claims and reliefs being denied. The rejection of plaint is thus presumed to be a decree for the purpose of deciding the remedy available to the plaintiff under the Code. The scope and ambit of decree and

the remedies available under the code against a decree and order have been succinctly explained in ***Mangluram Dewangan v. Surendra Singh & Ors., 2011(12) SCC 773*** [paragraphs 11 to 14 and 25]. It is stated thus:

“11. The normal remedies available under the Code whenever a civil court makes an order under the Code are as under:

(i) Where the order is a 'decree' as defined under Section 2 of the Code, an appeal would lie under Section 96 of the Code (with a provision for a second appeal under Section 100 of the Code).

(ii) When the order is not a 'decree', but is an order which is one among those enumerated in Section 104 or Rule 1 of Order 43, an appeal would lie under Section 104 or under Section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal).

(iii) If the order is neither a 'decree', nor an appealable 'order' enumerated in Section 104 or Order 43 Rule 1, a revision would lie under Section 115 of the Code, if it satisfies the requirements of that section.

12. The difference between a 'decree' appealable under Section 96 and an 'order' appealable under Section 104 is that a second appeal is available in respect of decrees in first appeals under Section 96, whereas no further appeal lies from an order in an appeal under Section 104 and Order 43, Rule 1 of the Code.

13. Section 96 of the Code provides that save where otherwise expressly provided in the body of the 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 decision of such court. The word 'decree' is defined under Section 2(2) of the Code thus:

2.(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;

14. A reading of the definition of decree in Section 2(2) shows that the following essential requirements should be fulfilled if an order should be treated as a 'decree':

(i) there should be an adjudication in a suit;

(ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it;

(iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and

(iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under Section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default.

25. If the court orders that suit has been abated or dismissed the suit as having abated, as a consequence of rejection of an application under Order 22 Rule 3 of the Code, as noticed above, there is no determination of rights of parties with regard to any of the matters in controversy in the suit and therefore the order is not a decree. But if an order declares that the suit has abated, or dismisses a suit not as a consequence of legal representatives filing any application to come on record, but in view of a finding that right to sue does not survive on the death of sole Plaintiff, there is an adjudication determining the rights of parties in

regard to all or any of the matters in controversy in the suit, and such order will be a decree”.

47. Now the issue arises when the first appellate court either affirms the order rejecting the plaint or reverses the order thereby restoring the suit to be tried on merits, what would be the remedy available to an aggrieved party. It is in effect an order of remand under Order 41 Rule 23. An order remanding the suit to be tried on merits is however, appealable under Order 43 Rule 1(u) of the Code of Civil Procedure and is to be classified as a First Miscellaneous Appeal but is required to be admitted on a substantial question of law under Section 100 read with Order 41 Rule 11 CPC. In ***Narayanan v. Kumaran & Ors.***, reported in **2004(4) SCC 26** this was explained in paragraph 17:

“17. It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were it is to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43 Rule (1) Clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V. Iyer and hold that the appellant under an appeal under Order 43 Rule (1) Clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot convass all the findings of facts arrived at by the Lower Appellate Court.”

48. This was clarified in ***Jegannathan v. Raju Sigamani & Anr.***, reported in **2012(5) SCC 540** in paragraph 11 which reads:

“11. The High Court relied upon a decision of this Court in the case Narayanan v. Kumaran and Ors. (2004) 4 SCC 26 in holding that Civil Miscellaneous Appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in Narayanan is that an appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100.”

49. In **Shamsher Singh** (*supra*) a preliminary objection was raised by the defendant/appellant that the suit was not properly valued for the purposes of court fees and jurisdiction. The Trial Court decided it as a preliminary issue and rejected the plaint as the revised court fees determined by the Trial Court was not put in by the plaintiff. This order was carried in appeal. The High Court allowed the appeal. The appellant preferred an appeal by Special Leave. This was opposed on the ground that whether proper court fees has been paid on a plaint is primarily a question between the plaintiff and the State and that the defendants who may believe and even honestly that proper court fees has not been paid by the plaintiff has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court fee payable on the plaint. In declining to accept the said objection the Hon'ble Court held:

“In the present case the plaint was rejected under Order 7, Rule 11 of the C.P.C 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 this Court has granted special leave the question whether an appeal lies or not does not arise. Even otherwise a second appeal would lie under Section 100 of the C.P.C. on the ground that the decision of the 1st Appellate Court on the interpretation of Section 7(iv) (c) is a question

of law. There is thus, no merit in the preliminary objection.” (emphasis supplied)

50. The right of revision in terms of the West Bengal Amendment can be exercised by the High Court as well as the District Court. The said power is exercised in the following situation:

- i. Where the court have exercised its jurisdiction not vested in it by law or;
- ii. The court had failed to exercise a jurisdiction so vested or;
- iii. The court has exercised a jurisdiction illegally or with material irregularity.

51. The words ‘illegality’ and ‘with material irregularity’ as used in the said clause was explained in ***Tek Singh v. Shashi Verma*** reported in **2019(16) SCC 678** to mean that “they would not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached”. The errors contemplated by this clause may, “related either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with.”

52. In ***Suraj Mull Gouti*** (*supra*) the revisional court in exercise of its power under Section 115(A) held that the suit was not maintainable and accordingly dismissed the suit. We assume that the revisional application was filed as the trial court refused to allow the rejection of the plaint and it is not an appealable order. The remedy by a revision was availed of since the trial court had failed to exercise its jurisdiction in deciding the matter in

favour of the plaintiff and the revisional court exercised its jurisdiction and thereby dismissed the suit. This power was exercised in terms of Section 115A as amended.

53. The Division Bench was essentially considering an objection with regard to the classification of the appeal. The appeal was originally classified as a First Miscellaneous Appeal. The Hon'ble Division Bench had proceeded on the basis that the power of revision under Section 115 of the Code of Civil Procedure is in reality exercised by a superior court as part of general appellate jurisdiction *per* Justice A.N. Grover in **Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat** reported in **AIR 1970 SC 1**. In **Skankar Ramchandra** (supra) at paragraph 6 this issue was addressed. It states:

“6. Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior court. It is only one of the modes of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We do not, therefore, consider that the principle of merger of orders of inferior Courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal.” (emphasis supplied)

54. The Hon'ble Division Bench on the basis of the aforesaid observation has concluded that the same principle would apply to a

proceeding under Section 115(A) of the Code. The Division Bench observed thus:

“8. It is true that an affirmative finding on a question of maintainability of a suit does not amount to decree within the meaning of Section 2(2) of the Code and as such, the Defendant preferred a revisional application before the learned District Judge but the said Revisional Court having reversed such finding and come to the conclusion that the suit is not maintainable, such order amounts to decree. The order impugned herein, therefore, should be held to be a decree passed by the first appellate Court below, notwithstanding the fact that such finding was arrived at not in an appeal but in exercise of power of revision.

9. We, therefore, find substance in the contention of Mr. Roy Chowdhury that this appeal should be classified as a regular second appeal. Since, we have determination to hear second appeal only at the stage of hearing Order 41 Rule 11 of the Code and in this case, this appeal had already been admitted by a different Division Bench under Order 41 Rule 11 of the Code after keeping the question of classification of appeal open for final decision, we cannot hear out this second appeal on merit as contested one at the final hearing stage.” (emphasis supplied)

55. In **Frost International Limited** (*supra*) referred to by Mr. Probal Mukherjee, Senior Advocate a similar situation as that of **Suraj Mull Gouti** (*supra*) had arisen. The Trial Court refused to reject the plaint and the revisional court allowed the revision petition and rejected the plaint. The decision of the revisional court was challenged in the High Court by way of a revision. In the said decision in paragraph 29.2 reference was made to **Tek Singh** (*supra*) where the bench speaking through Justice Nariman while discussing Section 115 and its proviso held that revision petitions filed under Section 115 CPC are not maintainable against interlocutory orders.

The jurisdiction under section 115 CPC is essentially exercised to correct jurisdictional errors.

56. The said paragraphs would give an impression that it is the nature of the jurisdiction that was to be taken into consideration in deciding the remedy.

57. It is sought to be argued that once the order impugned is a 'decree' or a "deemed decree" the remedy provided under the Code should follow. Moreover, there is a clear distinction between the power exercised by an appellate court and a revisional court. The revisional jurisdiction is correctional in nature and does not contemplate a revisional decree unlike an appellate court which by virtue of Order 41 Rule 33 can pass any decree and make any order which ought to have been passed by the trial court exercising original jurisdiction. The CPC does not contemplate a revisional court to pass a decree in exercise of its revisional jurisdiction. In view of **Shankar Ramchandra Abhyankar** (*supra*) it was contended that the jurisdiction exercised by the revisional court in rejecting a plaint is a decree within the meaning of Section 2(2) CPC and the jurisdiction so exercised by the revisional court is part of the general appellate jurisdiction.

58. There cannot be any doubt that unlike the revisional Court the appellate court has a co-extensive power of the trial court [See. **T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board and Ors.**, reported in **2004(3) SCC 392**] and the trial court if allowed an application for rejection of the plaint it would be an appealable decree under Section 96 CPC. This appellate power permits the appellate court to pass, inter alia, a decree.

59. In **Frost International Limited** (*supra*) the following points were formulated for consideration in paragraphs 17.1 and 17.2:

“17.1 (a) Whether the High Court was justified in setting aside the order passed by the revisional court in C.R.P. No. 5 of 2012 and thereby remanding the matter to the said court for reconsideration on the premise that the revisional court had exceeded its jurisdiction in rejecting the plaint?”

17.2 (b) What order?”

60. However, in discussing the remedy available to a party where the Revisional Court dismissed the plaint, it was observed in paragraphs 31 and 32:

“31 No doubt rejection of a plaint is a decree within the meaning of Section 2(2) of Code of Civil Procedure and an appeal lies from every decree passed by any court exercising original jurisdiction to the Court authorised to hear appeals from a decision of such court. However, it must be borne in mind that when a revisional court rejects a plaint, in substance, an application filed Under Order VII Rule 11 is being allowed. Under such circumstances, the remedy by way of a writ petition Under Article 227 of the Constitution could be availed and Respondent No. 1/Plaintiff has resorted to the said remedy in the instant case; although if the plaint had been rejected by the trial court i.e. court of original jurisdiction, it would have resulted in a right of appeal Under Section 96 of Code of Civil Procedure.

32. Having regard to the second proviso to Section 115 of Code of Civil Procedure (Orissa amendment), a revisional court while allowing the application filed Under Order VII Rule 11 of Code of Civil Procedure would in substance reject the plaint but since the said decree is not passed by the court of original jurisdiction, namely the trial court, the remedy by way of writ petition Under Article 227 of the Constitution would be available to the aggrieved party and Respondent No. 1 has availed the said remedy.” (emphasis supplied)

61. The amendment of Section 115 in Orissa is in pari materia with the West Bengal Amendment and the scope, ambit, width and power of the revisional court was considered in ***Frost International Limited*** (*supra*). In fact the counter argument in support of lack of jurisdiction of the revisional court to pass a decree was negated in ***Frost International Limited*** (*supra*) on interpretation of Section 115 (as amended) as is clearly evident from paragraph 32 of the said judgment. In fact the judgment of Justice Biswanath Rath in ***Milan Developers and Builders (P) Ltd. v. Frost International Limited***; 2016 SCC Online Ori 1051 to the effect that “*the Revisional Authority has a limited role in the matter of hearing on rejection of an application under Order 7 Rule 11 of CPC and in the event, it feels that there is some substance in considering the application under Order 7 Rule 11 of CPC, then the Revisional Authority is to remit the matter back to the Original Authority for fresh consideration of the matter*” was not accepted by the Hon’ble Supreme Court.

62. The said decision affirms the power of the Revisional Court to decide an application for rejection of plaint although allowing such an application would be a ‘deemed decree’ under Section 2(2) of the CPC. If such a jurisdiction is vested with the revisional court which it has in view of ***Frost International Limited*** (*supra*) notwithstanding such a decision being a ‘deemed decree’ is assailable in a writ petition under Article 227 of the Constitution of India. Justice Tandon possibly has this in mind while making the reference.

63. The decision in **Shankar** (*supra*) was followed in **Suraj Mull Gouti** (*supra*). We are of the opinion that the view expressed in **Suraj Mull Gouti** (*supra*) is no more a good law in view of **Frost International Ltd.** (*supra*). However, I do not find any conflict between **Surajmal Jain** (*supra*) and **Suraj Mull Gouti** (*supra*). The said decision has been distinguished on similar grounds in **Uttam Chand Surana** (*supra*) in paragraphs 11 to 13 which read:

“11. Their Lordships held that the appeal which is directed against an order passed under Order 21 Rule 103 of the Code of Civil Procedure amounting to a deemed decree is different from an appeal which is directed against the decree within the meaning of "decree" as per section 2(2) of Civil Procedure Code. Their Lordships thus held that an appeal against a deemed decree should be registered as a Miscellaneous Appeal.

12. While deciding the issue regarding the nomenclature of such an appeal which is directed against an order under Order 21 Rule 103 of the Code of Civil Procedure, the said Division Bench of this Hon'ble Court had no occasion to consider as to how an appeal which is directed against an order of rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure, will be classified.

13. Since the expression "decree" to some extent is different from the expression "deemed decreed", we feel that the decision of the said Division Bench cannot be regarded as a direct authority on the present issue.”

64. I agree with the learned Advocate General in this regard and further observe that it was with regard to classification of an appeal arising out of an order under Order 21 Rule 103 CPC and not with regard to the remedy.

65. Thereafter the issue was resolved with reference to an earlier decision of this court as would appear from the following paragraphs:

“14. While considering such an issue, we have got a direct authority on this point. In an identical situation, a question came up for consideration as to whether an order of rejection of plaint can be assailed in a regular appeal or it can be challenged by way of revisional application under section 115 of the Code of Civil Procedure.

15. While considering such an issue, the Division Bench of this Hon'ble Court, after considering the nature of the order which is passed under Order 7 Rule 11 of the Code of Civil Procedure and the definition of "decree" as defined under section 2(2) of the Code of Civil Procedure conclusively held in the case of Smt. Annapurna Dassi & Ors. vs. Sarat Chandra Bhattacharjee & Ors. reported in 38 CWN page 1063 that when an order is passed under Order 7 Rule 11 of the Code of Civil Procedure and an appeal preferred therefrom is dismissed by the Learned First Appellate Court, such an order of the First Appellate Court is assailable before the High Court in Second Appeal. Their Lordships held that such an order is not assailable before this court under section 115 of the Civil Procedure Code, as it stood in the Civil Procedure Code at the relevant time. Though the Civil Procedure Code has been amended subsequently changing the scope of revisional jurisdiction of this Court under section 115 of the Civil Procedure Code but still then when we find that an order of rejection of the plaint amounts to a decree within the meaning of "decree" as it is defined under section 2(2) of the Civil Procedure Code, we by relying upon the said decision of the Division Bench of this Hon'ble Court in the case of Annapurna Dassi & Ors. vs. Saral Chandra Bhattacharje & Ors. (supra), hold that the present appeal should be classified as a regular Second appeal.”
(emphasis supplied)

66. However, I must hasten to add that although the points formulated in this reference is different from the issues raised in **Frost International Limited** (supra), in deciding the issues as framed in

paragraph 17.1 (a) and 17.2(b), the Hon'ble Supreme Court in Paragraph 32 has clearly stated that when the revisional court is allowing an application under Order 7 Rule 11 CPC in substance it is a decree passed by the revisional Court, however, as the order of rejection is not by a court of original jurisdiction the remedy would be by way of a writ petition under Article 227 of the Constitution. In ***Frost International Limited*** (*supra*) in fact, the High Court was approached by way of a writ petition under Article 227 and not by way of a second appeal.

67. It thus follows that it is the nature of the jurisdiction that was emphasised and given predominance, importance and preference over the nature of the order. The nature of jurisdiction prevailed over the form and spirit of the order. The decision in ***Shankar Ramchandra*** (*supra*) was not considered in ***Frost International Limited*** (*supra*) where it has been decided that the revisional court is part of the general appellate jurisdiction and in following the said observation in ***Suraj Mull Gouti*** (*supra*) it was held that the order allowing rejection of plaint should be treated as a 'deemed' decree and hence a second appeal would be maintainable may not be the correct law in view of the latest judgment in ***Frost International Limited*** (*supra*). It may be contended that ***Shankar Ramchandra*** (*supra*) was rendered in the context of merger of orders. This has been dealt with by Justice Kausik Chanda in a separate concurring judgment.

68. Under such circumstances we answer the reference in the negative in view of paragraph 32 of ***Frost International Limited*** (*supra*).

The proper remedy would be to file a writ petition under Article 227 of the Constitution of India.

69. We record our sincere appreciation for the assistance received from the learned Advocate General, Mr. Bhaskar Ghosh, Amicus, ably assisted by Mr. Rwitendra Banerjee, Mr. Probal Kumar Mukherjee, Senior Advocate and Mr. Saunak Bhattacharjee, Advocate.

(Soumen Sen, J.)

Amrita Sinha J.: I have had the opportunity of perusing the draft judgment prepared by both my partners in the Bench. I completely concur with the deduction arrived at.

2. The facts of the case and the various case laws relied upon by the parties have been deliberated upon by the Bench and, as such, the same is not repeated.

3. After threadbare discussion of the facts of the case and the points of law, the Court is of the opinion that if the order of the learned Trial Court refusing to reject the plaint under Order 7 Rule 11 CPC is reversed by the Revisional Court, then the order of the Revisional Court will be a “decree” under Section 2 (2) CPC and in terms of the judgment passed by the Hon’ble Supreme Court in the matter of **Frost International Limited vs. Milan Developers and Builders Pvt. Ltd. & Another** reported in **(2022) 8 SCC 633** paragraph 32 the remedy by way of writ petition under Article 227 of the Constitution would be available to the aggrieved party.

4. Though the issue as to whether a second appeal would lie from an order allowing application under Order 7 Rule 11 CPC by a Court exercising Revisional jurisdiction was not directly decided or even argued before the Hon'ble Supreme Court, but the Court while deciding the issue as to whether the Revisional Court could have passed order to reject the plaint held that, rejection of a plaint is undoubtedly a decree within the meaning of Section 2(2) CPC.

5. As appeal lies from every order passed by any Court exercising original jurisdiction, accordingly, the order passed by the Revisional Court cannot be the subject matter of an appeal. Remedy is to file writ petition under Article 227 of the Constitution.

6. The same implies that even though the order passed by the revisional Court amounts to a decree, no appeal will lie therefrom. Plainly said, appeal cannot be filed from an order passed by the Court exercising revisional jurisdiction. Appeal under Section 96 CPC can be filed only from order passed by the Court exercising original jurisdiction.

(underlined for emphasis)

(Amrita Sinha J.)

Kausik Chanda, J.:- I have read the draft judgment of my esteemed colleagues, Justice Soumen Sen and Justice Amrita Sinha

and concur with the conclusions arrived at by them. However, I propose to give my own reasoning.

2. The following question of law has been referred by a learned Single Judge to this Bench.

“Whether the remedy lies by filing Second Appeal, if the Revisional Court reverses the order of the Trial Court refusing to reject the plaint, as a corollary effect the plaint is rejected in view of the definition of “decree” given under Section 2(2) of the Code.”

Simply put: whether an appeal would lie against the rejection of a plaint in the exercise of revisional jurisdiction.

3. This scenario comes to light in a case where the Trial Court declines to reject a plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short, the Code), while the Revisional Court rejects the plaint by reversing the order of the Trial Court.

4. It is noteworthy that the learned Single Judge made this reference in relation to a distinct factual scenario where an application under Order VII Rule 11 had been filed before the Trial Court and the same was allowed. An appeal was preferred against the said order. The Appeal Court set aside the order of the Trial Court holding that the Civil Court had the jurisdiction to adjudicate the dispute and thereby refused to reject the plaint. The said order of the Appeal Court was challenged before this Court by a civil revision under Article 227 of the Constitution of India.

5. In dealing with the maintainability of the said revision before this Court, the learned Judge while making this reference, held that in such a situation, only a second appeal would lie against the order of the Appeal Court. The relevant part of the said order of the learned Judge is quoted below:

“There is hardly any dispute that in view of the nature of an order passed under Order VII Rule 11 of the Code, more particularly the definition of “decree” given in Section 2(2) thereof, the appeal lies before the Appellate Court as such order neither comes within the peripheral limit of Section 104 nor under Order XLIII Rule 1 of the Code, but under Section 96 thereof. It is not always necessary that the formal decree is to be drawn up if the Code expressly provides that such order would be a deemed decree, the appeal can be maintainable before the appellate forum.

In the instant case the Appellate Court, who is in seisin of the appeal filed under Section 96 of the Code, reversed the order of the Court of original jurisdiction, which is otherwise competent under the Code of Civil Procedure itself and in view of Section 100 of the Code an appeal must lie before the High Court.”

6. The learned Judge, however, was of the view that there are conflicting views on the issue where the Revisional Court rejects a plaint, whether an appeal would lie against such an order. The learned Judge deemed it fit to refer the issue to a larger Bench for consideration.

7. The learned Judge observed that Division Benches of this Court hold conflicting views on this issue as to “whether the nature of the order is the sole and primary factor to ascertain the remedy available to an aggrieved person or it would be dependent upon the nature of the proceeding filed

before the Court and the power vested under relevant provisions is exercised; to be more precise, whether an appeal or revision would be the remedy if the nature of the order is such which comes within the purview of the aforesaid provisions of the Code or it is the proceeding itself filed before the Court would be the guiding factor to decide the remedy to the aggrieved person.”

8. In both the judgments, reported at **(2005) 2 WBLR Cal 296 (Suraj Mull Gouti v. Sumati Gouti)** and **(2006) 2 Cal LJ 180 (Amal Chandra Mondal v. Anita Biswas)**, the Division Benches of this Court concurred that an appeal will lie if a plaint is rejected by a Revisional Court. There was, however, a difference of opinion concerning the classification of appeal. In the case of **Suraj Mull Gouti (Supra)**, it was held that such an appeal should be treated as a regular second appeal, while in the case of **Amal Chandra Mondal (Supra)** it was classified as a first miscellaneous appeal.

9. We may, however, notice another judgment passed in **(Uttam Chand Surana v. Prabir Guha)** reported at **(2016) 2 CHN Cal 49**, where an order of rejection of the plaint was passed by the Trial Court. In the first appeal, the order of the learned Trial Judge was upheld which prompted the plaintiff to prefer a second appeal before this Court. It was held in the said case also that such an appeal should be classified as a regular second appeal.

10. In the case reported at **(1980) 2 Cal LJ 161 (Surajmal Jain v. Prabir Kumar Sett)**, a Division Bench of this Court dealt with the question as to whether an appeal preferred against an order passed on an application

under Order XXI Rule 97 of the Code should be classified as an “appeal from original decree” or as an “appeal from order.” In paragraph 16 of the said judgment it was held as follows:

“**16.** In view of the above position of law, we conclude that appeals preferred against orders passed under Rules 98 or 100 of Order 21 of the Code should be classified as appeals from orders and they are required to be heard under Order 41, Rule 11 of the Code of Civil Procedure.”

11. As this Bench is confronted with a different situation involving the rejection of a plaint by a Revisional Court, the ***Uttam Chand Surana*** and ***Surajmal Jain*** cases are not relevant to the present reference.

12. The answer to the reference can be traced to the provisions of the first appeal and second appeal as provided under Section 96 and Section 100 of the Code. The said two provisions are quoted 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 to the Court authorized to hear appeals from the decisions of such Court.

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

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

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

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.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

[emphasis supplied]

13. It bears repeating that the right of appeal is founded on statutory provisions. Unless the relevant legislation specifically provides for an avenue of appeal, the right thereof cannot be invoked. The right to appeal can be hedged with certain conditions. A bare perusal of Section 96 of the Code elucidates that an appeal shall lie from every decree passed by “any Court exercising original jurisdiction.” In other words, a decree can only be deemed appealable when it emanates from the exercise of original jurisdiction; a *fortiori*, a decree passed outside the realm of original jurisdiction is not

susceptible to appeal. While it remains true that an order passed by a Court of original jurisdiction or a revisional jurisdiction rejecting an application under Order VII Rule 11 of the Code qualifies as a deemed decree in view of the definition of “decree” provided under Section 2(2) of the Code, it must be noted that such a decree, originating in a revisional jurisdiction rather than an original jurisdiction, does not warrant an appeal.

14. In a similar vein, Section 100 of the Code provides that an appeal shall lie to the High Court “from every decree passed in appeal” by any Court subordinate to the High Court. Consequently, a decree passed in a revisional jurisdiction cannot be made appealable before this Court as a second appeal.

15. Whether an appeal or revision would be the remedy depends on the nature of the order/decreed in conjunction with the nature of jurisdiction in the exercise of which such order/decreed has been passed.

16. In fact, the issue at hand has been decisively addressed by the judgment reported at **(2022) 8 SCC 633 (*Frost International Limited v. Milan Developers & Builders Private Limited*)**, where the Supreme Court upheld the power of Revisional Court to reject a plaint by reversing a judgment passed by the Orissa High Court.

17. The relevant parts of the said judgment, which in no uncertain terms resolve the issue at hand in the negative, are excerpted below:

“31. No doubt rejection of a plaint is a decree within the meaning of Section 2(2)CPC and an appeal lies from every decree passed by any

court exercising original jurisdiction to the court authorised to hear appeals from a decision of such court. However, it must be borne in mind that when a Revisional Court rejects a plaint, in substance, an application filed under Order 7 Rule 11 is being allowed. Under such circumstances, the remedy by way of a writ petition under Article 227 of the Constitution could be availed and Respondent 1/the plaintiff has resorted to the said remedy in the instant case; although if the plaint had been rejected by the trial court i.e. court of original jurisdiction, it would have resulted in a right of appeal under Section 96CPC.

32. Having regard to the second proviso to Section 115CPC (Orissa Amendment), a Revisional Court while allowing the application filed under Order 7 Rule 11CPC would in substance reject the plaint but since the said decree is not passed by the court of original jurisdiction, namely, the trial court, the remedy by way of writ petition under Article 227 of the Constitution would be available to the aggrieved party and Respondent 1 has availed the said remedy.”

18. Ergo, there cannot be any other option but to respond negatively to the query posed, considering the authoritative judgment delivered in ***Frost International Limited*** case.

19. Although the judgment in ***Frost International Limited*** case was delivered subsequent to the initiation of this reference, it is, however, imperative to acknowledge that the view expressed by the learned Single Judge, while making the reference indeed aligns with the perspective put forth in ***Frost International Limited*** case. The relevant part of the judgment under reference is quoted below:

“Naturally an order passed by the District Judge under Section 115A of the Code is not an appealable one nor a letters patent appeal lies if such jurisdiction is exercised by the High Court under Section 115 of the Code. Whether a second revisional application lies against the order of the District Judge under Section 115A is yet a debatable question, but it does not impinge upon or fetters the power of superintendence exercised by the High Court under Article 227 of the Constitution of India. The primary object to exercise of power of superintendence is to keep all the subordinate Courts within the precinct or boundaries of law. If the order is passed under Section 115A of the Code by the District Judge reversing the order of the Trial Court having a resultant effect that the suit is held to be non-maintainable, yet such order is passed exercising a power conferred under Section 115A of the Code and in my opinion the nature of jurisdiction exercised by the Court below should be the determining factor for further remedy.”

20. It has already been noted that two Division Benches of this Court arrived at a contrary conclusion in ***Suraj Mull Gouti*** case and in ***Amal Chandra Mondal*** case. The determining factor for the said two Division Benches was the conviction that the revisional jurisdiction is a part of appellate jurisdiction and, therefore, an order rejecting a plaint by a Revisional Court effectively represents an order passed in appeal, thereby justifying the viability of an appeal against such a decision.

21. The relevant passage of ***Suraj Mull Gouti*** case is quoted below:

“7. It is now settled law that power of revision under Section 115 of the Code of Civil Procedure is in reality exercised by a superior Court as part of general appellate jurisdiction.

(See *Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat*, reported in AIR 1970 SC 1). Therefore, the same principle will apply to a proceeding under Section 115(A) of the Code.”

22. The pertinent segment of ***Amal Chandra Mondal*** case runs as follows:

“**24.** But, it appears that the appellants have filed the instant second appeal against the impugned order passed by the learned Revisional Court below. There cannot be any dispute that revisional jurisdiction is a part of the appellate jurisdiction and the learned Court below passed the impugned order by exercising revisional jurisdiction which is a part of the appellate jurisdiction. In such situation, we are of the view, that the impugned order should be treated to be a deemed decree passed by the Court of First Appeal and accordingly, the appellants should have filed second miscellaneous appeal before this Court. We, accordingly, convert the present second appeal into a second miscellaneous appeal and we direct the department concerned to assign an appropriate number to the said case and again place the matter for hearing under Order 41 Rule 11 CPC before the appropriate Bench. We make it clear that we have decided only a preliminary point as indicated above.”

23. With utmost respect, I must express my inability to embrace such a perspective. The Division Bench in ***Suraj Mull Gouti*** case found its basis in a judgment reported at **AIR 1970 SC 1 (*Shankar Ramchandra Abhyankar v. Kirishnaji Dattatraya Bapat*)**. It is crucial to consider the contextual underpinning in which the aforesaid judgment was rendered. In that case, a decree of partial eviction was passed by the Trial Court, and an

appeal ensued, wherein the Appeal Court affirmed that decree. The decree of the Appellate Court was challenged before the Bombay High Court by filing a revisional application. A Single Judge of the High Court dismissed the revisional application which was again challenged by filing a writ petition under Article 226/227 of the Constitution of India before a Division Bench. The Division Bench reversed the order of the Single Bench. The said order of the Division Bench was challenged before the Supreme Court. In the aforesaid context, the Supreme Court grappled with the inquiry as to whether the order of the subordinate Court merged with the order of the High Court passed in revisional jurisdiction. The relevant paragraph of the said judgment is quoted below:

“3. Now as is well known Section 115 of the Civil Procedure Code empowers the High Court to call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies to it. It can interfere if the subordinate court appears to have exercised the jurisdiction not vested in it by law or to have failed to exercise the jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material illegality. The limits of the jurisdiction of the High Court under this section are well defined by a long course of judicial decisions. If the revisional jurisdiction is invoked and both parties are heard and an order is made the question is whether the order of the subordinate court has become merged in the order of the High Court. If it has got merged and the order is only of the High Court, the order of the subordinate court cannot be challenged or attacked by another set of proceedings in the High Court, namely, by means of a petition under Article 226 or 227 of the Constitution. It is only if by dismissal of the revision petition the order of the subordinate court has not become merged in that of the High Court that it may be open

to a party to invoke the extraordinary writ jurisdiction of that court. There again the question will arise whether it would be right and proper for the High Court to interfere with an order of a subordinate court in a writ petition when a petition for revision under Section 115 CPC, against the same order has been dismissed. Such a consideration will also enter into the exercise of discretion in a petition under Article 226 or 227.

...

6. Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Section 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior court. It is only one of the modes of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We do not, therefore, consider that the principle of merger of orders of inferior courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal."

[emphasis supplied]

24. The Supreme Court ultimately held that the course which was followed by the High Court, in that case, was certainly one which led to a conflict of decisions of the same Court.

25. It is essential to distinguish between the notion that an order passed by a subordinate Court merges with an order passed by a Revisional Court and the assertion that appeal and revision are the same. The Code

crafts separate and distinct provisions for both appeal and revision. It cannot be said that the nature of exercise in revisional jurisdiction is the same as of the appellate jurisdiction. The scope of revision and appeal has been distinguished in a long line of Supreme Court judgments. **[See: (2002) 3 SCC 626 (*Harshavardhan Chokkani v. Bhupendra N. Patel*), (2003) 6 SCC 659 (*Shiv Shakti Coop. Housing Society v. Swaraj Developers*), AIR 1965 SC 1585 (*State of Kerala v. K.M. Charia Abdulla and Company*), AIR 1963 SC 698 (*Hari Shankar v. Rao Girdhari Lal Chowdhury*), (1965) 1 SCR 601 (*State of Kerala v. K.M. Charia Abdulla and Company*), (1980) 4 SCC 259 (*Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar*), (2003) 6 SCC 659 (*Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers*), (2014) 9 SCC 78 (*Hindustan Petroleum Corporation Limited v. Dilbahar Singh*) and (2019) 6 SCC 424 (*Karnataka Housing Board v. K.A. Nagamani*)]**

26. With due respect, I am of the view that the aforesaid Division Benches has wrongly applied the proposition of law as laid down in ***Shankar Ramchandra Abhyankar (supra)*** to hold that an appeal will be maintainable against an order rejecting a plaint passed by a Court in the exercise of its revisional jurisdiction. The appealability of an order or decree must be traced exclusively to the relevant provisions of appeal under the Code.

27. Given the discourse hitherto, I am of the view that where the Trial Court rejects an application under Order VII Rule 11 and the Revisional Court reverses the said order by rejecting the plaint, an application under

Article 227 of the Constitution of India will lie, but when such an application is allowed by the Trial Court and, in appeal, the Appellate Court either affirms or reverses the said deemed decree, a second appeal within the scope of Section 100 of the Code shall lie before the High Court. I answer the reference in negative and respectfully concur with the conclusion at paragraph 68 of the judgment of Justice Sen.

(Kausik Chanda, J.)