
(2013) 09 BOM CK 0250

In the Bombay High Court

Case No : Writ Petition Nos. 5775 of 2012, 722 of 2013 and Civil Revision
Application No. 482 of 2012

Walchandnagar Industries Limited

APPELLANT

Vs

Indraprastha Developers and Others

RESPONDENT

Date of Decision : 25-09-2013

Acts Referred:

Citation : (2014) 2 ALLMR 550

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Judgement

R.K. Deshpande, J.—Writ Petition No. 722 of 2013 filed by the original defendant No. 1 takes exception to the order dated 28-11-2012 passed by the learned Civil Judge, Senior Division, Pune, allowing Exhibit 68 - the application for amendment under Order VI, Rule 17 of the CPC filed by the plaintiffs in Special Civil Suit No. 590 of 2011, after conclusion of cross-examination of one witness, viz. Mahendra Maniklal Shah, examined by the plaintiffs. It was a suit for declaration that there is a concluded conditional contract between the plaintiffs and the defendant No. 1 for transfer of right, title and interest in the suit property in favour of the defendant No. 2 and for permanent injunction restraining the defendant No. 1 from dealing with the suit property in any manner prejudicial to the interest of the plaintiffs. By way of amendment, which has been allowed by the Trial Court, a relief of specific performance of contract and for possession of the suit property, has been asked for.

2. The Trial Court has recorded the finding that the plaintiffs have indirectly sought relief of specific performance of contract in the original suit and, therefore, the plaintiffs were directed to pay the deficit court fee. The further finding recorded is that the amendment sought does not change the basic structure of the suit, so also the additional pleadings and prayer are necessary for deciding the real controversy in the suit, and in peculiar circumstances of the case, it cannot be said that the plaintiffs are not diligent in filing an application

for amendment of the plaint.

3. Initially, the matter was listed before this Court on 6-2-2013, and an order of status quo was passed. The learned counsels have put their appearance for the respondents. On 24-7-2013, the matter was taken up for final disposal. Shri S.G. Aney, the learned Senior Counsel, appeared for the petitioners; whereas Shri GS. Godbole, the learned counsel, appeared for the respondent Nos. 1 and 2, the original plaintiffs. The respondent Nos. 3 and 4 supported the case of the respondent Nos. 1 and 2/plaintiffs.

4. During the course of arguments, in the beginning, it was expressed to the learned counsels for the parties that there is a board of at least 125 matters listed daily in the form of writ petitions or civil revision applications challenging the interlocutory orders, and hence in order to adopt some uniform criteria about entertaining all such petitions or revision applications, can certain guidelines not be laid down? The learned counsels have agreed to address this Court on such question to be framed. Accordingly, a question of law is finalized in consultation with the learned counsels for the parties, and an order was passed on 24-7-2013 as under:

1. After hearing the learned Counsels appearing for the parties for quiet sometime, it is proposed that the Counsels should address this Court on the following question;

Where a Court subordinate to the High Court, passes an interlocutory order in any suit or other proceedings, deciding an issue or determining some right or liability based upon the conspectus of facts, should this Court exercise its Revisional jurisdiction u/s 115 of the CPC or as the case may be, a Writ Jurisdiction under Article 226 or 227 of the Constitution of India, to interfere, when such decision or determination, can be more conveniently and effectively challenged by exercising a statutory right of appeal available, after the final decision in such a Suit or proceedings.

2. Since the question is repeatedly coming up for consideration of this Court in exercise of its Revisional Jurisdiction u/s 115 of CPC or a Writ Jurisdiction under Article 226 and 227 of the Constitution, the Members of the Bar are at liberty to address this Court on this question. Hence, notice be given to the Members of Bar that the matter is kept on 1st August 2013 at 3.00 p.m.

5. Some of the lawyers sitting in Court room expressed their desire to address the Court on the point and suggested that the notice be given to the members of the Bar. Accordingly, a notice of the aforesaid order was given to the Bar Council of Maharashtra & Goa on 26-7-2013; in response to which, this Court had pleasure to hear the arguments of the learned counsels Shri A.V. Anturkar, Shri Shriram Kulkarni, Ms Deepa Ahuja, Shri Amit A. Gharte and Shri Advit M. Sethna, who have voluntarily come forward to assist the Court in deciding such question of law.

6. In Writ Petition No. 5775 of 2012, the order passed by the learned Civil Judge, Junior Division, rejecting the application Exhibit 18 under Order VII, Rule 11(b) of CPC objecting to the valuation of the suit property, has been challenged. In Civil Revision Application No. 482 of 2012, the order passed by the learned Civil Judge, Junior Division, rejecting the applications Exhibits 20 and 38 raising objections under Sections 9A and Order VII, Rule 11(b) and (c) of CPC, has been challenged. In these matters, I have heard the learned counsels Shri P.B. Shah, Smt. Jaymala Oswal for the petitioners, and Shri Kiran Kandipile for the respondents.

7. It is not the argument by any of the learned counsels appearing for the parties or otherwise that merely because the interlocutory order can be challenged after the final decision, the jurisdiction of the revision u/s 115 of CPC or the jurisdiction under Article 226 or 227 of the Constitution of India cannot be invoked. All the learned counsels are at consensus ad idem in their arguments that the exercise of jurisdiction by the High Court under the aforesaid provisions will depend upon the facts and circumstances of each case and there is no absolute bar by way of an alternate remedy of challenging an interlocutory order after the final decision of the case. I accept this proposition of the learned counsels. By this judgment, I am also not laying down any law that there would be an absolute bar for the High Court to entertain either a revision u/s 115 of CPC or a petition under Article 226 or 227 of the Constitution of India. By this judgment, I am merely laying down certain guidelines for exercise of such jurisdiction in certain situations and that too, to a possible extent. The judgment does not take care of all situations, but deals with certain recurrent orders so as to maintain consistency in the approach, which is to be made known to all.

8. I must put a word of appreciation for the efforts taken by all the learned counsels appearing for the parties and those who have voluntarily come forward before this Court to spare their time and assist the Court in laying down the guidelines by exposing various shades of arguments and bringing to the notice of this Court the provisions of law and precedents. In order to reduce the length of this judgment, I have not referred to the arguments advanced by each and every counsel, who has addressed this Court, but the arguments advanced will find answers in the judgment. Almost all the citations referred to by the learned counsels have also been dealt with.

Kinds of Judgments

9. There are three kinds of judgments, as has been held by the Apex Court in the case of *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, which are as under:

- a) A final judgment;
- b) A preliminary judgment; and
- c) An intermediary or interlocutory judgment

Final Judgment

10. "A final judgment" means a formal expression of an adjudication, which, so far as regards the Courts expressing it, conclusively determines the rights of the parties with regard to all matters in controversy so as to put an end to the litigation pending before it. In such a case, the suit is either dismissed or allowed or partly dismissed or partly allowed. It becomes a "decree" within the meaning of sub-section (2) of Section 2 of the CPC ("CPC"), which can be challenged on facts and law both, by exercising a statutory right of appeal u/s 96 read with Order XLI, Rule 1 of CPC. In such case, there is no question of entertaining either a revision u/s 115 of CPC, or a writ petition under Article 226 or 227 of the Constitution of India.

Preliminary Judgment

11. "A preliminary judgment" in a suit is normally of two kinds, viz. (i) where a suit is dismissed without going into the merits, but only on the preliminary objection raised by the other side, it gets finally decided and no proceedings remain pending before the Court; and (ii) where a preliminary objection raised before the Court is rejected and the Court proceeds to decide the suit on merits. In a suit, a preliminary judgment is delivered, ordinarily and mostly in exercise of the power u/s 9A or under Order VII, Rule 11, or under Order XIV, Rule 2 of CPC, either by dismissing the suit; by rejecting a plaint, upholding a preliminary objection; or by rejecting such preliminary objection.

Stage to invoke power u/s 9A of CPC

12. The power of the Trial Court to decide an issue of jurisdiction u/s 9A of CPC can be invoked, only at the time of deciding an application for grant of interim relief's, as contemplated by sub section (1) therein. When such an objection is raised, the Court is obliged to decide an issue at that stage only, without proceeding to decide the suit on merits. Once the Court proceeds to decide the suit on merits and no objection is raised as to the jurisdiction of the Court while deciding the application for grant of interim relief's, as contemplated therein, the power under Sub-section (1) of Section 9A cannot be invoked. This however, does not preclude the Court from deciding such an issue raised in the written statement by invoking its discretionary power under Order XIV, Rules 2(a) and (b).

Stage to invoke power under Order VII Rule 11(d) of CPC

13. The power of the Court to reject a plaint under Order VII, Rule 11(d) of CPC for want of jurisdiction or barred by any law, can be invoked at any point of time and at any stage of the proceedings, and it is not necessary for the Court to frame an issue. The reason is obvious that the Court has to proceed on the footing that the averments made in the plaint are true and correct and the finding is required to be recorded that the suit appears from the statement in the plaint to be barred by any law for the time being in force. This also does not

preclude the Court to decide the issue of jurisdiction on the basis of such objection raised in the written statement by framing an issue under Order XIV, Rules 2(1) and (2), even if an application under Order VII, Rule 11(d) is rejected.

Effect of rejection of plaint or dismissal of suit and remedy

14. When a suit is dismissed or a plaint is rejected u/s 9A or under Order VII, Rule 11(d) or under Order XIV, Rule 2 of CPC, it becomes a "decree" within the meaning of sub-section (2) of Section 2. Hence, a statutory right of appeal u/s 96 read with Order XLI, Rule 1 can be exercised to challenge such an order on facts and on law both. Where a plaint is rejected under Order VII, Rule 11(a) to (f), it does not mean to preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action in terms of Order VII, Rule 13.

Effect of rejection of objection under Section 9A. Order VII. Rule 11(d) or Order XIV. Rule 2 of CPC and remedy

15. When a preliminary objection is rejected in exercise of the power u/s 9A or under Order VII, Rule 11(d) or under Order XIV, Rule 2 of CPC and the Court proceeds to decide the matter on merits, then there is no statutory right of appeal available at that stage to a party aggrieved by such rejection. In such a case, the revisional jurisdiction of the High Court u/s 115 can be invoked to challenge such rejection in terms of the proviso therein and claim a dismissal of the suit or rejection of plaint, which shall terminate the proceedings pending before the Trial Court. This is how a preliminary judgment can be processed to challenge.

An Intermediary or Interlocutory Judgment-Appealable

16. In the course of judicial proceedings before the Trial Court for grant of relief's by way of a suit, number of orders are passed disposing of the ancillary disputes raised by the parties. Sometimes, such orders decide an important and even the vital issue in the case, but the suit remains alive and the relief's claimed are left to be decided. Merely because the orders have decided some important and vital issues, they would not cease to be the interlocutory orders. Some of such orders are covered by Section 104 read with clauses (a) to (w) under Order XLIII, Rule 1 of CPC, wherein a statutory right of appeal is provided to challenge it. Sub-rule (2) of Order XLIII makes the rules under Order XLI applicable to the appeals under Order XLIII, Rule 1.

Non-appealable interlocutory orders and remedy

17. There are orders other than those passed by the Trial Court in exercise of its power u/s 9-A or under Order VII, Rule 11 or under Order XIV, Rule 2 of CPC or orders specifically mentioned in clauses (a) to (w) of Rule 1, Order XLII read with Section 104. There is neither any statutory appeal provided against such orders, nor a remedy of revision is available u/s 115 to challenge such orders at an interlocutory stage. Such orders can be challenged in appropriate cases by invoking jurisdiction of the High Court under Article 226 or 227 of the

Constitution of India.

Bar to challenge any error, defect or irregularity in any proceedings of suit, not affecting merits of case or jurisdiction

18. Section 99 of CPC is relevant and hence the same is reproduced below:

99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.-- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

Provided that nothing in this section shall apply to non-joinder of a necessary party.

Section 99 above prohibits challenge to any decree on the ground of any error, defect or irregularity in any proceedings in the suit, unless it is shown that it affects merits of the case or jurisdiction of the Court.

Bar to challenge an interlocutory order after a decree on the ground of any error defect or irregularity unless it affects the merits of case and a ground of objection is taken, in memo of appeal

19. Section 105 of CPC deals with the interlocutory orders against which there is neither an appeal provided u/s 104 read with Order XLIII, Rule 1 nor a revision u/s 115 is available. The provisions of Section 105 read with Order XLIII, Rule 1A are relevant and hence the same are reproduced below:

105. Other orders.-- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Sub-section (1) of Section 105 opens with an expression "Save as otherwise expressly provided" and states further that no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction. It is of a prohibitory nature to challenge non-appealable order. [See decision of the Apex Court in the case of Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others, . It bars an appeal against any order, which is not made expressly appealable under CPC. However, it states that where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of case, may be set forth as a ground of objection in the memorandum of appeal.

20. The corresponding provision contained in Order XLIII, Rule 1A is also reproduced below:

Rule 1A of Order XLIII -

Right to challenge non-appealable orders in appeal against decrees.-- (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

Sub-rule (1-A) of Order XLII also provides a right to challenge the non-appealable order in an appeal against a decree. Where any judgment is pronounced and/or a decree is drawn up on the basis of an interlocutory order made against a party, such party can, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced. Sub-Section (2) creates an exception in the case of an order of remand. Where there is an appeal provided against an order of remand and no appeal is preferred therefrom, the party aggrieved is precluded from disputing its correctness.

Position of law laid down by way of precedents

21. Where, at an earlier stage of litigation, a Court has decided an interlocutory matter in one way or the other and no appeal has been taken therefrom or no appeal did lie, whether a higher Court can, at a later stage of the same litigation, consider the matter again, is the question, which has been considered by the Apex Court in its decision in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, . In para 13 of the said decision, it has been held as under:

13. There can be little doubt the salutary effect of the rule as laid down in the above cases on the administration of justice. The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term. When a Court has decided the matter it is certainly final as regards that Court. Should it always be treated as final in later stages of the proceeding in a higher Court which had not considered it all merely on the ground that no appeal lay or no appeal was preferred? As was pointed out by the Privy Council in *Moheshur Singh's case*, 7 Moo Ind App 283, the effect of the rule that at every stage of the litigation a decision not appealed from must be held to be finally decided even in respect of the superior Courts, will put on every litigant against whom an interlocutory order is decided, the burden of running to the higher

Courts for redress of the grievances, even though it may very well be that though the interlocutory order is against him, the final order will be in his favour and so it may not be necessary for him to go to the appeal court at all. Apart from the inevitable delay in the progress of the litigation that such a rule would cause, the interests of the other party to the litigation would also generally suffer by such repeated recourse to the higher Courts in respect of every interlocutory order alleged to have been wrongly made. It is in recognition of the importance of preventing this mischief that the Legislature included in the CPC from the very beginning a provision that in an appeal from a decree it will be open to a party to challenge the correctness of any interlocutory order which had not been appealed from but which has affected the decision of the case.

It is thus open to the Appellate Court, which had not earlier considered the matter, to investigate into an appeal from a final decision and the grievances of a party in respect of an interlocutory order. An interlocutory order, which had not been appealed from, either because no appeal lay or even though an appeal lay and it was not taken up, could be challenged in an appeal from a final decree or order. The effect of the rule is that at every stage of the litigation, a decision not appealed from, must be held to be finally decided, will put on every litigant against whom an interlocutory order is decided, the burden of running to the higher Courts for redressal of his grievances. Even though it may very well be that though the interlocutory order is against him, a final order will be in his favour and so it may not be necessary for him to go to the Appeal Court at all. The Court has laid down that apart from an inevitable delay in the progress of the litigation that such a rule would cause, the interests of the other party to the litigation would also generally suffer by such repeated recourse to the higher Courts in respect of every interlocutory order alleged to have been wrongly made. It is in recognition of the importance of preventing this mischief that the Legislature included in the CPC from the very beginning a provision that in an appeal from decree, it will be open to a party to challenge the correctness of any interlocutory order, which had not been appealed from, but which has affected the decision of the case.

22. In the case of Achal Mishra Vs. Rama Shankar Singh and Others, , the Apex Court has held in paras 12 and 13 of the judgment as under:

12. In Sheonath v. Ramnath the Privy Council reiterated that a party is not bound to appeal from every interlocutory order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory order.

13. This principle is recognized by Section 105(1) of the CPC and reaffirmed by Order 43 Rule 1A of the Code. The two exceptions to this rule are found in Section 97 of the Code of Civil Procedure, 1908, which provides that a preliminary decree passed in a suit could not be challenged in an appeal against the final decree based on that preliminary decree and Section 105(2) of the Code of Civil Procedure, 1908 which precludes a challenge to an order of remand at a

subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. All these aspects came be considered by this Court in *Satyadhyan Ghosal v. Deorajin Debi* wherein, after referring to the decisions of the Privy Council, it was held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order. It was further held that a special provision was made in Section 105(2) of the CPC as regards orders of remand where the order of remand itself was made appealable. Since Section 105(2) did not apply to the Privy Council and can have no application to appeals to the Supreme Court, the Privy Council and the Supreme Court could examine even the correctness of an original order of remand while considering the correctness of the decree passed subsequent to the order of remand. The same principle was reiterated in *Amar Chand Butail v. Union of India* and in other subsequent decisions.

The principle laid down by the Apex Court in *Satyadham's* case, cited *supra*, has been followed and reiterated. The Apex Court has held that the principle recognized by Section 105(1) of CPC and re-affirmed by Order XLIII, Rule 1A is governed by two exceptions, viz. (a) Section 97 provides that a preliminary decree passed in a suit could not be challenged in an appeal against final decree based on that preliminary decree, and (b) Section 105(2) precludes a challenge to an order of remand at a subsequent stage while filing an appeal against a decree passed subsequent to the order of remand.

23. In the decision of this Court in the case of *Bai Bai Gyanoba Vs. Mahadu Maruti*, , it has been held by this Court that the effect of sub-section (1) of Section 105 of CPC is that where an interlocutory order is passed in the course of the litigation, whether an appeal is provided for the same or not, that interlocutory order can be challenged at the time of hearing of an appeal from a decree which ultimately is passed in the litigation pending, even though the appeal may not have been filed from such an interlocutory order. It has further been held that the provision of sub-section(1) of Section 105 is governed by the proviso that error, defect or irregularity in the interlocutory order can be challenged in an appeal from decree, only if it affects the decision of the case. The expression "affecting the decision of the case" has been construed to mean "a decision on the merits of the case."

24. In the case of the Apex Court in *Soni Dineshbhai Manilal and Others Vs. Jagjivan Mulchand Chokshi*, , the Apex Court has held in para 21 that any order passed can be questioned on the grounds taken in appeal against the final orders, but such interlocutory orders are required to be challenged in the memorandum of appeal. It has further been held that what is essential is that the orders should not have been appealed against If a revision has been filed, which is the part of the appellate jurisdiction although *stricto sensu* the doctrine of merger may not apply but Section 105 of CPC would also not apply in such cases. The Apex Court, in the decision in *Shankar Ramchandra Abhyankar Vs.*

Krishnaji Dattatreya Bapat, , has held that a civil revision is a part of the appellate jurisdiction.

25. An appeal u/s 96 read with Order XLI, Rule 1 of CPC can be preferred only against a decree and not against any finding. Section 107 empowers the Appellate Court, subject to such conditions and limitations as may be prescribed, viz. (a) to determine a case finally, (b) to remand a case, c) to frame issues and refer them for trial, and (d) to take additional evidence or to require such evidence to be taken. The corresponding provisions are under Order XLI, Rules 20 to 23, 23A, 24, 25, 26, 27, 28 and 33. When such appeal is preferred, then it is open for the respondent not only to support the decree passed, but also to file the cross-objections challenging any part of the decree against him. If the entire decree is in favour of the respondent, but the findings on certain issues are against him, then he can challenge such findings and urge that the Trial Court should have answered such issues in his favour. This is the requirement of Order XLI, Rules 22 and 33.

Position of Law as to the Challenge to Final, Preliminary and Interlocutory Judgment -- Summarized

26. In view of the aforesaid discussion and decisions, the position of law, which emerges, is summarized in brief as under:

a) When a suit is dismissed or allowed or partly dismissed or partly allowed, determining all the matters in controversy and putting an end to the litigation, it becomes a "decree" within the meaning of sub-section (2) of Section 2 of CPC, which can be challenged on facts and law both by filing an appeal u/s 96 read with Order XLI, Rule I.

b) The power of the Trial Court to decide an issue of jurisdiction u/s 9-A can be invoked only at the time of deciding an application for grant of interim relief's, as contemplated under sub-section (1) therein. This, however, does not preclude the Court from deciding such an issue raised in the written statement by invoking its discretionary jurisdiction under Order XIV, Rule 2(a) or (b), if the jurisdiction u/s 9-A is not invoked. However, if an issue of jurisdiction u/s 9-A is decided, then no such issue can be framed again under Order XIV, Rules 1 and 2.

c) The power to reject the plaint under Order VII, Rule 11(d) for want of jurisdiction can be invoked at any stage of the suit and it is not necessary to frame an issue. However, the dismissal of this application also does not preclude the Court from framing and deciding an issue under Order XIV, Rules 1 and 2.

d) Where a suit is dismissed or plaint is rejected u/s 9-A or Under Order VII, Rule 11(d) or under Order XIV, Rule 2, it becomes a "decree" within the meaning of sub-section (2) of Section 2, which can be challenged on facts and law both by exercising a statutory right of appeal u/s 96 read with Order XLI, Rule 1.

e) Where a plaint is rejected under Order VII, Rule 11(a) to (f), it does not of its own force preclude the plaintiff from presenting a fresh plaint on the same cause

of action under Order VII, Rule 13.

f) When a preliminary objection is rejected u/s 9-A, or under Order VII, Rule 11(d) or under Order XIV, Rule 2 and the Court proceeds to decide the matter on merits, then there is no statutory right of appeal available under CPC. In such a situation the revisional jurisdiction of the High Court u/s 115 of CPC can be invoked to challenge such rejection in terms of the proviso therein and to claim dismissal of the suit or rejection of the plaint, which shall terminate the proceedings pending before the Trial Court.

g) Though, in cases where a remedy of revision u/s 115 is available against some interlocutory orders, it is not necessary for a party aggrieved by any such order to challenge it at that stage and it can wait till the final decision of the suit, which may be in his favour, leaving no need to challenge it. Though, such an interlocutor)" order binds the Trial Court at the subsequent stage of the same proceedings, the party aggrieved by it, is not prevented from challenging it in the higher forum, if the ultimate decision in the suit goes against it. in spite of the fact that such an order was not challenged at an interlocutory stage.

h) In the course of judicial proceedings before the Trial Court for grant of relief"s claimed in the suit, a number of orders are passed disposing of the ancillary dispute raised by the parties. Some of such orders are covered by Section 104 read with clauses (a) to (w) under Order XLIII, Rule 1. Such interlocutory orders can be challenged by way of statutory appeal as provided therein, on facts and law both.

i) It is not necessary for a party aggrieved by any order covered by Section 104 read with clauses (a) to (w) under Order XLIII, Rule 1 to challenge it at that stage and it can wait till the final decision in the suit, which may be in his favour, leaving no need to challenge it. Though such an interlocutory order binds the Trial Court at the subsequent stage in the suit, the party aggrieved is not prevented from challenging it in the higher forum, if the ultimate decision in the suit goes against it, in spite of the fact that such an order was not challenged at an interlocutory stage.

j) There are some interlocutory orders, which are passed by the Court during the pendency of the suit, deciding some important or even vital issues in the case, keeping the suit alive. Such order can neither be challenged by filing an appeal u/s 96 read with Order XLI, Rule 1 or u/s 104 read with Order XLIII, Rule 1, nor by filing a revision u/s 115. But such order can be challenged by invoking the writ jurisdiction of the High Court under Article 226 or supervisory jurisdiction under Article 227 of the Constitution of India.

k) Section 99 is in the nature of prohibition to challenge a decree or an order u/s 47 unless it is shown that such a decree or order passed suffers from an error, defect or irregularity in any proceedings in the suit or relating to such order and affects the merits of the case or the jurisdiction of the Court or the decision in the proceedings u/s 47.

l) Though sub-section (1) of Section 105 read with Order XLIII, Rule 1A enables the party aggrieved by any such interlocutory orders to challenge it in an appeal against a decree and to contend that such order should not have been made and the judgment should not have been pronounced on the basis of such order, it is in the nature of prohibition to challenge non appealable orders, unless it is established that the error, defect or irregularity in such order affects the decision of the case.

m) Though the remedy of a statutory appeal u/s 104 read with Order XLIII, Rule 1 of CPC or revision u/s 115 is available against the interlocutory order and it has not been availed at an interlocutory stage, such an order can be challenged in an appeal against a decree filed u/s 96 read with Order XLI, Rule 1 by stating the specific grounds of challenges in the memorandum of appeal and making a prayer for setting aside or varying it. In the absence of it, it is not permissible for the Appellate Court to interfere with such an order.

n) The principle recognized u/s 105 and re-affirmed by Order XLIII, Rule 1A, is governed by two exceptions, viz. (a) Section 97 provides that a preliminary decree passed in a suit could not be challenged in an appeal against a final decree based on the preliminary decree; and (b) Section 105(2) precludes a challenge to an order of remand at a subsequent stage while filing an appeal against a decree passed subsequent to the order of remand.

o) In an appeal either against an interlocutory order u/s 104 read with Order XLIII, Rule 1 or u/s 96 read with Order XLI, Rule 1 of CPC, the Appellate Court has power to pass any order, which ought to have been passed or made, or make such further order, as the case may require, including an order of remand permitting the production of additional evidence or determining the case on facts and law both.

p) Any interlocutory order against which a statutory appeal u/s 104 read with Order XLIII, Rule 1 or a revision u/s 115 of CPC or a writ petition under Article 226 or 227 of the Constitution of India is preferred, then any decision rendered in such proceedings at an interlocutory stage cannot be re-opened either by the Trial Court or by the Appellate, Revisional or Writ Court, which has passed such order.

Revisional Jurisdiction u/s 115 of CPC

27. Section 115 of CPC deals with the revisional power of the High Court, which is reproduced below:

115. Revision.-[(1)] 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 the 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:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation.-- In this section, the expression, "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

It confers the power upon the High Court to call for the case, which has been decided by any Court subordinate to it and in which no appeal lies thereto, and make such order in the case, as it deems fit, if such subordinate Court appears - (i) to have exercised a jurisdiction not vested in it by law; or (ii) to have failed to exercise the jurisdiction so vested in it; or (c) to have acted in exercise of its jurisdiction illegally or with material irregularity, The power is, however, restricted under the proviso to vary or reverse any decree or order made or any order deciding an issue in the suit or other proceedings only where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Sub-sections (1) and (2) empowers the High Court to exercise revisional jurisdiction only when there is no appeal provided against any decree or order.

28. Prior to 1-7-2002, all the orders of interlocutory nature, which, if allowed to stand, would occasion a failure of justice or cause an irreparable injury to the party against whom such an order is made and the same could be assailed by way of revision. By way of amendment introduced in the CPC (Amended) Act, 1999 with effect from 1.7.2002, such requirement is deleted and the proviso is added to sub-section (1) of Section 115, curtailing power of the High Court to interfere in all kinds of interlocutory orders, save and except those provided therein. Sub-section (3) is added to Section 115 which states that "A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court".

Position of Law as to Exercise of Revisional Jurisdiction

29. in case of *Ittavira Mathai Vs. Varkey Varkey and Another*, , the Trial Court dismissed the suit for title and possession. The High Court allowed the appeal

and set aside the dismissal of the suit and partly decreed the suit in favour of the plaintiff. The Apex Court maintained the decision of the High Court. It was urged before the Apex Court that the decree passed by the High Court was a nullity because the suit was barred by time. While rejecting such contention, the Apex Court considered the question in para 8 of the said decision, which is reproduced below:

8. The first point raised by Mr. Paikedy for the appellant is that the decree in O.S. No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. Even assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well-settled that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong. the decrees rendered by them can not be treated as nullities. Learned counsel, however, referred us to the decision of the Privy Council in AIR 1935 85 (Privy Council) and contended that since the court is bound under the provisions of S. 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that S. 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.

It is thus clear that the Apex Court, in the aforesaid decision, has held that if the suit was barred by time and yet the Court decreed it, the Court would be committing an illegality and, therefore, the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. It has further been held that it is difficult to appreciate the contention that a decree can be treated as a nullity and ignored in subsequent litigation. The Apex Court held that the Court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right, may decide wrong, and that even though

it decided wrong, it would not be doing something which it had no jurisdiction to do. It was held that the High Court had jurisdiction over the subject-matter and had jurisdiction over the parties and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted without jurisdiction. The Apex Court held that Section 3 of the Limitation Act is peremptory, and that it is the duty of the Court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings.

30. In the decision of the Apex Court in case of *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, , the Trial Court allowed the application for setting aside the abatement holding that the appellant established sufficient cause which prevented him from continuing with the suit. The High Court in revision u/s 115 of CPC set aside the said order holding that the appellant failed to make out a sufficient cause for continuation of delay and for setting aside the abatement. The Apex Court set aside the order of the High Court and restored the order of the Trial Court holding that the High Court fell in error in interfering with the findings of fact arrived at by the subordinate Judge with respect to the appellant having sufficient cause for not making an application for bringing the respondents on record within time and for not applying for the setting aside of the abatement within time.

31. It was urged before the Apex Court in the aforesaid decision that the Trial Court acted illegally or with material irregularity and hence the High Court was justified in interfering in terms of clause (c) of Section 115 of CPC. Relying upon Section 3 of the Limitation Act, it was urged that it enjoins the Court to dismiss any application made after the period prescribed for it and if erroneous decision results in assuming jurisdiction not vested in it or failing to exercise jurisdiction vested in it, the case is covered by clause (c) of Section 115. The Apex Court held that there is a distinction between the two classes of cases. In the first one, the Court decides the question of law pertaining to jurisdiction by a wrong decision it clutches at jurisdiction or refuses to exercise jurisdiction, and in the other, it decides a question within its jurisdiction and in the said case it was held that the question whether there was sufficient cause was exclusively within the jurisdiction of the Court u/s 5 of the Limitation Act and the Court could decide it rightly or wrongly.

32. In the case of *Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav*, , the Apex Court was considering the provisions of Section 115 of CPC. Paras 10, 11 and 12 of the said judgment being relevant are reproduced below:

(10) The provisions of S. 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under S. 115. it is not competent to the High Court to correct errors of fact, however, gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As Cls. (a), (b) and (c) of S. 115 indicate, it is only in cases where the subordinate Court has exercised a

jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate Courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of S. 115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under S. 115.

(11) The history of recent legislation in India shows that when Legislatures pass Acts dealing with socio-economic matters, or make provisions for the levy of sales tax, it is realized that the operative provisions of such legislation present difficult problems of construction; and so, sometimes, the Act in question provides for a revisional application to the High Court in respect of such matters or authorises a reference to be made to it. In such cases, the High Court will undoubtedly deal with the problems raised by the construction of the relevant provisions in accordance with the extent of the jurisdiction conferred on it by the material provisions contained in the statute itself. Sometimes, however no such specific provision is made and the questions raised in regard to the construction of the provisions of such a statute reach the High Court under its general revisional jurisdiction under S. 115 of the Code. In this class of cases, the revisional jurisdiction of the High Court has to be exercised in accordance with the limits prescribed by the said Section. It is true that in order to afford guidance to subordinate Courts and to avoid confusion in the administration of the specific law in question, important questions relating to the construction of the operative provisions contained in such an Act must be finally determined by the High Court but in doing so the High Court must enquire whether a complaint made against the decision of the subordinate Court on the ground that it has misconstrued the relevant provisions of the statute, attracts the provisions of S. 115. Does the alleged misconstruction of the statutory provision have relation to the erroneous assumption of jurisdiction, or the erroneous failure to exercise jurisdiction, or the exercise of jurisdiction illegally or with material irregularity by the subordinate Court? These are the tests laid down by S. 115 of the Code and they have to be borne in mind before the High Court decides to exercise its revisional jurisdiction under it.

(12) The question has been recently considered by this Court in *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, and *Vora Abbasbhai Alimahomed Vs. Haji Gulamnabi Haji Safibhai*, . The effect of these two decisions clearly is that a distinction must be drawn between the errors committed by subordinate Courts in deciding questions of law which have

relation to, or are concerned with, questions of jurisdiction of the said Court, and errors of law which have no such relation or connection. It is, we think, undesirable and inexpedient to lay down any general rule in regard to this position. An attempt to define this position with precision or to deal with it exhaustively may create unnecessary difficulties. It is clear that in actual practice, it would not be difficult to distinguish between cases where errors of law affect, or have relation to, the jurisdiction of the Court concerned, and where they do not have such a relation.

The Apex Court has thus held in para 10 of the said decision that it is well-settled that a plea of limitation or plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. The findings on these pleas in favour of the party raising them would oust the jurisdiction of the Court and so an erroneous decision on these pleas can be said to be concerned with the question of jurisdiction which falls within the purview of Section 115 of CPC. In the cases where the construction of relevant provision relates to the jurisdiction of the Court and if such provision is misconstrued, it would attract the provisions of Section 115 of CPC. The test would be applied whether the alleged misconstruction of statutory provisions has relation to the erroneous assumption of jurisdiction, or the erroneous failure to exercise jurisdiction, or the exercise of jurisdiction illegally or with material irregularity by the subordinate Court. It has been held that the distinction is required to be drawn between the errors committed by the subordinate Courts in deciding the question of law, which has relation to or is concerned with the question of jurisdiction of the Court and errors of law, which has no such relation or connection. The Apex Court has held that though it is undesirable and inexpedient to lay down a general rule in regard to the position and an attempt to define this position with precision or to deal with it exhaustively may create unnecessary difficulties, it has been expressed that in actual practice, it would not be difficult to distinguish between the cases where errors of law affect or have relation to the jurisdiction of the Court concerned and where they do not have such a relation.

33. In the decision of the Apex Court in case of D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, , delivered prior to the amendment in 2002, the Apex Court held that while exercising the jurisdiction u/s 115 of CPC, it is not competent to the High Court to correct errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words "illegally" and "with material irregularity", as used in clause (c) do not cover either errors of fact or of law. They do not refer to the decision arrived at, but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision and not to errors either of fact or of law, after the prescribed formalities have been complied with.

34. In the case of Shri M.L. Sethi Vs. Shri R.P. Kapur, , the Apex Court was

considering jurisdiction of the High Court u/s 115 of CPC to allow the application for revision of orders passed by the Trial Court directing discovery of documents by the respondent, and dismiss the application filed by him for permission to sue in forma pauperis. The Apex Court set aside the order of the High Court and restored the decision of the Trial Court holding that the Trial Court had jurisdiction to pass the order for discovery. It was held that even if lack of jurisdiction is assumed to result from every material error of law, then the jurisdiction of the Court in the primitive sense of the term would not oust. It was further held that the order was not vitiated by any error of law. In para 12 of its judgment, the Apex Court has considered the provisions of Section 115 of CPC, the relevant portion of which is as under:

12. Counsel for the appellant contended that even if the order for discovery of documents was bad in law, the High Court was not justified in interfering with it. And as regards the order, dated April 4, 1970, dismissing the application for permission to sue in forma pauperis after rejecting the application for time, he said, the High Court was really interfering with the discretion of the trial Court in the matter of adjournment. The jurisdiction of the High Court u/s 115 of the C.P.C. is a limited one. As long ago as 1884, in *Rajah Amir Hassan Khan v. Sheo Baksh Singhi*, the Privy Council made the following observation on Section 622 of the former Code of Civil Procedure, which was replaced by Section 115 of the Code of 1908:

The question then is, did the judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

In *Balakrishna Udayar v. Vasudeva Aiyar*, the Board observed:

It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

In *N.S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras*, the Judicial Committee said that Section 115 empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. And if the High Court is satisfied on those three matters, it has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law.

This Court in *Manindra Land and Building Corporation Ltd. v. Bhutnath Banarjee and Others* and *Vora Abbasbhai Alimahomed v. Haji Gulamnabi Haji Safibhai* has held that a distinction must be drawn between the errors committed by subordinate courts in deciding question of law which have relation to, or are concerned with, questions of jurisdiction of the said court, and errors of law which have no such relation or connection. In *Pandurang Dhuni Chowgule v. Maruti Hari Jadhav*, this court said:

The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction u/s 115, it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court u/s 115.

The word "jurisdiction" is a verbal coat of many colours. Jurisdiction originally seems to have had the meaning which Lord Reid ascribed to it in *Anisminic Ltd. v. Foreign Compensation Commission*, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an enquiry, into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Darman in *R.v. Bolton*. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In *Anisminic Ltd. case (supra)*, Lord Reid said:

But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may

have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.

In the same case, Lord Pearce said:

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or, in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity.

The dicta of the majority of the House of Lords in the above case would show the extent to which "lack" and "excess" of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the court is prepared to allow. In the end it can only be a value judgment (see H.N.R. Wade, "Constitutional and Administrative Aspects of the Anisminic case", Law Quarterly Review, Vol. 85, 1969, p. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court.

35. In the another decision of Apex Court in case of Manick Chandra Nandy Vs. Debdas Nandy and Others, , the Apex Court was dealing with the question of

jurisdiction of the High Court u/s 115 of CPC. It has been held in para 5 of the said decision that the nature, quality and extent of appellate jurisdiction being exercised in first appeal and of revisional jurisdiction are very different. The limits of revisional jurisdiction are prescribed and its boundaries are defined u/s 115. The exercise of revisional jurisdiction is thus confined to the question of jurisdiction. While in a first appeal, the Court is free to decide all the questions of law and fact, which arise in the case, in the exercise of its revisional jurisdiction, the High Court is not entitled to re-examine or re-assess the evidence on record and substitute its own findings of fact for those of the subordinate Court. It has further been held that a plea of limitation concerning the jurisdiction of the Court which tries a proceeding, for a finding on this plea in favour of the party raising it would oust the jurisdiction of the Court. In determining the correctness of the decision reached by the subordinate Court on such a plea, the High Court may at times have to go into a jurisdictional question of law or fact, that is, it may have to decide the collateral question upon the ascertainment of which the decision as to the jurisdiction depends. For the purpose of ascertaining whether the subordinate Court has decided such a collateral question rightly, the High Court cannot, however, function as a Court of first appeal so far as the assessment of evidence is concerned and substitute its own findings for those arrived at by the subordinate Court unless any such finding is not in anyway borne out by the evidence on the record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand, would result in grave injustice to a party. This decision of the Apex Court was delivered prior to an amendment to the provision of Section 115 of CPC, introduced by the Act No. 22 of 2002.

36. In the decision of the Apex Court in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, , subsequent to amendment, the Apex Court has noted the objects and effects of the amendment in paragraphs 4 and 5 of the said judgment as under:

4. Section 115 of the Code of Civil Procedure, as amended, does not now permit a revision petition being filed against an order disposing of an appeal against the order of the trial court whether confirming, reversing or modifying the order of injunction granted by the trial court. The reason is that the order of the High Court passed either way would not have the effect of finally disposing of the suit or other proceedings. The exercise of revisional jurisdiction in such a case is taken away by the proviso inserted under sub-section (1) of Section 115 CPC. The amendment is based on the Malimath Committee's recommendations. The Committee was of the opinion that the expression employed in Section 115 CPC, which enables interference in revision on the ground that the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it was made, left open wide scope for the exercise of the revisional power with all types of interlocutory orders and this was substantially contributing towards delay in the disposal of cases. The Committee did not favour denuding the High Court of the power of revision but strongly felt that the power should be suitably curtailed. The effect of the erstwhile clause (b) of the

proviso, being deleted and a new proviso having been inserted, is that the revisional jurisdiction, in respect of an interlocutory order passed in a trial or other proceedings, is substantially curtailed. A revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied.

5. As a prelude to search for answer to the question posed, it becomes necessary to recollect and restate a few well-established principles relating to the constitutional jurisdiction conferred on the High Court under Articles 226 and 227 of the Constitution in the backdrop of the amended Section 115 CPC.

The jurisdiction u/s 115 of CPC is available in respect of the orders stipulated in the proviso and on the grounds limited by the said provision. The object of such amendment curtailing the revisional jurisdiction in respect of the grounds of challenges and the kinds of interlocutory orders, is to prevent the delay in the proceedings of the subordinate Courts caused due to frequent filing of revision petitions. The retention of existing revisional jurisdiction with restrictions in the proviso would enable the High Court to put an end to unsustainable and protracted litigation in subordinate Courts, contributing to increase in arrears.

37. In the decision in case of *Rajeshwari Vs. Puran Indoria*, , the Apex Court was considering the provisions of Section 115 of CPC after the amendment of the Code by the Act No. 22 of 2002. It has been held that the interference in revision u/s 115 has also been substantially curtailed. Even if the High Court is satisfied that there would be failure of justice if the order is allowed to stand, the High Court cannot interfere u/s 115, in view of the deletion of the particular proviso, which existed prior to the amendment. It has further been held that the High Court cannot correct errors that could lead to a mistrial or a finding of fact to be arrived at based on an erroneous approach that is proposed then and there by exercising a revisional jurisdiction, even at the initial stage, so that at a later stage, a remand by the first Appellate Court is avoided. The Apex Court has taken a note of the fact that the curtailment of the right to interfere u/s 115 has only resulted in the High Courts being flooded with proceedings under Article 227 of the Constitution, challenging all sorts of interlocutory orders.

Position of Law u/s 115 of CPC -- Summarized

38. The position of law on the jurisdiction of the High Court u/s 115 of CPC is stated as under:

- i) The revisional jurisdiction u/s 115 of CPC can be exercised only when there is no appeal provided, the manifest intention being that the order of the Trial Court, right or wrong, shall be final.
- ii) The exercise of revisional jurisdiction can only be in respect of any order made or any order deciding an issue, in the course of a suit or other proceedings, where the order if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.
- iii) While exercising revisional jurisdiction, the High Court has to satisfy itself that

the subordinate Court - (a) has exercised jurisdiction not vested in it by law, or (b) has failed to exercise jurisdiction so vested, or (c) has acted in exercise of its jurisdiction illegally or with material irregularity.

iv) The "exercise of jurisdiction illegally means breach of the provision of law and with material irregularity or committing an error of procedure in the course of the Trial, which is material, and in that it may affect the ultimate decision of the case.

v) The words "illegally" and "with material irregularity", as used in clause (c) of Sub-section (1) of Section 115 do not cover either errors of fact or of law. They do not refer to the decision arrived at, but merely to the manner in which it is reached.

vi) In determining the correctness of the decision of the subordinate Court on the question of jurisdiction, the High Court may have to deal with the collateral question upon which the decision depends. However, while doing so, the High Court cannot function as a Court of first appeal and review the evidence.

vii) In exercise of its revisional jurisdiction, the High Court is not competent to correct the errors of fact, however gross they may be. or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. But the erroneous decision on a question of law reached by the subordinate Court, which has no relation to the question of jurisdiction of the Court, cannot be corrected by the High Court u/s 115 of CPC.

viii) Section 115 of CPC is essentially a source of power for the High Court to supervise the subordinate Courts and satisfy itself that the subordinate Courts act within the bounds of their authorities and decide the cases in accordance with law.

ix) The High Court in exercise of its power u/s 115 cannot correct the errors that could lead to mistrial or a finding of fact arrived at based on an erroneous assumption that is proposed then and there by exercising a revisional jurisdiction, even at the initial stage, so that at a later stage, a remand by the first Appellate Court is avoided.

x) In view of the amendment to Section 115, introduced on 1.7.2002, the jurisdiction of the High Court to interfere in all sorts of interlocutory orders which, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom such order is made has been taken away with the object of preventing delay in the proceedings of subordinate Courts caused due to frequent filing of revision petitions.

xi) The retention of existing revisional jurisdiction of the High Court u/s 115 of CPC is to put an end to unsustainable and protracted litigation in subordinate Courts contributing to increase in arrears. xi) In view of the amendment on 1.7.2002, the earlier view that interference in the finding of fact is possible when such finding is not in any way borne out by the evidence on the record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand,

would result in grave injustice to a party, no longer subsists or available as has been observed by the Apex Court in case of Rajeshwari Vs. Puran Indoria, .

xii) The power of the High Court u/s 115 of CPC is available in respect of the question touching the jurisdiction of the subordinate Courts to pass an interlocutory or final order or to decide any preliminary issue.

xiii) The word "jurisdiction" is a verbal coat of many colours. It means to enter upon the inquiry into the question. If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The instances of the jurisdictional error can be narrated to some extent, which are as under:

(a) Although the Court had jurisdiction to enter at the enquiry and it is done, but has failed to do something in the course of enquiry, which is of such a nature that its decision is a nullity.

(b) It may have given a decision in bad faith, which it had no power to make.

(c) It may have failed in the course of enquiry, to comply with the principles of natural justice.

(d) It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided the same question which was not remitted to it.

(e) It may have refused to take into account something which it was required to take into account or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account.

(f) There may be an absence of those formalities or things which are conditions precedent to the Court having any jurisdiction to embark on an enquiry.

(g) The Court may at the end make an order that it has no jurisdiction to make.

(h) In the intervening stage, while engaged on a proper enquiry the Court may depart from the rules of natural justice.

(i) It may ask itself wrong questions.

(j) It may take into account matters which it was not directed to take into account, thereby it would step outside its jurisdiction.

(k) It would turn its enquiry into something not directed by the Parliament and fail to make the enquiry which the Parliament did direct.

(xiv) It is well settled that the plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of a party raising them, would oust the jurisdiction of the Court and so an erroneous decision on these pleas can be said to be concerned with the question of jurisdiction, which falls within the purview

of Section 115 of CPC, an erroneous decision on question of law reached by a subordinate Court which has no relation to the question of jurisdiction of that Court, cannot be corrected by the High Court u/s 115. (xv) In the matters where the Limitation Act is applicable, Section 3 casts a duty upon the Court to give effect to it, even though the point of limitation is not referred to in the pleadings. However, failure to perform this duty is merely an error of law which can be corrected only in the manner laid down in the Code of Civil Procedure. If a party aggrieved does not take appropriate steps to have an error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.

(xvi) In cases where the Court having jurisdiction over the subject matter of the suit and over the parties thereto, decides the mixed questions of law and fact touching the jurisdiction of the Court, it does not act beyond the jurisdiction or fails to exercise jurisdiction, if it decides the said question. The Court is bound to decide the right, may decide wrong and merely because, it has decided it wrongly, it does not amount to doing something which it had no jurisdiction to do.

39. In order to understand more precisely the extent of the jurisdiction of the High Court u/s 115 of the Code of Civil Procedure, the distinction between the appellate jurisdiction and original jurisdiction. which is laid down in paras 13 to 17 of the decision in the case of Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others, , which is summarized below:

(a) The right of appeal is a statutory substantive vested right and it inheres in no one. It is a continuation of the original proceedings and the provisions applied at the time of the institution of the suit are operative even in respect of an appeal. In fact, the entire proceedings are before the Appellate Court. The Appellate Court has a power to review, re-assess, re-examine the evidence on record and to substitute the findings of fact for those of the subordinate Court. A right of appeal carries with it a right of re-hearing on facts.

(b) Section 115 of CPC is a source of power of the High Court to satisfy itself that the subordinate Court has decided a case by acting within the bounds of its authority and has acted in accordance with law. It has the supervisory control, which is exercised by the High Court over the functioning of the subordinate Court. It is not linked with any substantive right and it is discretionary in nature. It does not confer a right upon the litigant aggrieved by an order of the subordinate Court to make an application to the High Court for the relief's. It concerns with jurisdiction and jurisdiction alone of the subordinate Court to pass an order. In revisional jurisdiction, the High Court is not entitled to re-assess, re-examine the evidence on record and to substitute the findings of fact for that of the subordinate Court. A litigant does not carry with him a right of re-hearing by the revisional Court on facts.

Jurisdictional Aspects -- (i) Pecuniary, and (ii) Territorial

40. The jurisdiction of the Court may be classified in several categories. The

important categories are - (i) territorial local jurisdiction, (ii) pecuniary jurisdiction, and (iii) jurisdiction over the subject-matter of the suit. The question of territorial and pecuniary jurisdiction are governed by Sections 21 and 21A of CPC, which are reproduced below:

21. Objections to jurisdiction.--(1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.

21-A. Bar on suit to set aside decree on objection as to place of suing.-- No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

Sub-Section (1) of Section 21 provides that no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. Sub-Section (2) of Section 21 of CPC (Amendment) Act, 1976 relating to pecuniary jurisdiction provides that no objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been consequent failure of justice. Section 21A was also introduced by CPC (Amendment) Act 1976, creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing.

41. In the case of Kiran Singh and Others Vs. Chaman Paswan and Others, . The question involved was whether the judgment delivered by the District Court in appeal should be treated as a nullity in view of the valuation of the suit which is ultimately determined. The Apex Court took into consideration the provisions of Section 11 of the Suits Valuation Act, and Sections 21 and 99 of the CPC and it has been held that the policy underlines Sections 21 and 99 of the CPC and

Section 11 of the Suits Valuation Act. In paras 12 and 15 of the said decision, it is held that a mere change of forum is not a prejudice within the meaning of Section 11 of the Suits Valuation Act. It has been held that the words "unless the over-valuation or under-valuation thereon has prejudicially affected the disposal of the suit or appeal on its merits" clearly show that the decrees passed in such cases are liable to be interfered with by the Appellate Court not in all cases as a matter of course but only if prejudice such as is mentioned in the said Section results and prejudice envisaged by that Section, therefore, must be something other than an appeal being heard in a different forum. The Apex Court has clearly opined that prejudice contemplated by the Section is something different from the fact of appeal having been heard in a forum, which would not have been competent to hear it on the correct valuation of the suit as ultimately determined. The Court has held that the jurisdiction that is conferred on the Appellate Courts u/s 11 is an equitable one to be exercised when there has been an erroneous assumption of jurisdiction by a subordinate Court as a result of overvaluation or under-valuation and as consequential failure of justice. The Court has held that it is neither possible nor even desirable to define such a jurisdiction closely or confine it within the stated bounds. It can only be predicated of it that it is in the nature of a revisional jurisdiction to be exercised with caution and for ends of justice whenever the facts and situation call for it. It has been held that where there has been a prejudice or not, is accordingly a matter to be determined on facts of each case.

42. After the decision of the Apex Court in the case of Kiran Singh, [2008 ALL SCR (O.C.C.) 81] (cited supra) noticing a conflict between the provisions of Sections 99 of CPC and Section 11 of the Suits Valuation Act, a Maharashtra Amendment was introduced u/s 11 of the Suits Valuation Act. Section 11 of the said Act is, therefore, reproduced below:

11.(1) Notwithstanding anything in section 99 of the Code of Civil Procedure, 1908 an objection that by reason of the overvaluation or undervaluation of a suit or appeal a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless-

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or undervalued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

(2) If the objection was taken in the manner mentioned in clause (a) of Sub-section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials

necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect or jurisdiction in the Court of first instance or lower appellate Court.

(3) If the objection was taken in that manner and the appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

(4) The provisions of this section with respect to an appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction u/s 115 of the Code of Civil Procedure, 1908 or other enactment for the time being in force.

(5) This section shall come into force on the first day of July 1887;

Provided that, in the Hyderabad area of the State of Maharashtra it shall come into force on the date of commencement of the Suits Valuation (Maharashtra Extension and Amendment) Act, 1960.

Section 99 of CPC (which is reproduced earlier) permitted challenge to the decree suffering from any error, defect or irregularity in any proceedings in the suit affecting the merits of the case or the jurisdiction of the Court. By virtue of overriding effect given to Section 11 of the Suits Valuations Act, the challenge to the decree on account of any error, defect or irregularity in the proceedings of the suit affecting the jurisdiction of the Court, is not available unless it is pointed out that the objection regarding over-valuation or under-valuation of a suit or appeal was taken in a Court of first instance at or before framing of the issues, or in the lower Appellate Court in the memorandum of appeal, and that such over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits. Sub-section (4) of Section 11 of the Suits Valuations Act has also made such criteria applicable to a Court exercising revisional jurisdiction u/s 115 of CPC. Thus, the question of valuation of the suit or appeal touching the jurisdiction of the Court to entertain, try and decide the suit can be agitated on the very limited grounds either in appeal or in revision.

43. By virtue of Section 8 of the Suits Valuations Act, 1887, the valuation of suits for the computation of court-fees and the value for the purposes of the jurisdiction, has to be the same, except in clauses (v) and (vi), and sub-clause (d) of clause (xi) in Section 6 of the Bombay Court Fees Act, 1959. If there is any dispute arises regarding valuation of a suit, an inquiry u/s 8 of the Bombay Court Fees Act is required to be made by the Court. Hence, the said provision is reproduced below:

8. Inquiry as to valuation of suits

If the Court is of opinion that the subject-matter of any suit has been wrongly

valued or if an application is made to the Court for the revision of any valuation made. the Court may revise the valuation and determine the correct valuation and may hold such inquiry as it thinks fit for such purpose.

The procedure for making such inquiry was laid down under Sections 9, 10 and 11 of the said Act. Section 14 of the said Act deals with the decision as to the question of valuation, and it is reproduced below:

14. Decision of questions as to valuation

(1) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this Chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(2) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided.

Sub-section (1) makes the decision on valuation of suit final as between the parties. Whenever the suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, then it shall require the party to pay so much additional fee as would have been payable had the question been rightly decided.

44. In the decision of the Apex Court in the case of Sri Ratnavaramaraja Vs. Smt. Vimla, , the Apex Court has held in para 2 of the said judgment that whether proper court-fee is paid on a plaint, is primarily a question between the plaintiff and the State. The jurisdiction in revision exercised by the High Court u/s 115 of CPC is strictly conditioned by clauses (a) to (c) thereof. The defendant, who may believe and even honestly that proper court-fee has not been paid by the plaintiff, has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court-fee payable on the plaint. Thus, in view of this decision, the defendant has no right to move the superior courts challenging the decision of the Trial Court or the Appellate Court on the question of valuation of the suit or appeal for the purposes of payment of court-fee.

45. In the decision of the Apex Court in the case of P.K. Palanisamy Vs. N. Arumugham and Another, , it was an application made under Order VII, Rule 11(c) of CPC made to claim rejection of plaint on the ground that the suit presented on 5-10-1998 was barred by limitation as the extension of time granted by the Trial Court u/s 149 read with Section 151 of CPC and the condonation of delay in re-filing was passed without notice to other side. The Trial Court dismissed the said application, but the High Court allowed the civil revision petition under Article 227 of the Constitution of India. The Apex Court

has held that when the plaint is presented, ordinarily it should be accompanied with the requisite court fee payable thereon. It has further held that this, however, does not mean that whenever a complaint is presented with the deficit court fee, the same has to be rejected outrightly. The Court has power u/s 149 of the Code to extend the period and when such deficit court fee is paid, the same would be deemed to have been paid in the first instance. The Apex Court in para 17 of its judgment has held as under:

17. Payment of court fee furthermore is a matter between the State and the suitor. Indisputably, in the event a plaint is rejected, the defendant would be benefited thereby, but if an objection is to be raised in that behalf or an application is to be entertained by the court at the behest of a defendant for rejection of the plaint in terms of Order 7 Rule 11(c) of the Code, several aspects of the matter are required to be considered. Once an application u/s 149 is allowed, Order 7 Rule 11(c) of the Code will have no application. It is for that additional reason, the orders extending the time to deposit deficit court fee should have been challenged.

Thus, the Apex Court has held that once an application u/s 149 of CPC is allowed, Order VII, Rule 11(c) of the Code will have no application.

46. The aspect of territorial and pecuniary jurisdiction has been dealt with by the Apex Court in its decision in case of Subhash Mahadevasa Habib Vs. Nemasa Ambasa Dharmadas (D) by LR.s. and Others, . The Apex Court has held that the objection to the territorial and pecuniary jurisdiction is to be treated on par with Section 21 of CPC. It has further been held that taking note of the object of the amendment in the light of law. as expounded by this Court, it would be incongruous to hold that Section 21A takes in only objection to the territorial jurisdiction and not to the pecuniary jurisdiction. It has been held that a decree passed by a Court lacking territorial or pecuniary jurisdiction does not automatically become void. At the best, it is voidable, in the sense that it could be challenged in appeal therefrom, provided the conditions of Section 21 of CPC are satisfied.

47. In the decision of the Apex Court in R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd., , an objection regarding the territorial jurisdiction of the High Court at Bombay was raised. The learned Single Judge took the view that the Court at Bombay had jurisdiction to decide the case. The learned Single Judge passed a decree in favour of the appellant/plaintiff and against the respondent/ defendant for the recovery of money alongwith interest. The Division Bench of the High Court allowed the appeal and dismissed the suit. The matter was carried to the Apex Court. The Apex Court held that Sub-Section (1) of Section 21 of CPC provides for no objection as to the place of suing shall be allowed by any Appellate or Revisional Court, subject to following conditions:

(i) that such objection was taken in the Court of first instance at the earliest opportunity;

(ii) that in all the cases where the issues are settled, then at or before such settlement of issues; and

(iii) that there has been a consequent failure of justice.

The Apex Court held that if the first two conditions are satisfied but, the third condition of failure of justice is not fulfilled. The Apex Court held that there is no failure of justice to the defendant by decreeing the suit by the learned Single Judge of the Bombay High Court, on the contrary it would be totally unjust and failure of justice to the plaintiff in case such an objection relating to jurisdiction is to be maintained, as allowed by the Division Bench of the High Court in its appellate jurisdiction.

Jurisdiction - Inherent

48. The question of jurisdiction as to the subject-matter of the suit has been dealt with by the Apex Court in paras 31, 32 and 33 of its decision in the case of Harshad Chiman Lal Modi Vs. DLF Universal and Another, . The said paragraphs are reproduced below:

31. In Halsbury's Laws of England, (4th edn.), Reissue, Vol. 10; para 317, it is stated: "317. Consent and waiver. Where, by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject-matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent.

32. In Bahrein Petroleum Co., this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing." A decree passed by a court having no jurisdiction is nonest and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non iudice.

33. In Kiran Singh v. Chaman Paswan, this Court declared:

It is a fundamental principle well established that a decree passed by a court

without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction... strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties

It is thus well established that a decree passed by a Court without jurisdiction is a nullity and its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, be it at the stage of execution and/or even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties. It has been held that neither consent nor waiver or acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit. A decree passed by a Court without jurisdiction is a coram non iudice.

Distinction between Territorial/Pecuniary and Inherent -- Lacking of

49. The law on the point of lack of inherent jurisdiction on one hand and the lack of territorial or pecuniary jurisdiction on the other hand, can be summarized as under:

(i) A decree passed by the Court lacking territorial or pecuniary jurisdiction does not automatically become void; at the most it becomes voidable, in the sense that it could be challenged in an appeal or revision on limited grounds.

(ii) A decree passed by a Court with lack of inherent jurisdiction becomes null and void in law and its validity can be set up whether and whenever it is sought to be enforced or relied upon - be it at the stage of execution or even in the collateral proceedings.

(iii) The factors, like waiver, acquiescence, consent, estoppel, etc., are not at all relevant in the case of a decree passed by a Court with lack of inherent jurisdiction; whereas, these factors are relevant where a decree is passed by a Court with lack of pecuniary and territorial jurisdiction.

(iv) The question of valuation of a suit or an appeal is closely interlinked to some extent with the question of payment of court-fee and pecuniary jurisdiction of the Court, and the provisions relevant are Sections 8 and 11 of the Suits Valuation Act, Section 8 and 14 of the Bombay Court Fees Act, Sections 24 and 8 of the Bombay Civil Courts Act, and Section 21 of the Civil Procedure Code.

(v) The question of categorization or classification of a suit under the different provisions of the Bombay Court Fees Act, which may not have any bearing on the question of pecuniary jurisdiction of the Court, can independently be dealt with.

Amendment to Section 115 of CPC Position - Before and, After

50. In exercise of revisional jurisdiction u/s 115 of CPC, the High Court is competent to correct the errors, which have relation to the jurisdiction and the jurisdiction alone to entertain, try and decide the dispute by the lower Court. The

High Court is not competent to correct the errors of fact -however gross them may be - or even the errors of law having no relation to the aspect of jurisdiction to entertain, try and decide the dispute. By an amendment introduced by Act No. 22 of 2002 with effect from 1-7-2002, the earlier jurisdiction of the High Court u/s 115 to vary or reverse all sorts of interlocutory orders is taken away and it is now restricted only to the nature of the orders covered by the proviso to Section 115, viz. the order if it had been made in favour of a party applying for a revision would have finally disposed of the suit or other proceedings pending before the lower Court. The amendment even restricts the grounds of challenges to the orders covered by the proviso. The earlier jurisdiction to interfere in the interlocutory orders on the ground that if such orders are allowed to stand shall occasion a failure of justice or cause an irreparable injury to the party against whom such an order is made, has been taken away. In respect of the challenges to the orders regarding valuation of the suit, payment of court-fee, pecuniary and territorial jurisdiction, the interference in the orders covered by the proviso is further minimized or controlled by the provisions of Section 11 of the Suits Valuation Act, Section 14 of the Bombay Court Fees Act and Section 21 of the Civil Procedure Code.

Distinction between Jurisdiction under Section 115 of CPC and Writ of Certiorari

51. In the decision of Apex Court in case of Major S.S. Khanna Vs. Brig. F.J. Dillon, , a distinction has been made between the issuance of writ of certiorari and the jurisdiction of the High Court u/s 115 of CPC in para 29 of the said judgment. In para 31 of the said decision, the Apex Court has held that a writ of certiorari to quash lay in a completed case on a question of jurisdiction and an error of law apparent from the face of the record. In para 33 of the said decision, the Apex Court has explained the scope of the jurisdiction of the High Court u/s 115 of CPC. It is held that a writ of certiorari to quash lay in a completed case on a question of jurisdiction and an error of law apparent from the face of record, the power u/s 115 does not comprehend the power exercisable under the writ of prohibition or mandamus. It is also not a full power of certiorari inasmuch as it arises only in a case of jurisdiction and not in a case of error. The revisional power is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists or an assumption of jurisdiction where none exists, and lastly acting with illegality or material irregularity. It has been held that where there is no question of jurisdiction in this manner the decision cannot be corrected, for it had also been ruled that a Court has jurisdiction to decide wrongly as well as rightly.

Jurisdiction under Articles 226 and 227 of the Constitution of India

52. The amendment curtailing the jurisdiction of the High Court u/s 115 of CPC, neither does curtail nor does enhance the jurisdiction of the High Court under Article 226 or 227 of the Constitution of India to interfere in all sorts of interlocutory orders not covered by the proviso to Section 115. In the decision of the Apex Court in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, , a

distinction has been made between the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India. This decision also lays down the parameters for exercise of jurisdiction under Articles 226 and 227 of the Constitution of India. In a later decision of the Apex Court in the case of *Radhey Shyam and Another Vs. Chhabi Nath and Others*, , a disagreement is expressed with the decision in *Surya Dev Rai's* case to the extent it laid down a legal proposition that the judicial orders passed by the Civil Court can also be examined and corrected or reversed by a Writ Court under Article 226 of the Constitution of India in exercise of its powers under the writ of certiorari. In another subsequent decision of the Apex Court in the case of *Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil*, , the principles on exercise of High Court's jurisdiction under Article 227 of the Constitution of India are laid down.

53. The legal proposition laid down in *Surya Dev Rai's* case that the judicial orders passed by the Civil Court can be examined and then corrected/reversed by the Writ Court under Article 226 of the Constitution of India in exercise of its power under the writ of certiorari, has been referred to a larger Bench. Keeping aside the said question, the observations of the Apex Court in paras 22, 26 and 29 in the said decision need to be looked into when we talk about exercise of jurisdiction under Articles 226 and/or 227 of the Constitution of India. The said observations are reproduced below:

22. Article 227 of the Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction excepting any court or tribunal constituted by or under any law relating to the armed forces. Without prejudice to the generality of such power the High Court has been conferred with certain specific powers by clauses (2) and (3) of Article 227 with which we are not concerned here at. It is well settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. Else the parameters invoking the exercise of power are almost similar.

26. In order to safeguard against a mere appellate or revisional jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under Article 227 of the Constitution, the courts have devised self-imposed rules of discipline on their power. Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. The High Court may have regard to legislative policy

formulated on experience and expressed by enactments where the legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of the proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceedings to judicial review by way of appeal or revision. So long as an error is capable of being corrected by a superior court in exercise of appellate or revisional jurisdiction, though available to be exercised only at the conclusion of the proceedings, it would be sound exercise of discretion on the part of the High Court to refuse to exercise the power of superintendence during the pendency of the proceedings. However, there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once proceedings have concluded.

39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a strait-jacket formula or rigid rules. Not less than often, the High Court would be faced with a dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where "a stitch in time would save nine". At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge.

54. The common principles laid down by the Apex Court in all the three decisions, which are relevant for the purposes of the present case, are summarized below:

(a) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(b) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is

being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(c) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(d) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(e) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error through calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(f) High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.

(g) According to the ratio in *Waryam Singh and Another Vs. Amarnath and Another*, followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and courts subordinate to it, "within the bounds of their authority".

(h) The High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of the tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(i) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(j) This reserved and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(k) An improper and a frequent exercise of this power will be counterproductive and will divest this extraordinary power of its strength and vitality.

Exercise of Jurisdiction under Articles 226 and 227 of the Constitution of India

55. Though existence of an alternate efficacious remedy by way of statutory appeal or revision is not an absolute bar for exercise of jurisdiction under Article 226 or 227 of the Constitution of India, it is a matter of self-restraint on exercise of such jurisdiction by the High Court. However, there are certain interlocutory orders against which there is neither statutory appeal provided nor revisional jurisdiction u/s 115 is made available. The obvious intention of the Legislature is to prohibit challenge to such orders at an interlocutory stage of the proceedings before the lower Courts. The challenge to such orders is permissible only in the manner provided under Sections 99 and 105 read with Order XLIII. Rule 1A of CPC only on the ground that the error, defect or irregularity in such orders affects the merits of the case.

56. As has been held by the Apex Court in para 26 of *Surya Dev Rai Vs. Ram Chander Rai and Others*, , the High Court may refuse to exercise its jurisdiction under Articles 226 and 227 of the Constitution of India, when an alternate remedy is available by way of appeal or revision, having regard to the Legislative policy formulated on experience and expressed by enactments where the Legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of the appellate and revisional jurisdiction in the hope of accelerating the conclusion of proceedings and avoiding delay and procrastination, which is occasioned by subjecting every order at every stage of the proceedings to judicial review by way of appeal or revision. So long as an error is capable of being corrected by a superior Court in exercise of the appellate or revisional jurisdiction, though available to be exercised only at the conclusion of the proceedings, it would be a sound exercise of discretion on the part of the High Court to refuse to exercise the power of superintendence during the pendency of the proceedings, to respect the Legislative wisdom.

57. Frequent intervention in pending proceedings creates an impediment and obstructs the smooth flow of proceedings before the Courts below. It breaks the continuity and causes the delay in termination of the proceedings. The

jurisdiction of the High Court under Article 226 and/or 227 of the Constitution of India, therefore, needs to be exercised sparingly with great care, caution and circumspection. The exercise of jurisdiction should not be a counter-productive, but it should be to advance the substantial justice by suppressing mischief. This, however, does not mean that the Court should overlook or ignore the patent perversity and gross errors resulting in manifest failure of justice or causing an irreparable loss to a party aggrieved. Sometimes, the timely correction of such errors saves multiplicity of proceedings and avoids travesty of justice. The timely correction of errors has got its own significance, in the sense that if the correction or remedial measures are not taken at an interlocutory stage, the position may subsequently become irreversible or incapable of being remedied once the proceedings are concluded.

58. There cannot be any strait-jacket formula to be laid down as to under what circumstances such intervention is called for and in what circumstances it is unwarranted. The facts and circumstances, the nature of order, the resultant effect of not correcting the errors at an interlocutory stage should dictate the Court the course of action to be adopted. The Court has to strike the balance to see that the process of Court is not is used with an ulterior motive. Therefore, some guidelines throwing some light on the exercise of jurisdiction either u/s 115 of CPC or under Article 226 and 227 of the Constitution of India arising out of certain common or repeated orders can be laid down to some extent while answering a question of law, which is framed as under:

Question of Law

Where a Court subordinate to the High Court, passes an interlocutory order in any suit or other proceedings, deciding an issue or determining some right or liability based upon the conspectus of fact, should this Court exercise its revisional jurisdiction u/s 115 of CPC or as the case may be, jurisdiction under Article 226 and 227 of the Constitution of India to interfere, when such decision or determination, can be more conveniently and effectively challenged by exercising a statutory right of appeal available, after the final decision in such a suit or proceedings?

Kinds of Order-Exercise of Jurisdiction

59. Now turning back to the interlocutory orders, which are in the nature of preliminary judgments, as pointed out earlier, the same are delivered ordinarily and mostly in exercise of the powers u/s 9A or under Order VII, Rule 11 or under Order XIV, Rule 2 of CPC either by dismissing the suit/rejecting a plaint by upholding the preliminary objection or by rejecting such preliminary objection. Such orders can be classified broadly in three categories as under:

(a) Deciding the applications under Order VII, Rule 11(a) to (f) of CPC;

(b) Deciding the question of jurisdiction of a Court to entertain, try and decide the suit under Order VII. Rule 11(d), u/s 9-A or under Order XIV, Rule 2 of CPC,

either wholly or partly, as the case may be; and

(c) Deciding the question of bar to the suit created by any law for the time being in force u/s 9-A or under Order VII, Rule 11(d) or under Order XIV, Rule 2 of CPC.

Order of rejection of plaint under Order VII. Rule 11 or dismissal of suit on preliminary judgment u/s 9-A or under Order XIV, Rule 2 of CPC

60. Whenever a preliminary judgment is delivered deciding any question, which results either in rejection of a plaint as a whole under Order VII, Rule 11 of CPC or dismissal of a suit as a whole u/s 9-A or under Order XIV, Rule 2, it becomes a "decree" within the meaning of sub-section (2) of Section 2. The remedy of filing a statutory appeal u/s 96 read with Order XLI, Rule 1 becomes available. In case of a rejection of plaint under Order VII, Rule 11, it is always open for the plaintiff to file a fresh plaint in terms of Order VII, Rule 13, provided the law of limitation does not interdict such filing. In such a situation, there is no question of entertaining either a revision u/s 115 of CPC or a petition under Article 226 and 227 of the Constitution of India.

Order of rejection of plaint or dismissal of suit in part

61. When a plaint is rejected in part or a suit is dismissed in part, two options are left for the plaintiff, viz. (a) to wait till the final decision in the suit and then to challenge such decision by exercising a statutory right of appeal against the findings of fact and law both; or (b) to invoke discretionary and more restricted jurisdiction of the High Court under Article 226 and 227 of the Constitution of India, as the remedy of revision u/s 115 of CPC may not be available. While exercising the jurisdiction under Article 226 and 227 of the Constitution of India, the High Court will normally proceed upon the conspectus of facts determining the questions of law and it may foreclose a statutory right to file a regular civil appeal challenging the decision on facts causing a prejudice to a party against whom a decision shall be rendered by the High Court. Once the jurisdiction of the High Court under Article 226 and 227 of the Constitution of India is rendered on merits of the case, then the remedy of assailing such an interlocutory order in a challenge to a decree by way of first appeal or second appeal is lost by both the parties to the suit.

Order rejecting application under Order VII. Rule 11(a) of CPC for rejection of plaint

62. When a claim for rejection of plaint under Order VII, Rule 11(a) of CPC on the ground that it fails to disclose cause of action is rejected by the Trial Court, it is the remedy of revision u/s 115, which becomes available and there is no question of invoking the jurisdiction of the High Court under Article 226 and 227 of the Constitution of India. In exercise of the power under Order VII, Rule 11(a), the plaint can be rejected only on the ground that there is a failure to plead material facts constituting the cause of action. Absence of a single material fact entails the consequences of rejection of plaint.

63. When an application under Order VII, Rule 11(a) of CPC is rejected, the Court is bound to record the finding on such a plea holding in clear terms that there is or there is no failure to plead the material facts alleged. When such a plea is raised at the initial stage, a wise lawyer may move an application for amendment of the plaint incorporating such a plea if there subsists a period of limitation instead of trying to justify it. The Court may also hold that all the material facts are pleaded or that there is no failure to plead a single material fact. In all such situations, the High Court would be slow to interfere in exercise of its jurisdiction u/s 115 of CPC for the reasons that:

(a) under Order VII, Rule 11(a) of CPC, it is the defendant, who invokes the jurisdiction of the Trial Court, and hence there is no question of challenging the order of such rejection on the ground that the Court had no jurisdiction. Unless a ground of exceeding the jurisdiction is made out in rejecting such application for the reasons not germane or a case is made out on the ground of exercise of jurisdiction illegally or with material irregularity, the jurisdiction u/s 115 of CPC may not be exercised;

(b) when there is a failure to record the finding by the Trial Court either one way or the other holding that there is or there is no failure to plead a single material fact, it will be for the High Court to record such a finding for the first time in revision, as there may not be any remand in view of the proviso to Section 115 of CPC, which requires the High Court to pass an order disposing of the suit or proceedings before the Trial Court. After recording of the finding of failure to plead a single material fact by upholding the objection under Order VII, Rule 11(a) of CPC, the Revisional Court will have to reject the plaint, which will amount to a "decree" within the meaning of sub-section (2) of Section 2 of CPC. This shall take away the right of first appeal before the District Judge, or second appeal before the High Court, to the plaintiff;

(c) the question as to whether all the facts pleaded are material facts or that there is a failure to plead a single material fact, can be more conveniently and effectively be adjudicated in a wider jurisdiction of a regular statutory appeal, if the ultimate decision in the suit goes against the defendant, and to urge that no amount of evidence can cure the defect in the pleading of material facts; and

(d) if in spite of rejection of an application under Order VII, Rule 11(a) of CPC, the suit is ultimately dismissed on merits, then there may not be any occasion for the defendant to challenge such order. However, if the plaintiff prefers an appeal against such decree, then it is open for the defendant to raise a cross-objection challenging the findings recorded on the application under Order VII, Rule 11(a) of CPC and acted upon by the Trial Court.

Order rejecting application under Order VII. Rule 11(b) and (c) of CPC

64. Order 7, Rule 11 of CPC empowers the Court to reject the plaint under clauses (b) and (c), which are reproduced below:

11. Rejection of plaint.--The plaint shall be rejected in the following cases:--

....

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so.

The question of valuation of the suit in clause (b) above, is closely interlinked to some extent with the question of court-fee payable in clause (c) above, through Section 8 of the Suits Valuation Act, which deals with the court-fee value and jurisdictional value to be the same in certain cases. As per this provision, the value as determinable for the computation of the court-fee and the value for the purposes of the jurisdiction shall be the same.

65. If the Court finds under clause (b) that the relief claimed in the suit is undervalued, or that the court-fee paid insufficient in terms of clause (c), then a conditional order is required to be passed in terms thereof, determining the correct valuation or court-fee payable and granting fixed time to the plaintiff to take corrective measures. If, upon correct valuation, as determined by the Court, the pecuniary jurisdiction of the Court changes, then the Court is required to pass further consequential order for returning the plaint for presentation before the proper Court. If the valuation is not corrected or deficit court-fee is not paid by the plaintiff within the stipulated time, then the order passed under clauses (b) and (c) rejects the plaint holding that the Court has no pecuniary jurisdiction to entertain, try and decide the suit or that deficit court-fee is not paid, as the case may be. It amounts to a "decree" within the meaning of sub-section (2) of Section 2 of CPC.

66. In all situations pointed out above, the High Court may not exercise its jurisdiction u/s 115 of CPC or a petition under Article 226 and 227 of the Constitution of India, for the reasons - (i) that there exists an alternate statutory remedy of filing an appeal u/s 96 read with Order XLI, Rule 1 of CPC; (ii) even if such an order is not to be treated as "decree", still the plaintiff is not prevented from filing a fresh plaint on the same cause of action with correct valuation in terms of Order VII, Rule 13 of CPC; and (iii) in case of expiry of time-limit specified in the Order under clause (b) or (c), an extension of time can be granted either in exercise of power under the proviso to Order VII, Rule 11 or u/s 149 of CPC and upon such extension of time, it relates back to the date of passing of an order under clauses (b) and (c) and hence bar of limitation interdicting will not arise. In the case of P.K. Palanisamy Vs. N. Arumugham and Another, , the Apex Court has held that once an application u/s 149 is allowed, Order VII, Rule 11(c) of CPC will have no application.

67. If the claim for rejection of a plaint under clauses (b) and (c) for undervaluation is rejected by the Trial Court, then it is a decision on an inquiry u/s 8 of the Bombay Court Fees Act. The decision on such question of valuation rendered by the Trial Court then becomes final as between the parties in terms of sub-section (1) of Section 14 of the said Act. In such a situation, the defendant, who may believe, and even honestly, that the suit has not been properly valued, has no right to move the superior Court either by way of appeal or revision against the order adjudging the valuation, for the reason that it is a matter between the plaintiff and the State Government and other party has no role to play. It has been held by the Apex Court in the case of *Sri Ratnavaramaraja Vs. Smt. Vimla*, , that whether proper court-fee is paid, is a question between the plaintiff and the State Government, and whenever such suit comes before a Court of Appeal, Reference or Revision, and if such Court considers that the said question has been wrongly decided, then it can direct the party to pay so much additional fee as would have been payable had the question been rightly decided. Hence, the question of entertaining either a revision u/s 115 of CPC or a petition under Article 226 and 227 of the Constitution of India, may not at all arise.

68. The question of valuation of the suit is also interlinked with the pecuniary jurisdiction of the Trial or the Appellate Court to entertain, try and decide the suit or the appeal through the provisions of Section 24 and Section 8 respectively of the Bombay Court Fees Act prescribing the pecuniary limits of jurisdiction. Whenever any decision either on the question of valuation of the suit or payment of the court-fee affects the pecuniary jurisdiction of the Trial or the Appellate Court to entertain, try and decide the suit or an appeal, the provisions of sub-section (2) of Section 21 of CPC along with Section 11 of the Suits Valuation Act and Section 14 of the Bombay Court Fees Act come into operation. A combined reading of all/ or these provisions indicate that any interference in such order can only be when an Appellate or the Revisional Court is satisfied that- (i) such objection was taken at the first instance; (ii) there has been a consequent failure of justice; and (iii) the wrong valuation has prejudicially affected the merits of the case. This, however, does not mean that the question of valuation also covers the classification or categorization of suits under various provisions of the Bombay Court Fees Act, which may be dealt with in accordance with law.

69. The Apex Court, in the decisions rendered in the cases of *R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd.*, ; and *Subhash Mahadevasa Habib Vs. Nemasa Ambasa Dharmadas (D) by LRs. and Others*, , has held that a decree passed by a Court lacking pecuniary jurisdiction, does not automatically become void. At the most, it becomes voidable and could be challenged, provided the aforesaid conditions at (a) to (d) are satisfied. It has held that if the objection to the pecuniary jurisdiction of the Court is rejected, then such an order can be set aside either in appeal or revisional jurisdiction subject to the conditions - (a) that such an objection was taken in the Court of first instance at the earliest opportunity; (b) that in all the cases where the issues are settled, then at or before such settlement of the issues; and (c) that there has been a

consequent failure of justice; or (d) that wrong valuation has prejudicially affected the disposal on its own merits.

70. In the decision in Kiran Singh's case, 2008 ALL SCR (O.C.C.) 811 cited supra, it was held that the prejudice is not a mere change of forum, but it must be something other than an appeal being heard in a different forum. It is also different from mere error in the decision on merits. An instance of prejudice is quoted where the suit to be tried by the regular Court has been tried by the Court of Small Causes in a summary inquiry where the provisions of discovery or inspection or that of evidence are not in extenso applicable and no right of appeal is available against such decision. There may be cases where as a result of the order of the Trial Court deciding the question of valuation or payment of court-fee will not change the pecuniary jurisdiction of the Court passing such an order.

71. In all the aforesaid situations, when a test to interfere in such order is the same so far as appeal and revision is concerned, there cannot be a different test to interfere in such order in exercise of jurisdiction either u/s 115 of CPC or under Article 226 and 227 of the Constitution of India. In such a situation, the High Court will be slow in interfering with such an order at an interlocutory stage, when such question can be more conveniently and effectively dealt with in a regular appeal against a decree or a final decision.

Preliminary judgment rejecting objection as to the jurisdiction of the Court and bar to suit in exercise of power under Order VII Rule 11(d) or under Order XIV. Rule 2 of CPC

72. Order XIV, Rule 2 of CPC deals with the preliminary issues relating to (a) the jurisdiction of the Court, or (b) the bar to the suit created by any law for the time being in force. Clauses (a) and (b) both are complimentary to each other. When it is said that there is a bar to the suit created by any law for the time being in force, it also relates to the jurisdiction of the Court, and when an issue deals with the jurisdiction of the Court, it deals with the law creating a bar of jurisdiction of the Civil Court to entertain, try and decide the suit. The decision on the preliminary issue framed under Order XIV, Rule 2 of CPC relates to a pure question of law and not to the mixed question of law and fact. Such an issue can also be decided by the Trial Court under Order VII, Rule 11(d) of CPC, where the suit appears from the statements in the plaint to be barred by any law. There is, however, no provision in the Civil Procedure Code, except Section 9-A introduced by Maharashtra Act No. 65 of 1977 with effect from 19-12-1977, which permits the Court to decide the preliminary issue relating to the jurisdiction of the Court or bar to the suit created by any law for the time being in force involving the mixed question of law and fact also.

73. When the Court decides any such question under Order VII, Rule 11(d) of CPC, it records a finding either that the suit appears from the statements in the plaint to be barred by any law for the time being in force, or that the statements

made in the plaint do not make out a case of any bar created by any law for the time being in force. When such an objection is rejected by the Trial Court, a remedy of filing a revision u/s 115 of CPC becomes available, and there is no question of preferring any petition under Article 226 and 227 of the Constitution of India. In such a situation, the Court will have to entertain a revision to decide it on its own merits to work the rights of parties at the initial stage, so as to put an end to unsustainable and protracted litigation causing delay in subordinate Courts, contributing to increase in arrears, as has been held in Surya Dev Rai's case by the Apex Court. The continuation of such proceedings before the Trial Court for years together causes some harassment to the litigant. He is exploited financially and also mentally and physically, being attentive to such proceedings. If the proceedings could be thrashed out at the initial stage without going into the merits of the case on the basis of a pure question of law to be decided on the principle of demurrer, the Court will entertain a revision and shall decide it on its own merits. The same would be the position in the case where the preliminary issues are framed by the Court in exercise of its power under Order XIV, Rule 2 of CPC and are decided on the principle of demurrer.

Preliminary judgment rejecting objection regarding the jurisdiction of Court under Section 9-A of CPC

74. The parameters for exercise of jurisdiction u/s 115 of CPC laid down in the aforesaid para in respect of Order VII, Rule 11(d) and Order XIV, Rule 2 of CPC cannot be applied in every situation to the cases where the Court decides the preliminary issues in exercise of its jurisdiction u/s 9-A of CPC, which permits the Court to decide a pure question of law and also a mixed question of law and fact, touching the jurisdiction of the Court. When the Court passes an order in exercise of its jurisdiction u/s 9-A on the principle of demurrer, then in that event the High Court should exercise its jurisdiction u/s 115 of CPC. for the reasons stated in the earlier para. However, when a decision relating to the question of jurisdiction of the Court based upon the conspectus of facts, the Court will have to decide in the facts and circumstances of each case whether such an interference is called for.

75. u/s 9-A of CPC, the Court is empowered to frame an issue as to the jurisdiction of the Court and to permit the parties to lead evidence in support of it, if it is a mixed question of law and fact. When a decision relating to the jurisdiction of the Court is based upon conspectus of facts, then a question of appreciation or re-appreciation of the evidence on record, may arise. For example, the cases of bar of limitation, bar of res judicata, bar under Order II, Rule 2 of CPC, and the matters of like nature, where the parties lead oral and documentary evidence, and on conspectus of facts, the decision is arrived at by the Trial Court either that the suit is barred by law of limitation, or by a principle of res judicata or by a principle under Order II, Rule 2 of CPC. No doubt, these issues pertain to the jurisdiction of the Court in respect of which the power u/s 115 can be exercised.

76. The question is, should this Court in aforesaid situation exercise its jurisdiction u/s 115 of CPC. The High Court may not exercise its jurisdiction in such situation. The reasons would be - (i) the Trial Court does not act beyond the jurisdiction, neither it fails to exercise the jurisdiction vested in it; (ii) the Trial Court is bound to decide the right, may decide wrong, and merely because it has decided wrongly, it does not amount to doing something which it had no jurisdiction to do; (iii) it is not the function of the High Court u/s 115 to appreciate or re-appreciate the evidence on record and to come to a conclusion different than the one arrived at by the Court below; (iv) the High Court cannot act as a Court of Appeal and substitute the view on facts taken by the Trial Court; (v) Section 115 does not confer a jurisdiction upon the High Court to correct the errors of fact, howsoever gross they may be, or even the errors of law, not touching the jurisdiction of the Court; (vi) the exercise of jurisdiction by the High Court shall deprive a statutory right of appeal available to the party to challenge the findings of fact recorded by the Court below to answer a preliminary issue either in the negative, (vii) the error, if any, can be corrected in more convenient and effective manner in wider jurisdiction of appeal; (viii) it is possible that if the suit is dismissed on merits, the decision on preliminary issue may lose its significance; and (ix) if any appeal is preferred against dismissal of suit, then in terms of Sub-section (1) of Section 105 read with Order XLIII, Rule 1A or under Order XLI, Rules 22 and 33 of CPC, it can be urged in such appeal by the defendant that the Trial Court could not have passed such an order and the Appellate Court is bound to decide the same on its own merits.

Law on the question of amendment of pleadings under Order VI. Rule 17 of CPC

77. The law on the question of amendment of pleadings under Order VI, Rule 17 of CPC is well settled. An amendment or alteration in the pleadings can be allowed at any stage of the suit or even in an appeal, which is a continuation of the suit. Once it is allowed, it relates back to the date of filing of the suit unless it is made clear in such order that it shall operate from the date of filing of an application for amendment. The grant of an amendment is the discretion of the Court to be exercised subject to certain conditions.

Decisions of the Apex Court on the amendment of pleadings

78. In the decision of the Apex Court in the case of Ajendraprasadji N. Pande and Another Vs. Swami Keshavprakeshdasji N. and Others, , the Trial Court dismissed the application for amendment filed after commencement of the trial. The High Court dismissed writ petition under Article 226 of the Constitution of India and hence appeal was preferred before the Apex Court. In para 52, it was held that no facts are pleaded nor grounds are raised in the amendment application to even remotely contend that despite exercise of due diligence, these matters could not be raised by the appellants. It was held that the grant of amendment at the belated stage when deposition and evidence of three witnesses is also over as well as documentary evidence is tendered, a serious prejudice will be caused to the contesting respondents. In para 54, it was held that either treating

the date of settlement of issues as the date of commencement of the trial or treating the filing of affidavit, which is treated as examination-in-chief as the date of commencement of trial, the matter will fall under proviso to Order VI, Rule 17 of CPC. Hence, the defendant was required to prove that in spite of due diligence, he could not have raised the matter before commencement of the trial. It was held that High Court was justified in not interfering with the order under Article 227 of the Constitution of India.

79. In the decision in the case of Chander Kanta Bansal Vs. Rajinder Singh Anand, , the application for amendment of written statement was allowed by the Trial Court. The High Court set aside the said order and the Apex Court dismissed the appeal. It was held that the proviso to Order VI, Rule 17 of CPC limits the power of the Court to allow amendment after commencement of the trial but grants discretion to allow such amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It has been held that the power to allow the amendment should be liberally exercised to avoid multiplicity of the proceedings and the amendments, which do not totally alter the character of an action, should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under the pretence of amendment. Whether a party has acted with due diligence or not, would depend upon the facts and circumstances of each case. It was held that the Court would have power to deal with the unforeseen situations whenever they arise. In para 13, the Apex Court has observed as under:

13. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.

In paras 16 and 17, the Court has dealt with the question of "diligence" and "due diligence" as under:

16. The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge

an obligation. According to Words and phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

17. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. As mentioned earlier, in the case on hand, the application itself came to be filed only after 18 years and till the death of her first son Sunil Gupta, Chartered Accountant, had not taken any step about the so-called agreement. Even after his death in the year 1998, the petition was filed only in 2004. The explanation offered by the defendant cannot be accepted since she did not mention anything when she was examined as witness.

It has been held that in spite of long delay, if acceptable material/materials placed before the Court show that the delay was beyond their control or diligence, it would be possible for the Court to consider the same by compensating the other side by awarding costs.

80. In the decision of the Apex Court in the case of Rajkumar Gurawara (Dead) thr. L.Rs. Vs. S.K. Sarwagi and Co. Pvt. Ltd. and Another, , a suit was filed seeking declaration that the plaintiff had exclusive right to do the mining operations, to use and sell over the suit lands against the respondent No. 2's infringement of such exclusive right of the plaintiff over the suit lands. An application for amendment of plaint was moved claiming the relief of possession of the suit lands and for damages trespassing into and carrying on mining operations on the suit lands. It was allowed by the Trial Court. The High Court in revision set aside the order and the Apex Court dismissed the appeal. In paras 13 and 18, the Apex Court has held as under;

13. To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso.

18. Further, it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition filed during the course of the arguments, he prayed for recovery of possession and damages from the second

defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation. The plaintiff not only failed to satisfy the conditions prescribed in proviso to Order 6 Rule 17 but even on merits his claim is liable to be rejected. All these relevant aspects have been duly considered by the High Court and rightly set aside the order dated 10-3-2004 of the Additional District Judge;

81. In the decision of the Apex Court in the case of Vidyabai and Others Vs. Padmalatha and Another, , it was a suit for specific performance of an agreement of sale. The issues were framed and the parties filed their respective affidavits by way of evidence. The dates were fixed for cross-examination of the witnesses. At that stage, an application for amendment of written statement was moved. It was dismissed by the Trial Court, holding that entire new case was sought to be made out. The High Court set aside the order of rejection of amendment and allowed the said amendment. The Apex Court set aside the decision of the High Court and restored the decision of the Trial Court. It was held in paras 11 and 19 as under:

11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfill the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the CPC envisage taking of various steps at different stages of the proceedings. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding".

19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

82. In the decision of the Apex Court in the case of Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, , it was a suit for recovery of amount along with interest. The appellant also claimed a declaration that he is the absolute owner of the scheduled property on the basis of the sale-deed. By way of amendment, the plaintiff sought relief of declaration that the defendants are trespassers and/or in unauthorized occupation of the building, which they were permitted under the sale-deed dated 30-9-1987 to use as a licensee till 31-3-1988. The mandatory injunction was also claimed directing the defendants

to vacate and deliver to the plaintiff, vacant and peaceful possession of the building. A relief of permanent injunction restraining the defendants from disturbing the enjoyment of the possession of the plaintiff over the suit property was also claimed. The amendment was allowed by the Trial Court. The High Court allowed the petition under Article 227 of the Constitution of India, holding that the amendment sought and granted has changed the entire nature of the suit and cause of action. It was also held that allowing amendment would take away the admissions in the plaint, which cannot be permitted by the Court. The Apex Court dismissed the appeal with the costs of Rs. 1,00,000/-. In para 31, the Apex Court has observed as under:

31. In our considered view, Order 6 Rule 17 is one of the important provisions of CPC, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. All civil courts ordinarily have a long list of cases, therefore, the courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases.

In para 58, the Apex Court has held that the first condition which must be satisfied before the amendment can be allowed by the Court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied; the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment. In para 59, it has been held that the discretion of the Court should be exercised keeping in view the potentiality of the prejudice or injustice, which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs, then there is no injustice, but in practice, hardly any Court grants actual costs to the opposite side. The discretion has to be exercised judiciously with great care. In paras 61, 62 and 63, the Apex Court has laid down certain guidelines of illustrative in nature and not exhaustive, which read as under:

Costs

61. The courts have consistently laid down that for unnecessary delay and inconvenience, the opposite party must be compensated with costs. The imposition of costs is an important judicial exercise particularly when the courts deal with the cases of amendment. The costs cannot and should not be imposed arbitrarily. In our view, the following parameters must be taken into consideration while imposing the costs. These factors are illustrative in nature and not exhaustive:

- (i) At what stage the amendment was sought.
- (ii) While imposing the costs, it should be taken into consideration whether the amendment has been sought at a pretrial or post-trial stage.

(iii) The financial benefit derived by one party at the costs of other party should be properly calculated in terms of money and the costs be awarded accordingly.

(iv) The imposition of costs should not be symbolic but realistic.

(v) The delay and inconvenience caused to the opposite side must be clearly evaluated in terms of additional and extra court hearings compelling the opposite party to bear the extra costs.

(vi) In case of appeal to higher courts, the victim of the amendment is compelled to bear considerable additional costs.

All these aspects must be carefully taken into consideration while awarding the costs.

62. The purpose of imposing costs is to:

(a) discourage mala fide amendments designed to delay the legal proceedings;

(b) compensate the other party for the delay and the inconvenience caused;

(c) compensate the other party for avoidable expenses on the litigation which had to be incurred by the opposite party for opposing the amendment; and

(d) to send a clear message that the parties have to be careful while drafting the original pleadings.

"Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

83. In the decision of the Apex Court in the case of Abdul Rehman and Another Vs. Mohd. Ruldu and Others, , it was a suit filed for prohibitory injunction restraining the defendants from forcibly and illegally dispossessing the plaintiffs from the suit land. In the said suit, an application for amendment was moved, incorporating the challenge to the sale-deeds dated 25-8-2003 issued in favour of the defendant Nos. 1 to 3 and for declaration that the same have no effect on the rights of the plaintiffs. The Trial Court dismissed the application. The High Court also dismissed the civil revision application. The Apex Court allowed the appeal. It was held that the challenge to the voidness of those sale-deeds was implicit in the factual matrix set out in the unamended plaint and, therefore, the relief of cancellation of sale-deeds as sought by the amendment does not change the nature of the suit as alleged. It was held that it is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. It was held that the proposed amendment to include a relief of declaration of title, in addition to the permanent injunction, is to protect their interest and not to change the basic nature of the suit as alleged. In para 18, it has been held as under:

18. We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

It is thus clear that the change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

Position of law on the amendment of the pleadings laid down by way of precedents is summarized

84. There is no change in the law laid down by the Apex Court prior to an amendment introducing the proviso to Order VI, Rule 17 of CPC and even after an amendment, the criteria to be applied remains the same to the extent that the Court must be satisfied on the following conditions when it allows an amendment:

- (a) The amendment necessary for determining the real controversy involved in the matter and to avoid multiplicity of the litigation should be liberally allowed.
- (b) It should not change the nature or basic structure of the suit.
- (c) The change in the nature of the relief claimed shall not be considered as a change in the nature of the suit and the power needs to be exercised for doing full and complete justice between the parties.

(d) The amendment changing cause of action setting up a fresh claim, which has become barred by limitation since the date of institution of the suit, should not be allowed. As a general rule, the Court should decline the amendments if a fresh suit on the amended claim would be barred by limitation on the date of the application.

(e) The amendment causing injustice and prejudice of an irremediable character, which cannot be compensated by awarding costs, should not be allowed.

(f) The Court should discourage mala fide amendment designed to delay or protract the legal proceedings.

85. The change brought about by introducing proviso to Order VI, Rule 17 is to apply the additional test of "due diligence" after the commencement of the trial. The entire object of the said amendment is to stall filing of applications for granting a pleading subsequent to the commencement of the trial, to avoid surprises and the party had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence he could not raise a plea, it is for the Court to consider the same. Therefore, it is not a complete bar, nor shuts out entertaining of any later application. The reason for adding proviso is to curtail delay and expedite the hearing of the cases. It puts an embargo on exercise of its jurisdiction. The Court's discretion in such a case is limited. Unless the jurisdictional fact as involved therein is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint. There is no absolute bar and in spite of delay, if acceptable material/materials placed before the Court show that the delay was beyond their control and diligence, it would be possible for the Court to consider the same by compensating the other side, imposing realistic costs rather than symbolic.

Law on "due diligence" laid down by precedents is summarized

86. The law on "due diligence" developed till this date is summarized under:

(a) "Due diligence" means careful and persistent application and effort. It means the diligence as a prudent man would exercise in the conduct of his own affairs. Unless the party takes prompt steps, mere action cannot be accepted after the commencement of the trial. The due diligence determines the scope of party's constructive knowledge of the claim. It is a kind of reasonable investigation, which is necessary before claiming the relief's.

(b) The due diligence is distinct from ignorance. In spite of knowledge, ignorance by a party or an Advocate cannot be a matter of due diligence. The neglect to perform an action, which one has an obligation to do, cannot be called as a mistake.

(c) The degree of prejudice to the other side by an amendment after the

commencement of the trial is greater than one at pre-trial stage.

(d) Without recording finding on the question of due diligence, the Court shall not get jurisdiction either to allow or disallow an amendment in the pleadings after the commencement of the trial.

(e) The Court while allowing an amendment must record a finding that in spite of due diligence, the party could not have raised the matter before the commencement of the trial or that the events sought to be brought on record by way of an amendment have occurred subsequent to the commencement of trial.

(f) The facts and grounds in the application for amendment must be clearly stated to bring out a case that the delay caused was beyond the control and diligence of the party proposing the amendment.

(g) Whether a party had acted with due diligence or not, would depend upon the facts and circumstances of the case and no hard and fast rule or strait-jacket formula can be laid down.

87. What should be the decision making process in respect of an application for amendment or alteration of pleadings, is the next question. The process to be adopted is little different. While deciding such an application, the Court is not required to deal with the disputed questions of fact involving in appreciation or re-appreciation of evidence on record. The Court has to be satisfied on the fulfillment of certain conditions and has to balance the conflicting interests. The process involves the following steps to be taken:

(a) To read all the averments in the plaint together and to find out what is the real controversy involved in the matter and the cause of action stated for the relief's claimed.

(b) To read the proposed amendment to find out as to how and in what manner it is necessary to decide the real controversy involved in the suit, to get the relief's claimed, or to avoid the multiplicity of the litigation.

(c) To find out whether the conditions precedent for grant of an amendment at the pre-trial stage or, as the case may, after the commencement of the trial, are satisfied.

(d) The grant of amendment does not fall within the conditions of prohibitory in nature laid down in the precedents.

Law laid down by precedents in respect of the suits for specific performance of contract - Nature of suit - Cause of action -- Bar of limitation

88. In the decision of the Apex Court in the case of Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar, , it was a suit for specific performance of contract without the averment that the plaintiff was and had always been ready and willing to perform his part of the agreement. The objection was raised in the written statement regarding non-compliance of Section 16(c) of the Specific

Relief Act. At that stage, an application for leave to amend the plaint, incorporating the averment was moved. It was rejected by the Trial Court and the revision was dismissed by the High Court. The Apex Court allowed the appeal and permitted the amendment to be carried out. It was held that all amendments ought to be allowed, which satisfy the two conditions: (a) not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. The amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It was held that it is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it, would be to cause the defendant an injury, which could not be compensated in costs by depriving him of a good defence to the claim.

89. In the decision of the Apex-Court in the case of K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, , it was a suit claiming the relief of permanent injunction restraining the respondent from alienating, encumbering, selling, disposing of or in any way dealing with the suit property described in Schedule-A to the plaint or any portion thereof. In para 28 of the plaint, 29-4-1987 was one of the dates set out to give cause of action to the petitioners. Subsequently, an application for amendment under Order VI, Rule 17 was filed seeking to incorporate the relief of grant of specific performance with supporting averments that subsequently the petitioners discovered that the Charity Commissioner had granted permission for the sale of Trust property and hence the petitioners were entitled to a decree for specific performance of contract. The Trial Court dismissed the said application and the High Court confirmed it. The Apex Court dismissed the appeal. In para 4 of the decision, the Apex Court has observed as under:

4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years to elapse from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent.

It has been held that the petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief of specific performance of contract in the original suit

itself. It was held that having allowed the period of seven years to elapse from the date of filing of the suit and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondents.

90. In the decision of the Apex Court in the case of T.L. Muddukrishanan and another Vs. Smt. Lalitha Ramchandra Rao, , it was a suit filed for mandatory injunction directing the defendant to comply with the requirements of the agreement dated 16-3-1989 for sale of plot of land for Rs. 64,00,00/-. During the pendency of suit, an application for amendment of plaint and seeking specific performance of contract was moved. It was rejected by the Trial Court and the said order was confirmed by the High Court. The Apex Court dismissed the appeal; as a result, the amendments stood rejected. In para 7, the Apex Court has held as under:

7. Under these circumstances, it must be held that for the purpose of limitation, what is material is that the limitation begins to run from the date the parties have stipulated for performance of the contract. The suit is required to be filed within three years from the date fixed by the parties under the contract. Since the application for amendment of the plaint came to be filed after the expiry of three years, certainly it changed the cause of action as required to be specified in the plaint. The suit for mandatory injunction is filed and the specific performance was sought for by way of an amendment. The cause of action is required to be stated initially in the plaint but it was not pleaded. It was sought to be amended, along with an application for specific performance which, as stated earlier, was rejected. Under these circumstances, even by the date of filing of the application, namely, 5-11-1992, the suit was barred by limitation. The High Court, therefore, was right in refusing to permit the amendment of the plaint.

It is thus held that the suit for specific performance is required to be filed within a period of three years from the date when the limitation begins to run. The application for amendment of the plaint was filed after the expiry of three years and it certainly changed the cause of action, as required to be specified in the plaint. It was held that the suit for mandatory injunction is filed and the specific performance was sought for by way of an amendment. It was held that the cause of action is required to be stated initially in the plaint, but it was not pleaded. It was sought to be amended along with an application for specific performance, which was rejected. It was held that even by the date of filing an application on 5-11-1992, the suit was barred by limitation, and hence the Courts below were right in refusing to permit the amendment.

91. In the decision of the Apex Court in the case of Vijendra Kumar Goel v. Kusum Bhuwania (Smt.), reported in (1997) 11 SCC 457, it was a suit for declaration that the contract dated 25-3-1985 for sale of Schedule "A" land to the plaintiff by the defendant is still subsisting and the defendant is bound to execute and register the sale-deed in respect of Schedule "A" land in favour of the plaintiff. A relief of permanent injunction restraining the defendant from

transferring Schedule "A" land to any other person, except the plaintiff, either by sale, gift, mortgage or in any other way, was also claimed. During the pendency of the suit, an application for amendment of plaint was moved and the relief of specific performance of contract was claimed. The amendment was refused by the Trial Court. However, in revision, the High Court allowed the said amendment. The Apex Court allowed the appeal and set aside the decision of the High Court; as a result, ultimately the amendment sought was rejected. The High Court proceeded on the footing that the plaintiff had made out a case for specific performance of contract and nothing new had been sought by way of amendment. The Apex Court held that after going through the plaint, it was not possible to agree with the view of the High Court. It was held that the plaintiff had made a reference to the agreement and his having requested the defendant to execute the sale-deed. But there was nothing in the plaint to show that the plaintiff was seeking specific performance of the contract. It was held that the suit, as framed, was for declaration and injunction only. It was sought to be converted into a suit for specific performance of contract by way of amendment, which had become barred by limitation.

92. In the decision of the Apex Court in the case of Aniglase Yohannan Vs. Ramlatha and Others, , it was a suit for specific performance of contract, which was dismissed by the Trial Court, holding that there was no compliance of the requirement of Section 16(c) of the Specific Relief Act. The High Court allowed the suit for specific performance of contract. The Apex Court confirmed the view of the High Court and dismissed the appeal. It was held in para 12 as under:

12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

93. In the decision of the Apex Court in the case of J. Samuel and Others Vs. Gattu Mahesh and Others, , it was a suit for specific performance of contract of sale and for perpetual injunction. During the pendency of suit, written statement was filed, pointing out the inherent defect, that is of absence of mandatory requirements of Section 16(c) of the Specific Relief Act and Form 47 of Appendix-A of the Code of Civil Procedure. An application for amendment of the plaint to incorporate specific pleading in compliance with Section 16(c) was filed on the ground that it was missed due to typographical error. This application was dismissed by the Trial Court, but was allowed by the High Court, against which appeal was preferred before the Apex Court. The Apex Court allowed the appeal and set aside the decision of the High Court and restored the decision of the Trial Court rejecting the application for amendment. It was held in para 9 that the only reason given by the plaintiff praying for amendment and inclusion of the

averment in the plaint is "type mistake". It was also stated that it happened in spite of their due diligence. It was held that the application was moved after the arguments were concluded and the matter was posted for judgment. It was held that it is not an omission to mention a word or an arithmetical number, but it is an omission with reference to specific plea, which is mandated in terms of Section 16(c) of the Specific Relief Act. It was held in para 18 that the primary aim of the Court is to try the case on its own merits and ensure that the rule of justice prevails. It has been held that the Court's discretion to grant permission for a party to amend his pleading lies on two conditions-firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added, which states that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. In para 19, it has been held that due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence"" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of the trial. In para 20, it has been held that a party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. In para 21, it has been held that the term "typographical error" includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. In para 23, it has been held that the entire objection of the amendment to Order 6 Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It has been held that it also helps checking the delays in filing the applications.

94. In the decision of the Apex Court in the case of Abdul Rehman and Another Vs. Mohd. Ruldu and Others, , it was a suit filed for prohibitory injunction restraining the defendants from forcibly and illegally dispossessing the plaintiffs from the suit land. In the said suit, an application for amendment was moved, incorporating the challenge to the sale-deeds dated 25-8-2003 issued in favour of the defendant Nos. 1 to 3 and for declaration that the same have no effect on the rights of the plaintiffs. The Trial Court dismissed the application. The High

Court also dismissed the civil revision application. The Apex Court allowed the appeal. It was held that the challenge to the voidness of those sale-deeds was implicit in the factual matrix set out in the unamended plaint and, therefore, the relief of cancellation of sale-deeds as sought by the amendment does not change the nature of the suit as alleged. It was held that it is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit. It was held that the proposed amendment to include a relief of declaration of title, in addition to the permanent injunction, is to protect their interest and not to change the basic nature of the suit as alleged. In para 18, it has been held as under:

18. We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

It is thus clear that the change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

Summary of the aforesaid law laid down in respect of amendments introducing a claim for specific performance

95. The law on the question of introducing a claim for specific performance of contract by way of amendment is summarized as under:

(a) In a suit for specific performance of contract, an amendment introducing a plea of readiness and willingness in terms of Section 16(c) of the Specific Relief Act proposed at an appropriate stage, can be permitted for the purposes of deciding the real controversy involved in the matter.

(b) In a suit simpliciter for grant of permanent injunction restraining the defendant from alienating, encumbering, selling, disposing of, or in any way dealing with the suit property, the relief of specific performance of contract cannot be permitted to be claimed by way of an amendment, if it is barred by a law of limitation.

(c) In a suit for mandatory injunction directing the defendant to comply with the terms of the agreement, an application for amendment introducing a claim for specific performance of contract may be refused if the cause of action required to be stated initially in the plaint, is not pleaded, and while introducing a cause of action by way of amendment, a bar of limitation operates since the date of inception of the suit.

(d) In a suit for declaration that the contract between the parties subsists and

the defendant is bound by the terms and also for grant of permanent injunction restraining the defendant from alienating the suit property in any manner, a claim for specific performance of contract by way of an amendment may be refused if there is no foundation laid in the plaint for that purpose, because it would amount to changing the nature or the basic structure of the suit and the cause of action having regard to a bar of limitation since the date of inception of the suit.

Exercise of jurisdiction by the High Court under Article 226 and 227 of the Constitution of India against an order deciding an application for amendment

96. The challenge to an order granting or refusing to grant an amendment can be entertained by the High Court in its jurisdiction under Article 226 and 227 of the Constitution of India, essentially on the grounds:

(i) that the Court has failed to record its findings on the relevant aspects and the findings recorded are based upon certain irrelevant aspects;

(ii) that the findings recorded by the Court on the conditions to be satisfied are erroneous and against the well-settled principles of law or on misreading of the averments in the plaint and the proposed amendment; and

(iii) that the Court has committed an error or an irregularity in the decision-making process, which has resulted in failure of justice.

97. When the challenge is on the ground no. (i) above, it may call for remand of the matter back to the lower Court to record the specific findings on the questions not decided, or where the decision is based upon irrelevant factors. When a challenge is on the ground no. (ii), the High Court may have to find out whether the decision is based upon the correct appreciation of the original pleadings and the proposed amendment. The High Court may have to see whether the conditions precedent have been complied with and that the case falls or does not fall within the prohibitory criteria laid down by the decisions. In case of challenge on ground no. (iii), if the Court finds that an order suffers from an error or an irregularity, which has occurred in the decision-making process resulting in failure of justice, it may thereafter decide the course of action to be adopted in the facts and circumstances of the case either to decide the application on its own merits or to remand the matter back to the lower Court for fresh consideration.

98. In entertaining the challenge as aforesaid, the Court is not appreciating or re-appreciating any evidence available on record. It is not entering into any finding of fact as such. The process to be adopted is to go through the original pleadings to find out real controversy involved in the matter and to find out from the proposed amendment whether it is necessary for deciding the real controversy involved. The question whether nature of suit or cause of action changes or not, can also be decided by comparing the pleadings. It is a matter of fulfillment of conditions to be seen. It is a matter of appreciation of pleadings. The Apex Court

has held in *Surya Dev Rai Vs. Ram Chander Rai and Others*, , that in exercise of power under Article 227 of the Constitution of India, the High Court can substitute the view taken by the Trial Court and can pass all such orders, which the Trial Court is empowered to pass.

99. No doubt, that any order passed on the application for amendment remains an interlocutory order and the correctness or legality of it on any ground, can be challenged in an appeal from a decree or a final decision. It will, therefore, depend upon the facts and circumstances of each case as to whether such a petition should be entertained or not. In a given case, keeping in view the nature of the order, the stage at which it is passed, and the grounds of challenges, the High Court may refuse to entertain a petition and can leave the party an option to challenge it in an appeal after a final decision. But in case of an order of amendment, the High Court may have to consider the question of lack of due diligence or presence of due diligence, or change in the nature of suit, or cause of action for the purposes of limitation, or the amendment sought is not bona fide, but only to protract the litigation, and interfere at an interlocutory stage itself under Article 227 of the Constitution of India, to substitute the view of the lower Court. The net result of the aforesaid discussion is that, the question of law framed is answered by holding that the exercise of jurisdiction by the High Court either u/s 115 of the CPC or under Article 226 and 227 of the Constitution of India will depend upon the facts and circumstances of each case and there is no absolute bar by way of an alternate remedy of challenging an interlocutory order after the final decision of the case. This judgment has merely laid down certain guidelines for exercise of such jurisdiction in certain situations that too to a possible extent and dealing with certain recurring orders so as to maintain consistency in the approach and it does not take care of all situations. On the basis of this judgment, I, therefore, proceed to decide the cases by independent judgment on their own facts and merits.