

(2017) 11 KAR CK 0012
In the Karnataka High Court
Case No : 1227 of 2005

Sri Channappa Hanamant

APPELLANT

Vs

Kallappa S/o Mallappa Thambad

RESPONDENT

Date of Decision : 10-11-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Order 2Rule 2](#), [Order 23Rule 1](#) -
[Limitation Act, 1963](#), [Section 14](#), [Article 5](#)

Citation : (2017) 11 KAR CK 0012

Hon'ble Judges : K.N.Phaneendra

Bench : SINGLE BENCH

Advocate : Sanjeevkumar C Patil, M.B.Nargund, Sona Vakkund, D.P.Ambekar

Judgement

1. The present Appeal is preferred against the concurrent findings given in O.S.No.585/1989 dated 15.06.2002 on the file of Addl. Civil Judge (Jr.Dn.) Bijapur, confirmed in R.A.No.412/2004 dated 05.03.2005, on the file of Fast Track Court-I, Bijapur.

2. On 09.12.2005, this Court has framed the following substantial question of law :- "Whether the finding of the courts below that suit is not barred by time since earlier suit in O.S.No.34/69 was permitted to be withdrawn with liberty to file a fresh suit is perverse and arbitrary, being contrary to law as no material has been produced to show that the suit was permitted to be withdrawn with liberty to file fresh suit."

3. At the time of submitting the arguments, the learned counsel for the appellant has strenuously contended that the trial Court and the first appellate Court have not properly considered the legal point with regard to surrender of the tenancy by Sri Shivappa and as well as the effect of the earlier sale deed executed by Smt Venkubai in favour of defendant No.2. Therefore, another substantial question of law also to be framed by this Court. After hearing both the parties on

merits, I prefer to frame one more substantial question of law in the following manner:- "Whether the trial Court and the first appellate Court have committed any serious error in considering the effect of the earlier registered sale deed executed by Smt. Venkubai in favour of defendant No.2 dated 21.09.1967 and regarding the effect of the surrender of the land by the Tenant as alleged by the defendants in favour of Smt.Venkubai?"

4. In order to answer the above said substantial questions of law, it is just and necessary for this Court to understand the case of the plaintiffs and the defendants, as per their pleadings before the trial Court and grounds urged before the first appellate Court. Therefore, it is just and necessary to have the brief factual aspects of the case, as pleaded by the parties before the trial Court.

5. The ranks of the parties is mentioned as per their ranks before the Trial Court. The plaintiff No.1 Sri Kallappa Mallappa Thambad is none other than the son of the second plaintiff by name Bhimawwa. It is the claim of the plaintiffs that the suit lands bearing R.S.No.527/1 and 527/2, measuring 06 acres and 12 guntas, originally belonged to one Smt Venkubai W/o Kulkarni of Sarwad, having inherited from her husband in the year 1947. The said Smt Venkubai died in the year 1974, leaving behind defendant No.1 Smt Sushilabai and one Smt Indirabai as her heirs. The said Smt Indirabai is none other than the mother of defendant Nos.3 to 6. The said Smt Venkubai was the absolute owner in possession and enjoyment of the properties. Both the daughters had no right in the suit land.

6. It is the further contention of the plaintiffs that they have purchased the suit lands on 10.05.1972 for valuable consideration of Rs.10,000/- from Smt Venkubai under a registered sale deed. To the said sale deed the mother of defendant Nos.3 to 6, Smt Indirabai was also a joint executant. Plaintiff No.1 was a minor at that time represented by plaintiff No.2.

7. The plaintiffs' further contention is that they and their ancestors were in possession of the land much prior to the execution of the sale deed as their predecessor were cultivating the said land for a long time as tenants. One Sri Shivappa was the grand-father of plaintiffs and father-in-law of plaintiff No.2, was cultivating the land as a protected tenant till his death, in the year 1969-70. Thereafter, his son Sri Mallappa continued the cultivation and he died in the year 1971. Thereafter, the plaintiffs continued to be in possession, cultivating the same as tenants. As the facts stood thus, the said Smt Venkubai filed an application for resumption of the land from the erstwhile tenant Sri Shivappa. But the said application was rejected on 07.02.1969 by the concerned Tahasildar, and as such Smt Venkubai never acquired the possession of the property at any point of time. The plaintiffs and their predecessors continued to be in possession of the said lands as tenants till they purchased the property on 10.05.1972. However, the said Smt Venkubai claiming that the deceased Shivappa has given a Varadi that he has delivered possession in favour of Smt Venkubai, mischievously colluded with the Revenue Authorities, got her name entered in the record of rights without any notice to Sri Shivappa or to the persons who

were in possession of the property. There was no such surrender in accordance with law by the said Sri Shivappa and the said alleged surrender is contrary to Section 25 of the Karnataka Land Reforms Act, having got revenue entries changed clandestinely. The said Smt Venkubai alleged to have executed a registered sale deed in favour of defendant No.2 to the extent of 06 Acres of northern portion of the suit land for consideration of Rs.5,000/- and rest of the land was relinquished in her daughters favour. The said transaction took place during the subsistence of tenancy by Sri Shivappa. Therefore, the same is ineffective, void abinitio. As such, none of the defendants can claim any right, title or interest over the suit lands and alleged relinquishment deed and the sale deed in their favour by Smt Venkubai are hit by Section 17 of the Indian Registration Act.

8. The ancestor of the plaintiffs Sri Shivappa has filed a suit O.S.No.34/1969 for permanent injunction before the Court of Munsiff, Bijapur to restrain the defendants therein from interfering with his cultivation and enjoyment. During the pendency of the said suit Sri Shivappa died, his son Sri Mallappa, father of first plaintiff came on record. But he too died in the year 1970. Thereafter, the plaintiffs came on record. The said suit was decreed at the first instance on 26.11.1970. However, the defendant No.2 and Smt Venkubai preferred R.A.No.2/71 before the Civil Judge Court, Bijapur. After contest the said appeal was allowed and the matter was remanded to Trial Court with a direction to refer the issue of tenancy as claimed by deceased Shivappa to the Land Tribunal. On 08.11.1974 the matter was referred to Land Tribunal and the Land Tribunal returned the matter to the Trial Court again on the ground that the plaintiffs have already purchased the suit schedule property from Smt Venkubai under registered sale deed dated 10.05.1972. Therefore, no issue of tenancy arises. Hence, the matter was returned to the Civil Court. Later the said suit in O.S.No.34/1969 was taken-up once again and the suit was dismissed on the ground that the Land Tribunal has not given any finding with regard to the tenancy. The earlier sale deed executed in favour of defendant No.2 by Smt. Venkubai, holds good and as such the suit was dismissed. Aggrieved by the said judgment, the plaintiffs preferred an appeal in R.A.No.1/1987. During the pendency of the said appeal the plaintiffs have withdrawn the said suit by filing an application dated 30.01.1988. The appellate Court has permitted them to withdraw the suit with liberty to file fresh suit. Therefore, the plaintiffs have filed the present suit in O.S.No.585/1989 claiming that the findings in the earlier suit neither operates as res-judicata nor any findings recorded in the said suit are binding upon them.

9. In the present suit, they have claimed for declaration and for consequential relief of Permanent Injunction against the defendants on the basis of the sale deed dated 10.05.1972 and also on the basis of continuous possession over the said land by Sri Shivappa and subsequently by his son Sri Mallappa and the plaintiffs.

10. After receiving the summons, the defendants appeared through their counsel. Defendant Nos.2 to 6 have filed the written statements and defendant No.1 has adopted the written statement filed by defendant Nos.3 to 6. The defendants denied that the land in Sy.No.527 forms one compact block. They contend that prior to 1967, there

was one compact block and out of which defendant No.2 purchased northern 06 acres of land by virtue of registered sale deed dated 21.09.1967 for Rs.5,000/- from deceased Smt Venkubai and the same has been numbered as R.S.No.527/1. Remaining portion of 12 acres 16 guntas was renumbered as R.S.No.527/2 and that portion was relinquished by Smt Venkubai in favour of her daughters. As such the defendant Nos.1 to 6 became the owners of their respective properties. The transaction entered into between Smt Venkubai and the defendants came to be certified on 05.11.1967 in the revenue records in M.E.No.8155 and 8156 respectively.

11. It is the further contention of defendants that one Sri Shivappa, the grandfather of plaintiff No.1 was admittedly a tenant of the said land. However he surrendered his tenancy rights over the entire extent of land voluntarily by receiving a sum of Rs.4,000/- from Smt Venkubai as consideration and further gave Varadi voluntarily on 12.08.1967. The Varadi has also been accepted and Smt Venkubai came into possession of the said land and thereafter sold some portion of the land as noted above in favour of defendant No.2, which is bifurcated and numbered as 527/1 and she also relinquished the remaining property in favour of her daughters, which portion is numbered as 527/2 and mutations were also accepted in M.E.No.8147 dated 14.09.1967, M.E.Nos.8155 and 8156 dated 05.11.1967 and the same has not been challenged by the plaintiffs at any point of time.

12. The defendants have admitted the previous proceedings in O.S.No.34/1969 and at the earliest point of time it was decreed and the said judgment has been challenged in R.A.No.2/1971 and the same has been remitted to the trial Court and the trial Court has referred the tenancy issue in O.S.No.34/1969 to the Land Tribunal and the Land Tribunal has returned the same to the trial Court and the trial Court has dismissed the suit subsequently and thereafter the plaintiffs have preferred an appeal in R.A.No.1/1987 and on 30.01.1988 in that appeal the suit has been withdrawn, those factual aspects, substantially admitted by the defendants. However, the defendants have categorically stated that the appellate Court has not given any permission to the plaintiffs to file a fresh suit on the same cause of action. Therefore, the suit of the plaintiffs is barred under Order II Rule 2 of Code of Civil Procedure (hereinafter referred to as the "CPC" for short) and the suit is also barred by limitation. It is also contended that the suit filed by the plaintiffs is not maintainable as they have not sought for cancellation of the sale deed executed by Smt Venkubai in favour of defendant No.2. It is also contended that the daughters of Smt Venkubai have not consented for selling the property in favour of the plaintiffs. Therefore, their rights are not affected. It is

also contended that the Land Tribunal, Bijapur has not decided the tenancy issue as the tenancy rights of the suit lands have become extinguished by efflux of time and also by virtue of surrender of the tenancy rights by Sri Shivappa in favour of Smt Venkubai. Therefore, for all the above said reasons, the defendants have prayed for dismissal of the suit.

13. On the basis of the above said rival contentions of the parties, the trial Court has framed the following issues :- 1. Whether plaintiffs prove that they have purchased the suit lands R.S.No.527/1 and 527/2 for valuable consideration and became the absolute owners ?

2. Whether defendant proves that the sale deed executed by Venkubai in favour of plaintiffs is a sham and created one of the suit land ?

3. Whether plaintiffs prove that the M.E.8147 is illegal ?

4. Whether the plaintiffs prove that the sale deed of Venkubai in favour of defendant No.2 effecting M.E.No.8155 and relinquishment of her rights to her daughters and effecting M.E.No.8156 are ineffective and void ?

5. Whether the defendants prove that the suit of plaintiffs is hit by the principles of resjudicata?

6. Whether the suit of plaintiff is barred by limitation ?

7. Whether the defendants prove that the sale deed executed by Venkubai in favour of plaintiff No.1 is hit by the doctrine of lispendence ?

8. Whether the plaintiffs prove that they are in possession of suit land and the obstruction of the defendants ?

9. What order or decree ?

14. In order to prove their case, plaintiff No.1 examined himself as P.W.1 and got exhibited thirty three documents as Exs.P.1 to 33. On the other hand defendant No.2 examined himself as D.W.1 and defendant Nos.3 to 6 have examined their Power of Attorney Holder as D.W.2 and got marked eighteen documents as Exs.D.1 to D.18. The trial Court has in detail heard the arguments and considering the oral and documentary evidence on record, gave the findings on Issue Nos.1, 3, 4 and 8 in the affirmative and Issue Nos.2, 5, 6 and 7 in the negative and ultimately decreed the suit of the plaintiffs, declaring that plaintiff No.1 is the absolute owner of the suit land bearing R.S.No.527 (comprising of 527/1 and 527/2) of Sarawad Village and also declared that the sale deed obtained by defendant No.2 from deceased Smt Venkubai with regard to Sy.No.527/1 of Sarwad Village is illegal, void and not binding on the plaintiffs and also granted temporary injunction restraining the defendants from interfering with plaintiffs peaceful possession and cultivation of the suit lands.

15. Being aggrieved by the above said judgment, defendant No.2 specifically preferred the appeal before the Fast Track Court-I, Bijapur i.e., in

R.A.No.412/2004. The defendant Nos.1 and 3 to 6 have also preferred an independent appeal before the same Court in R.A.No.413/2004. The first appellate Court after considering the pleadings of the parties, evidence adduced by them and as well as the issues framed by the trial Court and findings given thereon and also considering the grounds urged by the appellants, has framed the following points for its consideration :- 1. Whether the plaintiff proves that the M.E.No.8147 is illegal ?

2. Whether the plaintiff proves that sale deed by Venkubai in favour of the defendant No.2 and effecting M.E.No.8155 and relinquishment of her right to her daughters and effecting M.E.No.8156 are ineffective and void ?

3. Whether the plaintiffs prove that they have purchased the suit land for valuable consideration and are the owners in possession of the suit land ?

4. Whether the suit is hit by the principles of res-judicata ?

5. Whether the suit is barred by limitation ?

6. Whether the plaintiffs are entitled for the reliefs claimed ?

7. Whether the interference in the judgment and decree passed by the learned Trial Court is necessary ?

8. What order and decree ?

16. The appellate Court after re-appreciating the oral and documentary evidence on record, has given its finding on Point Nos.1 to 3 and 6 in the affirmative and Point Nos.4, 5 and 7 in the negative and ultimately concurred with the judgment and decree passed by the trial Court and dismissed both the appeals.

17. Being aggrieved by the above said judgment of the first appellate Court, the defendant No.2 alone has preferred the appeal before this Court in R.S.A.No.1227/2005. However, the defendant Nos.1 and 3 to 6 have not preferred any appeal before this Court. This Court after hearing both the parties has framed the substantial questions of law as noted above.

18. Now let me consider the above said two important substantial questions of law one by one. SUBSTANTIAL QUESTION OF LAW - 1

19. This particular point has been attacked by the learned counsel for the appellant on three counts. Firstly, there was no proper withdrawal of the earlier suit filed in O.S.No.34/1969 with a liberty to file fresh suit on the same cause of action. Therefore, Order XXIII Rule 1 of CPC is not applicable. It is contended that the suit is hit by Order II Rule 2 of CPC, as the plaintiff has not claimed all the relief, which were available to him at the time of filing of O.S.No.34/1969. Therefore, in the subsequent suit filed in O.S.No.585/1989, he cannot claim any other remedies than the reliefs claimed in O.S.No.34/1969. It is contended that the trial Court and the first appellate Court have not properly appreciated the application filed under Section 14 of the Limitation Act. Because Section 14 of

the Limitation Act is only applicable if a person is prosecuting a case in a wrong forum and where the Court has no jurisdiction to try that matter. Both the aspects are absent in so far as this case is concerned. Hence, the learned counsel pleaded for answering this point in the affirmative and to dismiss the suit of the plaintiff's in toto.

20. Repelling the above argument, the learned counsel for the respondents contended that the whole conduct of the parties has to be looked into, to ascertain whether actually at the time of filing of O.S.No.34/1969, all the reliefs, which are claimed in subsequent suit O.S. No.585/1989 were available and whether the plaintiff has been prosecuting with bonafides in O.S.No.34/1969, the same has been withdrawn, knowing fully well, that the plaintiff has made out a case for such withdrawal before the appellate Court. Hence, he pleaded that on over all looking into the factual aspects of the case, the plaintiff was bonafide in prosecuting his earlier case and as there was a defect in jurisdiction with reference to the remedy sought for, as such the suit had been withdrawn and therefore fresh suit has been filed on different cause of action. Therefore, the suit is maintainable.

21. In the above said backdrop, as already culled out, there is no dispute between the parties that earlier O.S.No.34/1969 was filed by the plaintiff one Sri Shivappa who died during the pendency of the suit and the present respondents continued the said suit as legal representatives and the said suit was decreed and thereafter an appeal was filed in the year 1971 in R.A.No.2/1971 and the same was remitted to the trial Court with a direction to refer the tenancy issue to the Land Tribunal. In the meantime the plaintiff has purchased the suit property from one Smt Venkubai on 04.05.1972. It is also not disputed that the Land Tribunal on 20.07.1982 passed an order dropping the proceedings sent back the case to the Civil Court on the ground that the tenancy rights have been merged into ownership rights with the plaintiff, in view of the purchase of the land vide registered sale deed dated 04.05.1972. It is also an undisputed fact that after remission, the said suit was dismissed on 05.12.1986 against which order R.A.No.1/1987 was filed. When the said appeal was pending, an application was filed on 31.01.1988 for withdrawal of the suit. The same was allowed and the appeal was dismissed permitting the plaintiff to withdraw the suit. It is also not in dispute that the plaintiff has presented a fresh suit on 04.02.1988 registered in O.S.No.56/1988 earlier and later on transferred the said case to the jurisdictional Court, where the case has been re-registered as O.S.No.585/1989. The said suit was decreed on 15.01.2002 in favour of plaintiff. The aggrieved parties i.e., 2nd defendant has preferred an appeal in R.A.No.412/2004 and the appeal was also dismissed on 05.03.2005, against which order the present appeal is preferred.

22. Now the Court has to consider, in view of the above said sequence of events whether the plaintiff has been throughout, prosecuting the case with all bonafides before adverting to each and every count. It is just and necessary to

bear in mind some of the decisions cited by the learned counsel for the appellant in this context.

23. In a decision reported in (2011) 9 SCC 126 between Khatri Hotels Private Limited and Another, vs. Union of India and another, the Hon''ble Apex Court has discussed with regard to when actually right to sue first accrues to a person and when the suit is barred under Articles 58 of the Limitation Act. The Hon''ble Apex Court has observed that - "While enacting Articles 58 of 1963 the legislature has designedly made a departure from Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mean that the suit is based on multiple cause of action, the period of limitation begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed, if it is beyond the period of limitation, counted from the day when the right to sue first accrued."

24. Based on the above said decision, it is the case of defendants, that the right to sue accrued for all the reliefs in the year 1969 itself, when particularly the suit has been withdrawn without liberty to file fresh suit. The limitation has to be taken into consideration for the purpose of this suit from the date when the cause of action first arose i.e., in this case in the year 1969. Therefore, the suit filed in the year 1988 is barred under the above said Section 58 of the Limitation Act.

25. So far as this point is concerned let me consider whether the second suit i.e., O.S.No.585/1989 is filed with the same cause of action or with different cause of action and whether the plaintiff has withdrawn the earlier suit and whether it amounts to giving them an opportunity permission to file fresh suit and whether the plaintiff could claim all the reliefs at the time of filing the suit in the year 1969 itself and whether the suit is hit by Order II Rule 2 of CPC.

26. It is evident from the records that earlier suit in O.S.No.34/1969 was filed only for permanent injunction restraining the defendants from interfering with the plaintiffs possession and enjoyment of the property. In the said suit, plaintiff has specifically contended that he was a protected tenant under the first defendant Venkubai and her husband and he continued to be in possession of the property as on the date of suit. The other defendants have contended that they have purchased the property by virtue of the registered sale deed to the extent of 06 acres and odd vide registered sale deed dated 21.09.1967 to the extent of 06 Acres 08 guntas. Therefore, they entered into possession to that extent and plaintiff is not entitled for any injunction. Therefore, it is clear that the earlier suit was only for mere injunction.

27. The conduct of the plaintiff has to be tested from the surrounding circumstances. It is seen from the records that the said suit was decreed earlier vide judgment dated 26.11.1970. Throughout, the injunction order was operating in favour of plaintiff and by virtue of the first decree, his possession has also

been confirmed. Therefore, he believed that the Court has got jurisdiction to grant the injunctive relief, and continued in the said suit filed even though the defendants have claimed that they have purchased some portion of the property. Irrespective of the purchase of the property by the defendants, the Court recognized the possession of the plaintiffs.

28. In R.A.No.2/1971 the first appellate Court has also recognized the possession of the plaintiffs, however, it found that the tenancy issue cannot be decided by the Civil Court. Hence, it directed the trial Court to refer the matter to the Land Tribunal. What is to be noted here is that, throughout, the possession of the plaintiff's had been recognized and injunction had been continued. After referring the matter to the Land Tribunal, the Land Tribunal has returned the matter to the trial Court, because of merger of rights of the tenant as owner by virtue of the sale deed dated 04.05.1972 executed by Smt Venkubai. Here also the plaintiff must have been under the impression that his right to possession and also his title has been recognized by the Tribunal. Therefore, he must have felt that he was safe in the hands of the trial Court. After the matter has been taken up again by the trial Court, the trial Court has proceeded to hear the matter but ignoring all the previous injunction order granted in favour of plaintiff mainly relied upon the sale deeds in favour of the defendant No.2 and the alleged surrender of the land by the plaintiff's grand father Shivappa in favour of first defendant Smt Venkubai, dismissed the suit of the plaintiff.

29. It is to be noted here that, the trial Court has also observed in its judgment passed in O.S.No.34/1969 on the second occasion while dismissing the suit that, the plaintiff has filed an interlocutory application before the trial Court seeking withdrawal of the suit with a permission to file fresh suit. The said interlocutory application was rejected by the trial Court. Perhaps the plaintiff after coming to know about the remission of the matter by the Land Tribunal and in view of the defendants taken up the contention that by virtue of surrender of the said land by Shivappa, the defendants have acquired right, title and interest over the property and they virtually countered the sale deed of the plaintiff in the year 1972. Therefore, the plaintiff at the earliest point of time filed an application for withdrawal of the suit with an intention to file a fresh suit. This conduct of the plaintiff clearly goes to show that at that time itself, the plaintiff has taken a decision to withdraw the suit because if the suit is continued in the same manner, he cannot claim the ownership of the property on the basis of the sale deed of 1972 and without such relief the Court may not get the jurisdiction to grant relief of declaration and there was every chances of his suit being dismissed for want of declaratory relief. Therefore, the plaintiff even at the earliest point of time, shown his bonafides and made an application seeking withdrawal of the suit.

30. After dismissal of the suit vide judgment dated 05.12.1986 and after filing an appeal in R.A.No.1/1987, the plaintiff has filed similar application under Order XXIII Rule 1 of CPC, for withdrawal of the suit with a liberty to file a fresh suit. The appellate Court considering the said application, vide order dated

30.01.1988, which could be borne out from the order sheet produced before the trial Court, the appellate Court has permitted the plaintiff to withdraw the suit. Therefore, it goes without saying that, though specifically the appellate Court has not given the liberty to file fresh suit, but it goes to show that, considering the over all story of the case, the appellate Court has decided to permit them to withdraw the suit. Therefore, here also the plaintiff has established his bonafides, consistently making applications to withdraw the suit soon after coming to know that, the Court may not have jurisdiction to grant declaratory decree without there being a prayer.

31. Apart from the above, the Court has to see as to what exactly the cause of action pleaded in the earlier suit and in the subsequent suit, whether the time spent in the previous suit on such basis can be excluded.

32. Before advertng to the pleadings of the plaintiff in both the suits with reference to the prayer, it is just and necessary to bear in mind the provisions of law, particularly Order XXIII Rule 1 of CPC as well as Order II Rule - 2 of CPC. Order XXIII Rule - 1 of CPC reads as follows :- "WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim.-

(1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court. (2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subjectmatter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in subrule (3), he shall be liable for such costs as the Court may award and shall be

precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. (5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]

33. Order XXIII Rule (2) & (3) of CPC are applicable if a second suit is filed withdrawing the earlier suit with liberty. If once the Court permits to withdraw the suit, it is an indication that the parties have never taken the judgment of the trial Court in any manner and the binding nature of the said judgment vanishes if the suit is allowed to be withdrawn. Even if the suit is withdrawn without liberty to file a fresh suit on the same subject matter or cause of action, if the plaintiff is able to show that he has spent time before the Court which had no jurisdiction to grant the relief or the plaintiff may not get the relief prayed for, in such an eventuality, if he withdraws the suit and files a fresh suit on different cause of action, though the subject matter may be same, the party would get the remedy i.e., exclusion of the said time spent before the courts.

34. It is worth to note here a decision of the Hon'ble Apex Court reported in AIR 1978 SC 312, between Korin vs. Indian Cables Co. Ltd. and others. It is cited before the trial Court and relied upon by the appellate Court also. Wherein the Apex Court has observed that - "If the title of the parties changed from that of the earlier suit and the prayer of the plaintiff is all together different in the subsequent suit and cause of action also changes, then the finding in the earlier suit will not operate as binding on the parties as the same is not hit by the principles of resjudicate." It is also worth to note here a decision of this Court as relied upon by the trial Court also reported in 1989 (2) Kar.L.J 84 = ILR 1989 KAR 1855 between Deputy Commissioner vs K.V.Gururaja Rao, wherein this Court has observed that - "If a suit is withdrawn due to technical defects and subsequently another suit is filed on the same cause of action, even then the time spent in the earlier litigation is liable to be given set off, considering Order XXII Rule 1 of CPC as well as Section 14 of the Limitation Act."

In view of the above said rulings and the factual aspects of this case, the prayer sought for in the earlier suit and the present suit play a dominant role.

35. In O.S.No.34/1969, the suit of the plaintiff is only for permanent injunction restraining the defendants from interfering with the plaintiffs peaceful possession and enjoyment of the suit schedule property. In the second suit O.S.No.589/1989 the plaintiffs have claimed the following reliefs :- 1. To declare that the plaintiffs are the absolute owners of the suit property i.e., land bearing Sy.No.527/1 and 527/2 of Sarwad Village.

2. For permanent injunction restraining the defendants from interfering with the plaintiffs peaceful possession and enjoyment of the property and for costs and such other reliefs as the court deem fit under the circumstances of the case.

3. In the case if the Court finds that the plaintiffs are not in possession of the

suit land or any portion of it on the date of suit or if they are dispossessed it or any portion of it during the pendency of the suit, without being awarded possession of it from the defendant with future mesne profits.

4. Declare that the sale deed obtained by defendant No.2 from Venkubai or other defendants regarding Sy.No.527/1 in the year 1967 is illegal and void.

Comparing the prayers in the two suits, the prayers are altogether different from earlier suit to the second suit. Apart from the above, the cause of action pleaded in the earlier suit O.S.No.34/1969 is with respect to interference by the defendants on the basis of their sale deed. The plaintiff has taken up the specific contention that he has been in possession as a tenant over the said land and interference by the defendants is from the year 1969.

36. In the second suit, the plaintiffs have specifically pleaded at Paragraph No.11 that the cause of action for the suit arose at Sarwad Village in November 1987, when the defendant Nos.1 and 2 began to interfere with the plaintiffs' enjoyment of the suit land. The first interference in October 1987 has been however prevented by the appellants. Therefore, looking to the above said prayers in the plaint, the cause of action pleaded are all together different. Therefore, even the appellate Court has not permitted to file the suit afresh on the same subject matter but in view of permitting the plaintiff to withdraw the suit, which in turn, earlier judgment in O.S.No.34/1969 does not bind the plaintiff then the plaintiff is at liberty to file a fresh suit on different cause of action with different prayers. If those prayers were available as on the date of the subsequent suit and those were not available to seek at the earliest point of time, when the earlier suit was filed. The Court has to see whether the above said reliefs were available to the plaintiff or not in the earlier suit. In this background, Order II Rule 2 of CPC also play an important role. Order II Rule 2 of CPC reads as follows :- "2.Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. (2) Relinquishment of part of claim.- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. (3) Omission to sue for one of several reliefs.- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. Explanation.- For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action." On plain reading of the above said provision, Order II Rule 2 of CPC requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order II Rule 2

of CPC contemplates as situation where a plaintiff omits to sue or intentionally relinquishes, any portion of the claim, if the plaintiff so acts. Order II Rule 2 of CPC makes it clear that he will not be afterward, sue for any of the portion of the claim that has been omitted or relinquished. It must be noticed that Order II Rule 2(2) does not contemplate or bar any omission or relinquishment of any portion of the plaintiffs claim with the leave of the Court so as to entitle him to come back later to seek what has been omitted or relinquished.

37. If the above said principles are applied to the present case on hand, it is clear from the records that the plaintiff has claimed his right on the basis of his tenancy rights, an injunction order against the defendants by filing O.S.No.34/1969. Though he had an opportunity to claim for declaration i.e., the sale deed executed by defendant No.1 in favour of other defendants in the year 1967, but he had not claimed for cancellation or setting aside the same. It is quite clear here that merely because the plaintiff claims for cancellation of the sale deed of defendant No.2, he will not get any declaration of his title or right. Therefore, as on the date of filing of O.S.No.34/1969, claiming of the right for declaration on the basis of the sale deed in favour of plaintiff in the year 1972 was not available to him.

38. Further added to that, the plaintiff was not a party to the sale deed between first defendant and the second defendant entered into in the year 1967. Therefore, if the plaintiff succeeds on the basis of his sale deed, the earlier sale deed of defendant No.2 automatically has no binding force on him and he need not claim any relief of cancellation of the said sale deed even in the earlier suit or in the subsequent suit. Therefore, the relief to claim declaration on the basis of the sale deed of the plaintiff executed by defendant No.1 in the year 1972 was not available to the plaintiff.

39. Secondly, it is seen from the records that the suit which was filed in the year 1969, is only for injunction and the Court has granted the temporary injunction and earlier decreed the suit considering the possession of the plaintiff. The Appellate Court also during the pendency of the appeal continued his possession and in subsequent suit also an injunction is granted (in O.S.No.585/1989), and the suit has been decreed. This clearly indicates that, even when the matter was referred to the Land Tribunal, he must be under the impression that he may get some relief before the Land Tribunal. Therefore, he did not seek any such relief before the trial Court at the earliest point of time. Subsequently, when the Land Tribunal has returned the matter to the Civil Court again immediately and rightly he filed an application for withdrawal of the suit seeking permission to file a fresh suit, that also shows his bonafides that immediately after coming to know that he did not get any relief before the Land Tribunal. It is the Civil Court only can grant such relief to him but those relief of declaration were not claimed in the earlier suit. Therefore, he thought of withdrawing the suit for the purpose of filing a fresh suit. The trial Court erroneously rejected the said application which made the plaintiff to file the same application before the appellate Court in

R.A.No.1/1987, wherein that Court has granted the said permission. Therefore, it clearly establishes that the plaintiff has been throughout making all his efforts to convert the suit to that of a declaratory suit by withdrawing the earlier suit. More over he would not have filed a fresh suit immediately after the sale deed being executed by defendant No.1 in favour of plaintiff in the year 1972 because of the simple reason that an earlier suit was very much present. The options open to the plaintiff were either to convert the suit for declaration or to withdraw the same for technical defects and to file a fresh suit. It also goes without saying that, the Court cannot grant a relief or remedy, which is not asked for. Therefore, the plaintiff suspected that for all practical purposes his suit O.S.No.34/1969 would be dismissed for want of declaratory relief after he obtaining the property under a registered sale deed. So, till the permission is granted by the first appellate Court it can be safely said that he has been prosecuting the said suit which has no jurisdiction to grant the remedy, which is not sought for and the plaintiff is entitled to after the sale deed of 1972. Therefore, the remedy of declaration and other remedies as pleaded in the second suit were not available to the plaintiff except the relief of bare injunction when the earlier suit was filed. Therefore, in my opinion, Order II Rule 2 of CPC is not applicable to the plaintiff.

40. So far as it relates to application of Section 14 of the Indian Limitation Act is concerned, under what circumstances the Court can exclude the time spent in another Court having no jurisdiction to deal with the matter fully or partially. Section 14 of the Limitation Act, is necessary for the purpose of adjudication of the present case which reads thus: - "14. Exclusion of time of proceeding bonafide in Court without jurisdiction. 1. In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. 2.

3. Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5) of 1908), the provisions of subsection (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature."

41. From the above said provisions, it is clear that it is in the nature of the proviso to Order XXIII Rule 1 and 2 of CPC. The non-obstante clause noted in the said provision provides that notwithstanding anything contained in Sub-rule (2) of Order XXIII of CPC, the provisions of Sub-section (1) of Section 14 shall apply in relation to a fresh suit instituted and permission granted by the court under Rule 1 Order XXIII of CPC for applicability of Subsection (3) of Section 14, certain conditions are to be satisfied i.e., 1. Both the prior and subsequent

proceedings are civil proceedings prosecuted by the same party;

2. The prior proceeding had been prosecuted with due diligence and good faith;

3. The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

4. The earlier proceeding and the later proceeding must relate to the same matter in issue and

5. Both the proceedings are in a Court.

42. It is also to be noted that, the expression "good faith" qualifies prosecuting the proceeding in the Court which ultimately found to have no jurisdiction. It also depends upon the facts and circumstances of each and every case.

43. The other relevant expression noted in the provisions shall also to be construed that "defect of jurisdiction or other cause of a like nature". The expression "defect of jurisdiction" on a plain reading means the Court must lack jurisdiction to entertain the suit or proceeding. The circumstances in which or the grounds on which, lack of jurisdiction of the Court may be found are not enumerated in the Section. Therefore, it is to be understood that there is a distinction between granting permission to the plaintiff to withdraw the suit with leave to file a fresh suit for the same relief or even permitting the party to simply withdraw the suit if really the party has got any other cause of a like nature. Therefore, the words "or other cause of a like nature" used in the Section has to be construed with the words "defect of jurisdiction", that is to say, the defect must be of such a character as to make it impossible for the Court to entertain the suit or to decide the case on merits or to grant such remedies to the parties as prayed.

44. On perusal of the above said Section applying same principle to this particular case, it is clear from the entire materials on record that at the time of filing of the suit, the plaintiff could not have claimed declaration as he acquired title over the property in the year 1972. But the said title of the plaintiff has been consistently and continuously denied by the defendants. On the other hand they claimed title over the property on themselves by virtue of their sale deed in the year 1967. Therefore, there is a clear cloud created on the title of the plaintiff. Therefore, the plaintiff could not have succeeded before the said Court without praying for declaration of his title. It is also settled principle that if the title is a clear cloud casted on the title of the plaintiff or where the plaintiffs' title is specifically denied and where the defendants claim title over the property, in such an eventuality, mere suit for injunction may not be maintainable and the Court may not be in a position to grant the decree of injunction without there being any prayer and pleading for declaration of title of the plaintiff. Therefore, in this context the words used in the above said Section the other cause of a like nature has to be understood. It is also trite to say here that the plaintiff could not have filed a suit till the disposal of the earlier suit or without withdrawing the

suit, because the said sale transaction between himself and defendant No.1 took place in the year 1972, when the suit was already pending before the Court. As, I have already stated, only two options were available to the plaintiff either to amend the plaint or to withdraw the suit and to file a fresh suit in order to correct the defect in the earlier suit, in view of the subsequent events and circumstances taken place. Therefore, the plaintiff in good faith that he may not get relief upto 1987, he made all his efforts before the trial Court and the first appellate Court to withdraw the suit having come to know that the Court may not have jurisdiction to grant such relief in the injunction suit in the absence of declaration relief. Therefore, it can be safely said by considering all the surrounding circumstances, the plaintiff had been prosecuting the earlier suit with all good faith and soon after coming to know that the Court has no jurisdiction to grant mere injunction without there being any declaration to his suit, he made all efforts to withdraw the suit at the earliest point of time and upto the appellate Court granting permission to withdraw the earlier suit. Therefore, Section 14 of the Indian Limitation Act is also very well applicable to this case. I am of the opinion that the trial Court and the first appellate Court have not committed any serious error in holding that the plaintiff's suit is maintainable.

45. As I have already noted that, even excluding the application filed under Section 14, of the Limitation Act, there is no bar to file fresh suit on the different cause of action at any point of time. Even considering this particular aspect, as I have noted above, the relief sought for in the earlier suit and the relief sought for in the subsequent suit and cause of action pleaded are different and from 1972 onwards the plaintiff has got a separate cause of action to file a suit for declaration of title and for other reliefs, but as the suit was already pending, unless the suit is withdrawn or amended, he could not have filed the second suit. Therefore, it can be safely said that the expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the relief for the right involved. Compendiously the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right or grievance to the judgment of the Court. Therefore, every facts, which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove such fact, compromises in "cause of action". Therefore, even on the basis of the fresh cause of action the plaintiff has filed the suit and his suit is held to be maintainable and no illegality committed by both the courts. Hence, I answer substantial question of Law No.1 in the negative holding that the findings of the trial Court and the first appellate Court are not arbitrary or contrary to any law.

SUBSTANTIAL QUESTION OF LAW NO.2:

46. So far as this substantial question of law is concerned, the defendant has

claimed that the trial Court has not properly appreciated and considered the legal aspect of the sale deed executed by Smt.Venkubai in respect of the suit property on 21.09.1967 and also not properly considered the effect of surrender of the land by the plaintiff in favour of Smt Venkubai, in the year 1967 itself prior to the above said sale deed and subsequent event of Land Tribunal not declaring the said Sri Shivappa as a tenant.

47. There is no dispute in this case with regard to the execution of the sale deed by Smt.Venkubai on 21.09.1967. The Court has to see whether as on that particular day Smt.Venkubai had got any absolute alienable and transferable right, title, interest and possession over the property as it is admitted throughout by Smt.Venkubai that plaintiff Sri Shivappa was a protected tenant of the land in dispute. It is also not much in dispute with regard to the execution of the sale deed in favour Shivappa by Smt.Venkubai in the year 1972.

48. The entire matter revolves around surrender of the said land by Sri Shivappa in favour of Smt.Venkubai. It is well recognized principle under the Karnataka Land Reforms Act of 1974 that the tenancy rights are heritable rights and as soon as the Land Reforms Act came into existence, the land vests with the Government. It is also an admitted fact in this case that the said Sri Shivappa the ancestor of plaintiffs, was in possession and enjoyment of the property. It is the specific case of the defendants that in the year 1967, Sri Shivappa the erstwhile tenant surrendered his tenancy rights over entire Sy.No.527 in favour of Smt Venkubai by receiving Rs.4,000/- as consideration and further gave Varadi voluntarily on 12.08.1967. Therefore, Sri Shivappa seized to be a tenant of the suit land when Smt Venkubai executed a registered sale deed in respect of the said land on 21.09.1967 and put the defendant No.2 in possession of the land and mutation was also accepted and certified by Revenue Authorities. The remaining lands were also given to the daughters of Smt Venkubai by her. Therefore, the defendants contend that, the trial Court and the first appellate Court have not properly appreciated the surrender of the land by Sri Shivappa.

49. The trial Court and the first appellate Court have considered this particular aspect on Issue No.4 and both the courts have definitely come to the conclusion that the said surrender was not properly proved or established in accordance with law. Admittedly, the tenancy rights, over immovable properties is on par with the immovable properties, the rights have to be given up only in accordance with law prevailing at that particular point of time. According to Section 17 of the Registration Act, any relinquishment of the property should be done by way of a registered document. But there is no material placed before the Court that the said tenant Sri Shivappa has executed any surrender document in accordance with Law by means of any registered document as the said document was alleged to be for consideration of Rs.4,000/-.

50. If it is not by way of any registered document, what is the other mode of transfer recognized under law is also to be looked into.

51. The mode recognized under Section 25 of the Karnataka Land Reforms Act 1961, is that the property can only be surrendered with the previous permission of the Court. In this background, what exactly has been done by the said Smt Venkubai and Sri Shivappa, as alleged by the parties in the evidence and as well as in the pleadings is that the said Sri Shivappa has given a Varadi as per Ex.D.1 stating that he surrendered his tenancy rights on 12.08.1967, by voluntarily giving up his cultivation in the year 1965-1966 itself. It is quite curious to note here that, on 21.12.1966, Smt Venkubai has filed an application for resumption of the suit land before the Tahasildar under Section 14 of the Karnataka Land Reforms Act. The said document is marked at Ex.P.19 before the Court. The said application was registered before the Tahasildar in Application No.64/1967, which is marked at Ex.P.21. The said rozanama shows that on 07.02.1969 the resumption application filed by Smt Venkubai came to be dismissed. It creates a serious doubt if at all Sri Shivappa had executed a surrender deed and Waradi as per Ex.D.1 what was the necessity for Smt Venkubai to file another application before the Tahasildar for resumption of the land and permission to surrender the said land.

52. Moreover, this document Ex.D.1 has been specifically denied by the plaintiffs. On careful perusal of this Ex.D.1, which is running about two pages stating that the said Sri Shivappa executed this document considering the poor status of Smt Venkubai and being a widow and no avocation for her livelihood and no other lands are available, therefore, by taking Rs.4,000/- the said application was executed as a Wardi for change of Waradi in the name of Smt Venkubai. This document is attested by witnesses by name M.K.Peerashetti and Erappa Gadigappa Sali and alleged to have signed by Sri Shivappa. It is stated in the document, the same has been taken place in presence of some villagers. When the document is produced before the Court which is attested though it is not compulsorily attestable document in law but once it is attested the document should be proved as if the said document is an attested document by examining any one of the attesting witness or the scribe. But very peculiarly enough this document is only styled as Waradi but not a document transferring any right under the said document. The document though it is specifically denied has not been proved in accordance with law.

53. On careful perusal of Section 25 of the Karnataka Land Reforms Act, which says that the tenancy rights have been surrendered with previous permission of the Court only and no Revenue Officer including Tahasildar have got any power to accept any document like Ex.D.1 and give permission for surrender of tenanted lands. Even otherwise as could be seen the surrender application filed under Section 14, before the Tahasildar has been rejected. Therefore, for all practical purposes there cannot be any valid surrender of the land by Sri Shivappa and therefore the trial Court and the first appellate Court have rightly held that the said Sri Shivappa continued to be in possession of the property even as on the date of the suit and by virtue of the sale deed in the year 1972, he acquired a valid title over the property.

54. Now coming to the effect of the sale deed alleged to have been executed by said defendant No.1 in the year 1967, immediately after the surrender of the lands by Sri Shivappa. There is no material to show that after the said surrender, actual possession of the land has been given to Smt Venkubai.

55. It is worth to note here that the trial Court in O.S.No.34/1969, at the initial stages decreed the suit in the year 1970 precisely on 26.11.1970, till that point of time though the sale deed of defendant dated 22.09.1967 was operating but still the court held that he was not in possession of the property by virtue of the sale deed and therefore granted injunction and ultimately decreed in the year 1970. The matter was remanded to the trial Court in R.A.No.2/1971 and the matter was sent to the Land Tribunal and the Tribunal returned the same to the Civil Court on 20.07.1982 and after remand the trial Court has dismissed the suit on 05.12.1986, till that point of time the possession of the plaintiffs have been recognized by the Civil Courts throughout. Because of the reason the suit was dismissed on the second occasion on 05.12.1986 in O.S.No.34/1969. It cannot be at stretch of imagination be said that the defendant in any manner entered into the suit, as there is no injunction order granted in his favour in any manner. Even in this particular case O.S.No.56/1988 filed after disposal of R.A.No.1/1987, wherein the plaintiff has withdrawn the earlier suit in O.S.No.34/1969, in O.S.No.56/1988, which is ultimately registered as O.S.No.585/1989, throughout, the injunction order was granted recognizing the possession of the plaintiff and the said injunction order was operating from 09.03.1988. Even till disposal of the suit, as it is evident that the present suit has been decreed and appellate Court has also confirmed the said judgment and decree. Therefore, the continuous possession of the plaintiff even much prior to the filing of the earlier suit in O.S.No.34/1969, as a tenant has also been continuously recognized by the courts upto till today. Therefore, the sale deed executed by defendant No.1 in favour of defendant No.2 cannot be said that the possession has been given to him. Therefore, it is only a sale deed bereft of any possession over the property. Therefore, the title is not complete in favour of defendant No.2 as the valid possession has not been delivered in favour of him. On the other hand the plaintiff has been in possession and enjoyment of the property.

56. Further added to that the Land Tribunal has recognized the merger of the tenancy rights with the ownership right by virtue of the sale deed executed by Smt Venkubai in favour of tenant Sri Shivappa, in the year 1972. The valid right of tenancy when merges with the ownership right, it goes without saying that considering the pre-existing right over the property, the plaintiff has acquired the said title in the year 1972. Therefore, the sale deed of the plaintiff has got a predominant character as against the sale deed of defendant No.2. Therefore, the trial Court and the first appellate Court have categorically come to the conclusion that defendant No.1 cannot be said to have acquired the complete and absolute ownership over the property. It is quite obvious to say that defendant No.2 at any point of time claimed any possession over the property from the plaintiff, though he got the sale deed in the year 1967. Therefore, both

the courts have rightly held that the earlier sale deed executed by Smt Venkubai is not binding upon the plaintiffs and the surrender of the land has not been properly made and the Land Tribunal has rightly considered the merger of tenancy rights in the ownership rights of Sri Shivappa in the year 1972. It goes without saying that when the Tribunal has categorically stated that only in view of the purchase, the plaintiff has acquired the right and there is a merger of the said right. Even under Section 39 of Karnataka Land Reforms Act, which says that an alienation can be made by the owner only in favour of tenant himself by giving first option. If that is so the tenancy rights will automatically extinguished and that will groom into ownership right. Therefore, looking to the above said factual and legal aspects, there is no mistake committed by the trial Court and the first appellate Court, there is no error in considering the effect of sale deed in favour of defendant No.2 dated 21.09.1967 as against the sale deed in the year 1972 in favour of said Sri Shivappa and merger of the tenancy rights into ownership right. Therefore, I am of the opinion, the second substantial question of law is also to be answered in the negative and in view of the same, I proceed to pass the following ORDER The substantial questions of law are answered in the negative. The Regular Second Appeal deserves to be dismissed. Accordingly, Regular Second Appeal is dismissed with cost throughout. The judgment and decree passed by the trial Court and the first appellate Court are hereby confirmed.