

(2002) 12 SHI CK 0012

In the High Court Of Himachal Pradesh

Case No : Civil Revision Petition No's. 158 of 2001, 378 of 2000 with CMP No. 464 of 2000 and CRP No. 208 of 2001 with CMP No. 285 of 2001 and etc. etc.

Sallo Ram and etc.

APPELLANT

Vs

Kuldip Chand and etc.

RESPONDENT

Date of Decision : 13-12-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, Order 18 Rule 7, Order 41 Rule 27, 115

Citation : AIR 2003 HP 148 : (2002) 3 ShimLC 86

Hon'ble Judges : Lokeshwar Singh Panta, J;Arun Kumar Goel, J

Bench : Division Bench

Advocate : G.D. Verma, R.K. Bawa and Kuldip Singh and Romesh Verma, Dinesh Bhanot, B.S. Atri, Rajpal, Rajpal Thakur, Rama Mehta, Ramesh Thakur and Jatinder Thakur, for the Appellant; C.B. Singh, Kapil Dev Sood, T.S. Chauhan, Deepal Bhasin, Ankush D. Sood, Sanjiv Kuthiala, Vijay Bhatia and Niraj Gupta, for the Respondent

Judgement

Arun Kumar Goel, J.—These are two sets of references which have been ordered to be listed together.

2. While Civil Revision Petition No. 158 of 2001 was being heard, it transpired that an application under Order XVIII, Rule 17 of the CPC for recall of plaintiff was filed by the petitioner in this case which was declined. At the time of hearing of this revision, reference was made by learned counsel for the parties to two decisions of this Court in case Poshu Ram v. Chobe Ram. Civil Revision No. 187 of 1999, Kunji Devi v. Chaman Lal, Civil Revision No. 389 of 1999. In both these decisions, it was held that revision against order passed under Order XVIII, Rule 17 of the CPC being not the "case decided", as such was not maintainable. Reliance was placed on decisions of the Punjab and Haryana High Court as such both revisions were rejected. There were decisions of this Court to the contrary, i.e. State of Himachal Pradesh v. Shri Sita Ram 1972 SLJ 131; Kulwant Singh v.

Om Prakash Sud 1998 (1) SLJ 290 ; Satinder Singh Vs. Sukhdev, and Sarwan Kumar v. Ravinder Kumar 2000 (1) Shim LC 373. In these circumstances, following order was passed :--

"In view of the conflicting decisions of this Court (supra) regarding maintainability of the revision petition against an order under Order 18, Rule 17 and 17-A, CPC, it is necessary that the matter be set at rest by referring it to a larger Bench. Accordingly, Registry is directed to place the matter before the Hon'ble Chief Justice for constituting a Bench to examine the matter. Ordered accordingly."

3. Civil Revision Nos. 333 of 2001, 354 of 2001, 1 of 2002 and 235 of 2002, all arise from orders on applications filed in the respective cases under Order XVIII, Rule 17-A of the Code of Civil Procedure. Civil Revision No. 158 of 2001 arises out of an order passed on an application under Order XVIII, Rule 17 of the Code of Civil Procedure.

4. The other set of cases has arisen out of the orders passed by appellate Courts below on applications under Order XLI, Rule 27 of the Code of Civil Procedure. When the matter in Civil Revision No. 314 of 2001 came before the Court for consideration, following order was passed :--

"Mr. Sood submitted that on maintainability a learned single Judge of this Court (Coram : A.K. Goel, J.) has referred the matter to a larger Bench by a speaking order passed on 2nd January, 2001 (it should be 2nd November, 2001) in Civil Revision No. 158 of 2001 titled Sailo Ram v. Kuldip Chand 2003 (1) LLR 424. Referring two contradictory orders, the learned single Judge felt that in view of conflicting decisions of this Court regarding maintainability of revision petition against an order passed under Order 18, Rule 17 and Rule 17-A of the Code, it was necessary that the matter be set at rest by referring it to a larger Bench. The Registry was directed to place the matter before the Hon'ble Chief Justice to constitute a Bench to examine the matter.

It appears that in pursuance of the above order, a Division Bench was constituted by the Hon'ble Chief Justice and the matter was also placed before larger Bench (Division Bench) and it awaits hearing and decision.

It also appears that, even thereafter a similar question arose before another Single Bench of this Court in Civil Revision No. 378 of 2000 titled Brastu v. Rajinder Singh, a reference was made by the learned single Judge (Coram : L. Section Panta, J.) on 9th November, 2001 to a larger Bench.

The learned counsel for the petitioner, no doubt, submitted that in the first matter, i.e. Civil Revision No. 158 of 2001, the question related to examination of witnesses under Order 18, Rule 17 and/or 17-A of the Code and did not relate to Order 41, Rule 27 of the Code. But in the second matter, i.e. Civil Revision No. 378 of 2000, the question related to Order 41, Rule 27 of the Code, Again in the first matter, the learned single Judge has referred to an order passed by another

learned single Judge of this Court in Civil Revision No. 187 of 1999 titled Poshu Ram v. Chobe Ram, decided on 7th July, 1999 (Coram ; R. L. Khurana, J.), wherein the revision under Order 18, Rule 17-A of the Code was disposed of relying on two decisions of the High Court of Punjab and Haryana in Smt. Parmeshwarl Devi v. Mohinder Kumar (1998) 2 RLJ 406 : (1998 AIHC 3028); Sher Singh v. Kashmiri Lal Chaman Lal Saraf. (1998) 2 Pun LR 225 : (1998 AIHC 3469) and Balwant Singh v. Bishan Singh, (1998) 2 Pun LR 482 : (1998 AIHC 3029). Both the cases dealt with by the High Court of Punjab and Haryana related to Order 41, Rule 27 of the Code.

In my opinion, therefore, it would not be appropriate for me as a single Judge of this Court to decide the question. Judicial comity as also discipline requires me to refer the matter to a Division Bench. Let the matter be decided along with Civil Revision No. 158 of 2001 and Civil Revision No. 378 of 2000.

It is open to the learned counsel for the petitioner to take all contentions available at law including the contention that in revision under Sub-section (5) of Section 24 of the Act, such "a revision would be maintainable or that the remedy available to the petitioner under the Act would be to file revision against the impugned order as no right of appeal is provided; or that the scope of revision under Sub-section (5) of Section 24 is very wide than scope of revision in Section 115 of the Code or that first reference was made by this Court in C.R. 158 of 2001 related to Order 18, Rule 17 and 17-A of the Code and, hence, the reasons recorded would not apply on the case on hand. It is equally open to the learned Counsel for the respondent to contest the matter.

Let all the questions be considered by a larger Bench (Division Bench) and appropriate decision be taken. To be placed with Civil Revision No. 158 of 2001 and 378 of 2000. Order accordingly."

5. Order passed in Civil Revision Petition No. 378 of 2000 by one of us (L. S. Panta, J.) is as under :--

"Post this revision petition alongwith C.R. No. 19 of 2002 (it should be CR 158 of 2001), titled Sailo Ram v. Kuldip Chand (2003 (1) LR 424), said to have been referred by Hon"ble brother Justice Arun Kumar Goel, J. to the larger Bench."

6. In this background, Civil Revision Nos. 67, 68, 90 of 2002 and Civil Revision Nos. 314 of 2001 and 378 of 2000 have been taken up for consideration before this Bench.

7. We will be first dealing with revision petitions so far those which are under Order XVIII, Rule 17-A of the Code of Civil Procedure. Rule 17-A to Order XVIII of the Code of Civil Procedure, was added by Central Act No. 104 of 1976 which became applicable w.e.f. 1-2-1977. This Rule was in the following terms :--

"17-A. Procedure of evidence not previously known or which could not be produced despite due diligence.-- Where a party satisfies the Court that, after the exercise of due, diligence, any evidence was not within his knowledge or

could not be produced by him at the time when that party was leading his evidence, the Court may permit that party to produce that evidence at a later stage on such terms as may appear to it to be just. "

8. Legislature having examined the law as also having examined the provisions of CPC as amended from time to time, passed Central Acts No. 46 of 1999 as well as No. 22 of 2002. By means of these amending Acts, some existing provisions in the CPC were amended and some deleted.

9. As per Section 27(iii) of Act No. 46 of 1999, Rule 17-A was omitted. It reads as under :--

"27. Amendment of Order XVIII.-- In the first Schedule, in Order XVIII,--

(i) to (ii) *** **

(iii) Rule 17-A shall be omitted;

(iv) *** **

10. It was not disputed at the time of hearing on behalf of the parties that both the Central Acts, supra, are in force since 1-7-2002. In this behalf, when a reference is made to Chapter-IV of Act No. 46 of 1999, as well as to Section 16 of Act No. 22 of 2002 which deals with both Repeals and Savings, it is clear what are the provisions, which were intended to be saved when both these amendments came into force.

11. So far legality of the provisions of both these Amending Acts is concerned, it came up for consideration before the Supreme Court, in Salem Advocate Bar Association Vs. Union of India (UOI), A prayer was made for withdrawal of the writ petition, which was declined by the Supreme Court. Except in the context of new Section 89, as it stood by Amending Act of 1999, the matter was finally disposed of. What was held in the context of this Section was as under :--

"9. It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in Court need not necessarily be decided by the Court itself. Keeping in mind the laws delays and the limited number of Judges which are available. It has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

10. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of Court, there is a

requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the Court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

11. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for settling the disputes, this has not really reduced the burden on the Courts. It does appeal to us that modalities have to be formulated for the manner in which Section 89 and, for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a committee is constituted so as to ensure that the amendments" made become effective and result in quicker dispensation of justice.

12. In our opinion, the suggestion so made merits a favourable consideration. With the constitution of such a committee, any creases which require to be ironed out can be identified and apprehensions which may exist in the minds of the litigating public or the lawyers clarified. As suggested, the committee will consist of a Judge sitting or retired nominated by the Chief Justice of India and the other members of the committee will be Mr. Kapil Sibal, Senior Advocate, Mr. Arun Jetley, Senior Advocate, Mr. C.S. Vaidyanathan, Senior Advocate and D. V. Subba Rao, Chairman, Bar Council of India. This committee will be at liberty to co-opt any other member and to take assistance of any member of the Bar Association. This committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to Section 89(2)(d)."

12. Regarding Order XVIII, Rule 17-A of the Code of Civil Procedure, it was held as under :--

"21. We find that in the Code of Civil Procedure. 1908, a provision similar to Rule 17A did not exist. This provision, as already noted, was inserted in 1976. The effect of the deletion of this provision in 2002 is merely to restore status quo ante, that is to say, the position which existed prior to the insertion of Rule 17-Ain 1976. The remedy, if any, that was available to a litigant with regard to adducing additional evidence prior to 1976 would be available now and no more. It is quite evident that Rule 17-A has been deleted with a view that unnecessary applications are not filed primarily with a view to prolong the trial."

13. In view of the above legal position. Order XVIII, Rule 17-A of the CPC being not on the statute book, in our considered view, so far reference of the cases under it to the larger Bench is concerned, it is of purely academic interest and need not be answered.

14. Though learned counsel for the petitioners in all these cases after referring to a decision of the Supreme Court of India in the case of Sufal Kumar Sood v. Varinder LalSood, Civil Appeal No. 5736 of 2001 arising out of Special Leave "Petition (C) No. 18407 of 2000 submitted that these revisions are maintainable. For ready reference, this order is extracted hereinbelow :--

"Learned counsel for the parties are agreed that this case be disposed of at this stage.

Leave granted.

The sole question that arises in this appeal is whether the revision filed by the appellants is maintainable in law or not. We have heard counsel for the parties and perused the record. We are of the view that the revision was maintainable. Under such circumstances, we set aside the order under challenge and send the case back to the High Court, to decide the same on merits.

The application is allowed. There shall be no order as to costs."

15. This appeal before the Supreme Court had arisen from the judgment of this Court in Civil Revision Petition No. 284 of 1999 wherein after following the decision rendered by this Court in the case of Vidya Sagar Sood v. Amar Chand, 1993 (Suppl) CCC 25 (HP), it was held that the revision is not maintainable. It may be noted that revision in the case of Sufal Kumar (supra) had arisen out of an order passed by the Court below whereby an application under Order XXVI, Rule 9 of the CPC had been dismissed. A perusal of Civil Procedure prior to its amendment supra which became applicable w.e.f. 1-7-2002 and even prior to it shows that an order passed under Order XXVI, Rule 9 of the CPC was not covered either prior to or after the amendments of 1999 and 2002. However, Supreme Court after setting aside the order of this Court, held that revision was maintainable. We are not going into the question of maintainability after deletion of Rule 17-A of Order XVIII of the CPC despite the decision in the case of Sufal Kumar supra.

16. Another reason to take this view is that whatever Rule of a particular Order as contained in the First Schedule of the Code of Civil Procedure, and was intended to be saved as mentioned in the Repealing and Saving Sections of both the aforesaid Amending Acts, admittedly, not only Rule 17-A of Order XVIII of the CPC stands deleted, but without there being any mention of its applicability to the pending cases. Thus, it can safely be said that this Rule was never intended to be saved. In this behalf, it may also be noted that rules of procedure unless specifically provided in their specific applicability prospectively, can be applied retrospectively, Looking to the Sections dealing with such Repeal and

Savings, it can safely be inferred and held that the applicability of Order XVIII, Rule 17-A of the CPC to the pending cases was never intended to be saved.

17. So far revisions arising out of the orders passed on an application under Order LXI, Rule 17 of the CPC for leading additional evidence are concerned, again there are two direct conflicting decisions of this Court on which reliance was placed by learned Counsel for the parties. Besides referring to a number of other decisions, reliance was placed by both sides while putting up the respective pleas regarding maintainability or otherwise of these revisions.

18. On behalf of petitioners, reliance was placed on the decision in Parveen Kumar v. Prem Chand. 2001 (3) Shim LC 356, wherein though revision was dismissed, but regarding maintainability, plea raised on behalf of respondent-Prem Chand was in the following terms :--

"8. Mr. K.D. Sood, learned counsel for the respondent, at the outset contends that the revision petition is not maintainable as the impugned order of the learned District Judge doe"s not amount to case decided within the meaning of Section 115 of the Code. The contention is that the impugned order does not determine the right of the parties in any manner. Mr. Sood refers to Poshu Ram v. Chobe Ram (C.R. 187/1999) in support of his contention. In Poshu Ram learned single Judge of this Court relying upon Smt. Parmeshwari Devi v. Mohinder Kumar. 1998 (2) LJ 406 : (1998 AIHC 3028); Sher Singh v. Kashmiri Lal Chaman Lal Saraf 1998 (2) Pun LR 225 : (1998 AIHC 3469) and Balwant Singh v. Bishan Singh, 1998 (2) Pun LR 482 : (1998 AIHC 3029), took a view that an order dismissing an application for additional evidence would not fall within the meaning of case decided for the purpose of Section 115 of the Code,"

19. And after examining the case law and what is meant by "case decided" it was observed as under :--

"19. In view of the ratio of the Supreme Court in Major S.S. Khanna Vs. Brig. F.J. Dillon, and Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, the ambit, scope and limitation of the powers of the High Court is no longer res integra. The expression "case decided" is not restricted to the entirety of the proceedings in Civil Court. It includes part of proceedings in the same case including the proceedings which may be of interlocutory nature. The High Court will be within its supervisory jurisdiction to interfere u/s 115 of the Code of Civil Procedure, if it is shown that the appellate Court acted, in exercise of jurisdiction with material irregularity and the order passed by the Court, if allowed to stand, will cause failure of justice or irreparable injury to the party aggrieved.

20. It is equally settled, as held in Naresh Chandra AIR 2001 SC 134, the first appellate Court would be within its right to admit additional evidence if that Court found itself unable to pronounce judgment owing to lacuna or defect in the evidence. The ability to pronounce a judgment must be understood to mean to pronounce a judgment "satisfactorily to the mind of the Court delivering it".

When the first appellate Court does not find the necessity for additional evidence, the High Court normally should not interfere with such order in exercise of its power u/s 115 of the Code of Civil Procedure."

20. On the other hand, on behalf of respondents, reference was made to another decision of this Court rendered in the case of Kunji Devi v. Chaman Lal, latest HLJ 2000 (HP) 805 , wherein after keeping in view the decisions of the Supreme Court in the case of Gurdev Singh and others Vs. Mehnga Ram and another, as well as other decisions, it was held as under :--

"12. While dealing with the question of maintainability of a revision against an order passed under Order 41, Rule 27 of the Code of Civil Procedure, the Hon''ble Supreme Court in case Gurdev Singh and others Vs. Mehnga Ram and another, held as under :

"2 The grievance of the appellant before us is that in an appeal filed by them before the learned Additional District Judge, Ferozepur, in an application under Order LXI, Rule 27(b), CPC (CPC) the learned Additional District Judge at the final hearing of the appeal wrongly felt that additional evidence was required to produce as requested by the appellants by way of examination of a handwriting expert. The High Court in the impugned order exercising jurisdiction u/s 115. C.P.C. took the view that the order of the Appellate Court could not be sustained. In our view the approach of the High Court in revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which was within the jurisdiction of the Appellate Court. The reason is obvious. The Appellate Court hearing the matter finally could exercise jurisdiction one way or the other under Order XLI, Rule 27 specially Clause (b). If the order was wrong on merits, it would always be open for the respondent to challenge the same in accordance with law if an occasion arises to carry the matter in Second Appeal, after an appellate decree is passed. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction. Only on this short question, without expressing any opinion on the merits of the controversy involved and on the legality of the contentions advanced by both the learned Counsel for the parties regarding additional evidence, we allow this appeal, set aside the order of the High Court....."

21. And finally revision was dismissed.

22. In Devi Ram and Another Vs. Murli and Others, while dealing with Section 115 of the CPC in the context of an interlocutory order, it was observed as under :--

"The word "case" in Section 115 is of a very wide import and means any state of facts juridically considered, and therefore an interlocutory order deciding any substantial question in controversy between the parties so as to affect their rights, as distinguished from a purely formal or incidental order, amounts to a

case decided within the meaning of Section 115, even though such an order is passed in the course of the trial of a suit. Hence, an erroneous decision on a preliminary issue as to jurisdiction will be open to revision."

23. In *State v. Krishhnu Mal*, AIR 1955 Him Pra 33, while dealing with the situation created on account of remand order having been passed by appellate Court, it was held as under :--

"(8). The obvious answer to this contention is that this Court is seized of the matter in the exercise of its revisional jurisdiction. The District Judge has created an impossible situation by rejecting the cross-objections, while remanding the appeal under a Rule which has no application. The powers of this Court, to remedy such flagrant errors, in the exercise of its revisional jurisdiction, are unfettered. It can proceed even "suo motu" in the interest of justice."

24. In *Mina Ram Vs. Amolak Ram and Others*, it was observed as under :--

"The word "case", used in Section 115, C.P.C. is a word of comprehensive import and includes civil proceedings other than suits and a part of a proceeding and an interlocutory order directly affecting the rights and obligations of parties is a "case decided". It has been so held by the Supreme Court in *Major S.S. Khanna Vs. Brig. F.J. Dillon*, with respect to the interpretation of Section 115, C.P.C. which does not apply to Him. Pra. But these observations apply with full force to the interpretation of Clause (a) of Paragraph 35(1) aforesaid.

The order, therefore, of Subordinate Judge directing the petitioner to pay an additional court-fee is a case decided within the meaning of paragraph (35)(1), aforesaid and is revisable. Though the order is interlocutory it affects the rights of the petitioner."

25. In *Sohan Singh and Company v. Mohammad Aishak Tyagi*, 1972 SLJ (HP) 270, again while interpreting the word "case" in Section 115 of the Code of Civil Procedure, it was held as under :--

"Held, the expression "Case" used in Section 115 is a word of "comprehensive import" and is not restricted to the entirety of proceeding in a Civil Court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding would be to impose a restriction upon the exercise of power of superintendence, which is inherent in the phraseology of Section 115."

26. In *Ram Dass Vs. Smt. Subhash Bakshi*, case decided" was interpreted to mean :--

"13. A "case is decided" when there is an adjudication on the rights or obligations of the parties in controversy. Such adjudication may be in the nature of a decision expressly deciding those rights or obligations. For example, the entire suit or appeal may be disposed of or a distinct part of the suit or appeal may be disposed of finally so far as the Subordinate Court is concerned. Or, the adjudication may be such as to have the necessary effect of deciding those rights

or obligations. The rejection of an application for amending the plaint by the addition of further items of property concerning which relief is sought in the suit would give rise to a "case decided". For in that even the effect would be to deny relief at once to the plaintiff in respect of those items of property."

27. In Major S.S. Khanna Vs. Brig. F.J. Dillon, three Judges of the Supreme Court observed as under :--

"(7). The jurisdiction of the High Court to set aside the order in exercise of the power u/s 115 CPC is challenged by Khanna on three grounds :--

(i) that the order did not amount to "a case which has been decided" within the meaning of Section 115 Code of Civil Procedure;

(ii) that the decree which may be passed in the suit being subject to appeal to the High Court; the power of the High Court was by the express terms of Section 115 excluded: and

(iii) that the order did not fall within any of the three Clauses (a), (b) and (c) of Section 115.

The validity of the argument turn upon the true meaning of Section 115 Code of Civil Procedure, which provides :

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

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

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

(c) to have acted in the exercise of its jurisdiction illegally or with material Irregularity, the High Court may make such order in the case as it thinks fit."

The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e. there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second, sets out the circumstances in which the jurisdiction may be exercised. But the power of the High Court is exercisable in respect of "any case which has been decided". The expression "case" is not defined in the Code, nor in the General Clauses Act. It is undoubtedly not restricted to a litigation in the nature of a suit in a Civil Court : *Balkrishana Udayar v. Vasudeva Aiyar* 44 App. 266 : AIR 1917 PC 71 it includes the jurisdiction of the Civil Court in which the jurisdiction of the Court is invoked for the determination of some claim or right legally enforceable. On the question whether an order of a Court which does not finally dispose of the suit or proceeding amounts to a "case which has been decided", there has arisen a serious conflict of opinion in the High Courts in India and the question has not been directly considered by this Court. One view which is accepted by a majority of the High Courts is that the expression "case" includes an interlocutory

proceeding relating to the rights and obligations of the parties, and the expression record of any case includes so much of the proceeding as relates to the order disposing of the interlocutory proceeding. The High Court has therefore power to rectify an order of a Subordinate Court at any stage of a suit or proceeding even if there be another remedy open to the party aggrieved i.e. by reserving his right to file an appeal against the ultimate decision, and making the illegality in the order a ground of that appeal. The other view is that the expression "case" does not include an issue or a part of a suit or proceeding and therefore the order on an issue or a part of a suit or proceeding is not a "case which has been decided", and the High Court has no power in exercise of its revisional jurisdiction to correct an error in an interlocutory order.

(9). By their constitution the High Courts of Calcutta, Madras and Bombay were within Presidency towns, as successors, to the respective Supreme Courts competent to issue writs of certiorari, mandamus and prohibition, This was so because the jurisdiction of the Courts of King's Bench and Chancery in England to issue those writs was conferred upon the three Supreme Courts, But exercise of this jurisdiction which was established by Charters of the British Crown, was (except as to British subjects and servants of the company) restricted. The jurisdiction did not ordinarily extend to the territories beyond the presidency towns : AIR 1943 164 (Privy Council) The appellate Courts, called the Sudder Adalats, which exercised appellate powers over the East India Company's Courts in the mofussil of the three Presidencies were not the Courts of the King of England; they were the creatures of Regulations, and did not administer the law of any of the prerogative writs-except probably the writ of habeas corpus. But the power to superintend the exercise of jurisdiction by the mofussil Courts was found essential to the proper functioning of the Sudder Courts and the Sudder Courts were accordingly invested by express legislative enactments with authority to rectify orders of the mofussil Courts subordinate thereto. Bombay Regulation II of 1827 of Ch. I. Section 5(2) authorised the Sudder Court at Bombay to call for the proceedings of any subordinate Civil Court and to issue such order thereon as the case may require. No regulation was however enacted elsewhere conferring revisional jurisdiction upon the Supreme Court or the Sudder Court in respect of adjudication by subordinate Courts. The Code of 1859 contained no provision for the exercise of revisional powers by the Sudder Courts, but by Section 35 of Act XXIII of 1861 the Sudder Courts were invested with the power to call for the record of any case decided in appeal by the subordinate Courts and in which no further appeal lay, when it appeared that a subordinate Court had exercised jurisdiction not vested in it by law. With the setting up of the High Courts in the Presidency towns of Calcutta, Madras and Bombay power of superintendence was conferred by Section 15 by the Charter Act (24 and 25 vict. Ch. 104) upon the High Courts over subordinate Courts. By Section 622 of the Code of 1877 revisional jurisdiction of the High Courts was defined, and made exercisable in the condition set out in Clauses. (a) and (b) of the present Section 115. Clause (c) was added by the Amending Act XII of 1879.

This jurisdiction was exercisable suo motu as well as on application to the High Court. It was conferred in the widest terms. The jurisdiction was supervisory and visitorial and was complementary to the powers conferred by Clause 15 of the Charter Act, 1861, and the subsequent Constitution Acts, and was conceived in the interest of maintaining effective control over Courts subordinate to the High Courts. It had to be so conferred because in the historical evolution of the powers of the diverse High Courts" supervisory jurisdiction to issue writs of certiorari and Prohibition could not be effectively made in respect of the mofussil Courts.

(11) The expression "case" is a word of comprehensive import : it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a Civil Court. To interpret the expression "case" as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice.

(12). It may be observed that the majority view of the High Court of Allahabad in *Buddhoo Lal and Another Vs. Mewa Ram*, founded upon the supposition that even though the word "case" has a wide signification the jurisdiction of the High Court can only be invoked from an order in a suit, where the suit and not a part of it is decided, proceeded upon the fallacy that because the expression "case" includes a suit, in defining the limits of the jurisdiction conferred upon the High Court the expression "suit" should be substituted in the section, when the order sought to be revised is an order passed in a suit. The expression "case" includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for equating it with a suit alone.

(14) The Subordinate Judge in the present case held by an interlocutory order that the suit filed by Dillon for recovery of the amounts advanced to Khanna was not maintainable. That was manifestly a decision having a direct bearing on the rights of Dillon to a decree for recovery of the loan alleged to have been advanced by him, which he says Khanna agreed to repay, and if the expression "case" includes a part of the case, the order of the Subordinate Judge must be regarded as a "case which has been decided".

(16) In considering whether the revisional jurisdiction of the High Court was intended to cover decisions, which did not dispose of the suit or proceeding, possibility of delay arising in the disposal of some cases because of investigation commenced by the High Court is not, in our judgment, a sound ground for presuming that the jurisdiction was to be limited to those matters which were finally disposed of.

(18) The third question may now be dealt with. By the order passed by the Court of First Instance on the third issue it was held that the suit filed by Dillon was hot

maintainable. That decision, in our judgment affected the rights and obligations of the parties directly. It was a decision on an issue relating to the jurisdiction of the Court to entertain the suit filed by Dillon. In any event the decision of the Court clearly attracted Clause (c) of Section 115 Code of Civil Procedure, for the Court in deciding that "the suit was not maintainable as alleged in paragraphs 15, 16, 17 and 18 of the written statement" purported to decide what in substance was an issue of fact without a trial of the suit on evidence. Dillon alleged in his plaint that at the request of Khanna, he had advanced diverse loans (from the funds lying in deposit in the joint account) and that the latter had agreed to repay the loans. The cause of action for the suit was therefore the loan advanced in consideration of a promise to repay the amount of the loan, and failure to repay the loan. By his written statement Khanna had pleaded in paragraph 15 that Dillon had not advanced any money to him and that Dillon had not claimed the amount for himself and therefore he was not entitled to file a suit for recovery of the amounts. By paragraph 16 he pleaded that Dillon having admitted in the plaint that the amounts in suit were to be paid back to the joint account he was not entitled to file the suit. By paragraph 17 it was pleaded that a suit by one joint fund was not maintainable and by paragraph 18 he pleaded that Dillon could not institute a suit against him because the amount was not repayable. All these contentions raised substantial issues of fact which had to be decided on evidence, and Dillon could not be non-suited on the assumption that the pleas raised were correct. At the threshold of the trial two problems had to be faced :

(1) Whether in a suit to enforce an agreement to repay an amount advanced in consideration of a promise to repay the same, the question as to the ownership of the fund out of which the amount was advanced is material; and

(2) if the answer is in the affirmative, whether the fund in fact belonged jointly to Dillon and Khanna.

The Judge of the Court of First instance unfortunately assumed without a trial an affirmative answer to both these questions. Under Order 14, R, 2 Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of laws only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of, fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction under the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court : not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lopsided trial of the suit."

28. This decision was followed by this Court in the case of Sohan Singh and Company v. Mohammad Aishak Tyagi, 1972 SLJ (Him Pra) 270.

29. Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, was a case dealing with Section 115 of the CPC when the trial Court had overruled objection to certain questions being put to a witness. It was held by the Supreme Court that it is not a "case decided" as no case in fact was decided by such refusal. In this background, the appeal was allowed.

30. In Jaipur Development Authority Vs. Smt. Kailashwati Devi, during the pendency of the appeal before the first appellate Court below, an application under Order XLI, Rule 27 of the CPC was allowed. This decision was relied in the case of Kunji Devi (2000 HLJ (HP) 805 supra. This is a decision by two Judge Bench. Whereas the decision in Major S.S. Khanna Vs. Brig. F.J. Dillon, is a decision by three Judge Bench.

31. In this behalf, what was held by the Supreme Court in Kadiyala Rama Rao v. Gutala Kahna Rao (dead) by Lrs. (2000) 3 SCC 87, while dealing with Section 115 of the CPC and is relevant for the present revisions is as under :--

"15. The learned advocate in support of the appeal further contended that in any event the revision petition as framed is not maintainable and the High Court should have rejected the same. We are, however, unable to lend concurrence therewith since the legislative change introduced in Section 115 is clear enough to indicate that an order passed by a Court subordinate to the High Court in its appellate jurisdiction, if it is not appealable, would be within the ambit of Sections 115 of the Code and thus a revisional application would be maintainable, A revision application against order which is not appealable either before the subordinate Court or the High Court would also be maintainable."

32. This is again a decision by two Judge Bench of the Supreme Court of India. This needs to be followed being latter in point of time in view of what has been held in the case of State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, and Union of India (UOI) and Another Vs. K.S. Subramanian, .

33. In addition to the above and keeping in view the decision of the Supreme Court of India in the case of Sufal Kumar, supra, it is obvious that revision against the order passed under Order XLI, Rule 27 of the CPC would be maintainable, What will be the fate of such revision, will depend on facts of each case.

34. Looking to the overall view of the law laid down by the Supreme Court of India and this Court, it is held that revision is maintainable against an order passed on an application under Order XLI, Rule 27 of the Code of Civil Procedure, view to the contrary taken by this Court in the case of Kunji Devi v. Chaman Lal, Latest 2000 HLJ (HP) 805, does not, in our view, lay correct law and is thus overruled.

35. So far question relating to the maintainability of the revision against an order passed under Order XVIII, Rule 17 of the CPC is concerned, the same would be

maintainable and for that we again rely on the decision of the Supreme Court of India in the case of Sufal Kurnar, supra.

36. References are answered in the aforesaid terms.

No other point is urged.

Registry while placing an authenticated copy of this order on the file of all the connected cases, shall now list the revision(s) before the appropriate Bench(es) for further proceedings.