Sr.No.106

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3681 of 2016 (O&M)
Reserved on : 21.02.2025
Pronounced on : 21.05.2025

Punjab National Bank

….Appellant

Versus

M/s Kohinoor Stone Crusher Chandi Mandir and others

….Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present:- Mr. Salil Sagar, Sr. Advocate with
Mr. Arvind Rajotia, Advocate
for the Appellant.

Mr. A.P.S. Shergill, Advocate,
Mr. R.C. Sharma, Advocate,
Ms. Navkiran Bajwa, Advocate,
Ms. Shagun Goyal, Advocate and
Mr. Robin Bawa, Advocate
for the Respondents.

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PANKAJ JAIN, J.

Plaintiff is in second appeal. For convenience, the parties are being referred to by their original position in the suit i.e. the appellant as plaintiff and the respondents as defendants.

2. Plaintiff-Bank filed suit for recovery of Rs.7,90,578/- against the defendants-borrowers. As per the plaintiff, the defendant No.1, a proprietorship concern, availed Cash Credit (Hypothecation) Limit of

Rs.5 lakh. The defendant No.2, the proprietor of defendant No.1, in order to secure the loan facility availed by the proprietorship concern, created collateral security in form of equitable mortgage of immovable property i.e. land measuring 4 Bighas 16 Biswas, situated in Village Chandi Mandir, H.B.No.391, Tehsil & District Panchkula, apart from creating hypothecation for the movable assets of the proprietorship concern.

2.1. Defendants having failed to adhere to fiscal discipline, exceeded arrangements in the loan account, they failed to regularize the same. Plaintiff claimed that a sum of Rs.7,90,578/-, on account of principle amount and interest, calculated upto 28.09.2003 was due. Defendants having failed to pay amount despite repeated reminders, the plaintiff was entitled to recover the same by way of suit.

2.2. Suit was contested by the defendants by way of filing written statement. Creation of Cash Credit Limit was not denied. Defendants averred that the bank had no right to take possession of the property of defendants by invoking the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*hereinafter referred to as 'the SARFAESI Act'*). Defendants further claimed that the bank disposed off all the properties in violation of the rules and regulations causing wrongful loss to the defendants. Defendants further pleaded that action of the bank in taking over the possession and disposing off the property is an act of fraud. Total scrap value plant, machinery and buildings worked out to Rs.7.53 lakhs. The possession of the property was taken over without there being any notice to the defendants. An application

dated 06.03.2004 was moved before the Court to cover up the entire fraudulent act by the bank. The entire plant, machinery and the immovable property was disposed off without disclosing any details to the defendants. Concealment of sale and disposal under the SARFAESI Act by the plaintiff-bank of the property of defendants was an act of fraud and cheating. Defendants claimed an amount of Rs.76 lakhs along with interest from the bank as damages by filing counter-claim.

2.3. Suit filed by plaintiff-bank and the counter-claim raised by defendants was put to trial on following issues:-

1. Whether the plaintiff is entitled for the recovery of Rs.7,90,578/- includes interest upto 28.09.2003, as prayed for? OPP
2. Whether the defendants are entitled for the decree of declaration as claimed in the counter claim of the defendants? OPD
3. Whether the suit of the plaintiff is not maintainable in the present form? OPD
4. Whether the plaintiff has no cause of action to file the present suit? OPD
5. Whether the suit of the plaintiff is time barred? OPD
6. Relief.

2.4. Deciding issue Nos.1 & 2 together, the Court of first instance found that there is no evidence regarding fraud having been committed by the plaintiff. The defendants had an alternate remedy of approaching Debt Recovery Tribunal against the action of plaintiff-bank. The Trial Court further held that the defendants despite specific directions from the Court had not affixed the *ad valorem* court fee and held that the counter-claim

raised by them was not maintainable as the fraud alleged had not been proved. The Court of first instant, thus, decided issue No.1 in favour of plaintiff-bank and issue No.2 in favour of defendants. Even though the Court of First instance concluded that issue No.2 is answered in favour of defendants, however, reading of para No.56 of the Trial Court's Judgment would reveal that the counter-claim was in fact held to be not maintainable. The Court of First instance further decided issue Nos.3 to 5 against the defendants. The suit filed by plaintiff was decreed in part. Plaintiff was held entitled to recover an amount of Rs.3,18,158.25/-. Both the suit as well as counter-claim were decided by a common judgment and a common decree.

2.5. Aggrieved, the defendants filed an appeal. The Lower Appellate Court reversed the findings recorded by the Court of first instance. It was held that the bank acted fraudulently in disposing off the movable and immovable assets of defendant No.1. Value of hypothecated stock and equitably mortgaged immovable property was assessed by the bank for a total sum of Rs.33,14,000/- in the year 1999 and the same had been sold away at a price below the reserve price fixed by the authorities. The Lower Appellate Court while referring to the statement made by Ram Kumar PW1 found that the property was auctioned on 22.06.2004, whereas the sanction letter regarding auction of the property was dated 25.06.2004. Even the name of the person to whom the property was sold in auction was not disclosed by the plaintiff bank. PW1 admitted that there was no record available nor did he bring any record with respect to auction proceedings

dated 22.06.2004. Further reference was made to the admission of PW1 that vide letter dated 12.05.2004 the value of the property was assessed at Rs.9 lakhs. Thereafter, the same was revised to Rs.6,58,000/- on 25.06.2004 and was ultimately sold only for Rs.5 lakhs.

2.6. Lower Appellate Court, thus, found that the act and conduct of the plaintiff-bank in selling hypothecated and mortgaged property belonging to defendants, without maintaining record of auction proceedings and without even disclosing the name of the auction purchaser, is an act of fraud, whereby the property worth Rs.40-45 lakhs had been sold @ Rs.5 lakhs only. The Lower Appellate Court accepted the counter-claim filed by defendants holding them entitled to recover Rs.45 lakhs from the plaintiff bank. Returning the finding that plaintiff acted in a fraudulent manner, the Lower Appellate Court held that jurisdiction of civil court was not barred and the counter-claim filed by defendants was maintainable.

2.7. With respect to non-payment of *ad valorem* court fee, the Lower Appellate Court found that despite there being specific directions vide order dated 06.10.2007 issued to the defendants, they did not affix the *ad valorem* court fee on the counter-claim. Therefore, they ought not have been allowed to prosecute the counter-claim by the Trial Court. However, the Lower Appellate Court held that since Trial Court proceeded on to decide the case on merits, there is no bar on the power of the Appellate Court to grant time to the defendants to affix appropriate Court fee on the counter claim. The appeal filed by the defendants was partly accepted subject to affixation of *ad valorem* court fee by the defendants on the value

of counter-claim i.e. Rs.76 lakhs and also subject to the affixation of *ad valorem* court fee on the memorandum of appeal of equal amount. The Lower Appellate Court, thus, held the defendants entitled to Rs.45 lakhs and accepted the appeal. Rs.5 lakhs already recovered vide sale dated 22.06.2004 was ordered to be set-off. Further amount of Rs.2,90,578/- due to be paid was also ordered to be set-off. Defendants were further held entitled to interest @ 11% per annum from the date of filing of the suit till actual realization.

3. Learned Senior Counsel for the appellant/plaintiff has assailed the findings recorded by the Lower Appellate Court. He has eloquently argued that a single appeal was not maintainable against judgment and decree passed by the Court of First instance deciding suit as well as of counter-claim. He submits that after plaintiff filed suit, the defendants raised the counter-claim. Trite it is that the counter-claim has to be treated as a separate suit. Both were decided by way of common judgment and decree, the separate appeals were required to be filed by defendants. Defendants having filed only one appeal, principle of *res judicata* needs to be invoked and the judgment and decree passed in civil suit needs to be treated as binding *vis-a vis* judgment passed in counter-claim. Thus, the single appeal preferred by defendants ought to have been dismissed by the Lower Appellate Court.

3.1. Mr. Sagar further asserts that perusal of counter-claim would reveal that prayer made was in form of simple suit for declaration. In the absence of prayer for possession, counter-claim was not maintainable in

form of simple suit for declaration. Defendants were required to claim further relief of possession. Counter-claim being not maintainable, the Lower Appellate Court ought to have dismissed the same.

3.2. Mr. Sagar raises objection regarding jurisdiction of the Civil Court. He submits that counter-claim has been filed by defendants impugning the action taken by the plaintiff-bank under the SARFAESI Act. In terms of mandate of Section 17 of the SARFAESI Act, the person aggrieved by any of the measures referred to in sub-section (4) of Section 13, has a remedy to approach the Debts Recovery Tribunal for redressal of his grievance. There being remedy provided under the Act before the Debts Recovery Tribunal, the jurisdiction of the Civil Court is barred under Section 34 of the SARFAESI Act. He, thus, submits that findings recorded by the Court of first instance on issue No.2 regarding the jurisdiction of the Civil Court to entertain the counter-claim being barred, ought not have been reversed by the Lower Appellate Court.

3.3. It has been further asserted that the counter-claimant was required to stand on his own legs. Having pleaded fraud, the counter-claimant was required to prove the same by leading positive evidence. In the absence of any evidence led by the counter-claimant to prove the same, the Lower Appellate Court ought not have relied solely upon the testimony of PW1 to return findings *qua* fraud against the plaintiff.

3.4. Mr. Sagar further submits that the counter-claim being without affixing the court fee was not maintainable. Despite there being specific directions issued by the Trial Court vide order dated 06.10.2007, the

counter-claimant failed to affix *ad valorem* court fee on counter-claim. Even the appeal was preferred without affixing *ad valorem* court fee. The Lower Appellate Court completely misread the judgment passed by the Court of first instance and misdirected itself in permitting the counter-claimant to deposit the court fee beyond the period of limitation after decision of appeal. He further submits that the counter-claim filed without court fee despite orders passed by the Court is non-est in the eyes of law and ought not have been adjudicated.

3.5. To support his contentions, the reliance is being placed by learned Senior Counsel on ***Samay Singh vs. Mona Yadav and another, 2019 SCC OnLine P&H 8026; Harbans Singh and another vs. Sant Hari Singh and others, 2009 (2) SCC 526; Suresh Kumar vs. Mala Ram, 2016 SCC OnLIne P&H 3603; Bhajan Singh vs. Jasvir Kaur, 2016 SCC OnLine P&H 4993, Rajni Rani and another vs. Khairati Lal & others, 2015(2) SCC 682; Ramesh Chand vs. Om Raj and others, 2022 SCC OnLine HP 2094; Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar vs. Chandran and others, 2017(2) CCC 48 (SC); Damandeep Singh vs. Jaspal Kaur, 2016(1) CCC 674 (P&H); Electrocsteel Casting Limited vs. UV Asset Reconstruction Company Ltd. and others, 2022(2) SCC 573; Hindon Forge Pvt. Ltd. and another vs. State of Uttar Pradesh and another, 2019(2) SCC 198; M.D. Frozen Foods Export Pvt. Ltd. vs. Hero Fincorp Ltd., 2017(16) SCC 741; Punjab National Bank vs. Union of India and others, 2022(7) SCC 260; Magnum Steels Ltd. and others vs. Asset Reconstruction Company India Ltd. and***

another, Delhi High Court – WP(C) No.5278 of 2023, decided on 10.04.2024; Union of India vs. Vasavi Cooperative Housing Society, 2014(2) SCC 269; Shivaji Balaram Haibattdi vs. Avinash Maruthi Pawar, 2018(11) SCC 652; National Textile Corpn. Ltd. vs. Naresh Kumar Badri Kumar Jagad, 2011 (12) SCC 695, Canara Bank vs. N.G. Subbaraya Setty and another, 2018(16) SCC 228 and Yogesh Goyanka vs. Govind and others, 2024(7) SCC 524.

4. *Per contra,* counsel for the respondents/defendants submits that since the counter-claim as well as suit were disposed off vide common judgment and decree and only single decree was drawn by the Court of first instance, single appeal was maintainable. There was no requirement to file separate appeal. Appeal could be filed only against a decree. There being composite decree, single appeal was maintainable and the Lower Appellate Court, thus, rightly entertained the appeal preferred by the counter-claimants/defendants.

4.1. Mr. Sharma, counsel for the respondents has further drawn attention of this Court to the prayer made in the counter-claim. He submits that apart from praying for cancellation of the auction sale, the plaintiff has further made prayer for recovery of an amount of Rs.76 lakhs on account of losses suffered by defendants. Thus, the plaintiff cannot be allowed to invoke Section 34 of the Specific Relief Act to claim that the counter-claim raised by defendants is merely a suit for declaration and thus not maintainable.

4.2. Mr. Sharma refers to the pleadings raised in the counter-claim to submit that the entire details of fraud were pleaded in para Nos.32 to 40 of the counter-claim. The concealment of the sale and disposal of the property by plaintiff in a clandestine manner has been admitted by the bank through PW1. Bank has failed to even disclose the name of the auction purchaser. Admission being best form of evidence, the fraud pleaded by the counter-claimant stands proved. He, thus, submits that in view of the observations made by Supreme Court in the case of ***Mardia Chemicals Ltd. and others vs. Union of India and others, (2004) 4 SCC 311***, the jurisdiction of the Civil Court in entertaining counter-claim pleading fraud at the hands of lender-financial institution while disposing off the property of borrower, cannot be held to be ousted invoking Section 34 of the Specific Relief Act read with Section 17 of the SARFAESI Act.

4.3. It has been further contended that after Trial Court passed order dated 06.10.2007 holding that the defendants were required to affix *ad valorem* court fee. Thereafter, an application was moved under Order VI Rule 17 CPC for amendment of the counter-claim. The said application was allowed vide order dated 09.12.2009. Thereafter, the application was moved by the bank seeking recalling of order dated 09.12.2009. Same was dismissed vide order dated 26.02.2011. The counter claim filed by defendants was entertained on merits and was decided by the Court of first instance. At the final adjudication of the appeal, the Lower Appellate Court exercising its jurisdiction allowed the defendants to pay deficient court fee. The court fee on the counter-claim as well as the memorandum of appeal

already stand paid and thus the defendants/counter-claimants/respondents cannot be non-suited for deficiency of court fee, once the same has already been made good within the period extended by the Lower Appellate Court.

5. I have heard learned Senior counsel for the appellant/plaintiff as well as counsels for the respondents/defendants and have carefully gone through records of the case.

6. In the considered opinion of this Court, following five issues fall for consideration of this Court:-

(i) **Whether** single appeal preferred by the defendants was sufficient when the civil suit filed by plaintiff and the counter-claim at the behest of defendants stand adjudicated by a common judgment drawing common decree ?

(ii) **Whether** the jurisdiction of the Civil Court can be said to be ousted in terms of Section 34 read with Section 17 of the SARFAESI Act in the given circumstances of the present case ?

(iii) **Whether** the counter-claim preferred by defendants can be said to be in the nature of simple suit for declaration and can be held to be barred under Section 34 of the Specific Relief Act ?

(iv) **Whether** the Lower Appellate Court fell in error in allowing the defendants to pay deficient court fee after decision of appeal, which defendants were required to affix on the counter-claim as well as the memorandum of appeal ?

(v) **Whether** the findings recorded by the Lower Appellate Court regarding fraud at the hands of the bank authorities while disposing off the property of defendants can be sustained ?

ISSUE NO.(i)

7. Issue regarding requirement of filing separate appeals against judgment and decree has repeatedly been subject matter of judicial debate. It came up for consideration before the Full Bench of Lahore High Court in ***Mussammat Lachhmi v. Mussammat Bhulli, 1927 SCC OnLine Lah 256***, wherein it was observed as under:-

> *" xxxx xxxx xxxx*
>
> *The questions of law, formulated by the learned Judges of the Division Bench, on which the Full Bench is invited to pronounce its opinion, are thus stated in the referring order:—*
>
> 1. *"Two widows A and B are jointly in possession of certain land. Each sues the other for a declaration that she (the plaintiff) is the exclusive owner of that land and that the defendant has no right in it of any kind. Both suits are disposed of by a single judgment, which decided that A is the owner but that B is entitled to hold possession of half the land in lieu of maintenance. A separate decree is drawn up in each suit declaring the rights of the plaintiff according to that decision. B appeals against one of these decrees only, namely, the decree given, in the suit in which she was the plaintiff. Does the fact that no appeal has been preferred by B against the decree in the other suit of A prevent B's appeal from proceeding?"*
> 2. *"If the answer to question is in the affirmative, does the fact that A has filed cross-objections pressing her claim to exclusive ownership and possession affect the situation? If yes, then in what way?"*
>
> *The answer to the questions depends on the application of the rule of res judicata to the facts as set forth above, and, as stated in the referring order, the case-law on the subject is in a state of some confusion. There is not only a serious conflict of*

judicial opinion between the different High Courts, but in some cases it is not possible to reconcile the rulings of the same High Court with one another. I think, therefore, that before discussing the various cases that have a bearing on the questions to be decided, it will be useful to make a few preliminary observations, which might clear the ground to some extent and be helpful in arriving at a correct conclusion on the exact points before us.

xxxx xxxx xxxx

The result of the examination of the rulings of the various High Courts may be summed up as follows:—

(a) The Madras High Court is whole-heartedly in favour of the right to proceed.

(b) The Allahabad High Court has held different views at different times, but the tendency of the latest decisions is in favour of the right to proceed.

(c) In the Calcutta Court the opinion of the majority in Mariam Nissa Bibi v. Joynab Bibi [(1906) I.L.R. 33 Cal. 1101 (F.B.).], is in favour of the right to proceed. Subsequent decisions of Division Benches (none of which, it is significant, has found its way into the authorized Reports) have however, taken the contrary view. But I venture to think that the reasoning of these decisions in so far as it conflicts with the earlier case cannot be supported.

(d) The High Courts of Patna and Rangoon have followed the earlier decisions of the Allahabad High Court but these latter are no longer considered to be authoritative in that Court itself.

(e) In the Punjab the rulings are not uniform, but on the whole, it seems to me that though much of the reasoning of the Full Bench judgment in Jogal Kishore v. Chammo [85 P.R. 1905 (F.B.).] cannot be supported, the conclusion arrived at in that case is correct.

The contrary decisions proceed on one or other of the following three grounds:—

(a) Section 11, Civil Procedure Code, in terms applies to such a case;

(b) There are two separate and independent judgments and, therefore, two appeals are necessary; or

(c) Two decrees having been prepared, an appeal against only one of them ought not to be allowed to proceed, as it is necessary to avoid the scandal of having two conflicting decrees on the record of the Court.

I have already examined the question in detail from each one of these points of view and with the utmost respect to the learned Judges who have endorsed one or other of these views, I am of opinion that none of them can, on principle, be supported. They have, if I may venture to say so, taken too technical a view of the doctrine of res judicata which, it must not be forgotten, is, as pointed out by Hukam Chand and other authors of standard text-books on the subject, a rule of procedure rather than of substantive law, strictly so called. And in enforcing rules of procedure it is as well to bear in mind the following remarks of Lord Penzance in Henry, J.B. Kendall v. Peter Hamilton [(1879) L.R. 4 A.C. 504.] : "Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights and is thus made to govern where it ought to subserve".

For the foregoing reasons, I am of opinion that the first question referred to us must be answered in the negative and it must be held that B's omission to prefer an appeal in A's suit does not prevent the appeal in her own suit from proceeding.

> *The second question is a simple one and no lengthy discussion is necessary. It is conceded by the learned counsel on both sides that the answer to this question will depend on our answer to the first. Mutuality is a condition of estoppel by res judicata and if the hearing of the appellant's appeal is barred by res judicata the same bar will apply equally to the respondent's cross-objections. If, on the other hand, it is held that the appeal can proceed, the cross-objections must also be heard and decided.*
>
> *As I have answered the first question in favour of the appeal proceeding, I must answer the second question also in similar terms, namely, that there is no bar to the hearing of the cross-objections."*

8. The same was reiterated by Supreme Court in the case of ***Narhari and others vs. Shanker and others, 1950 SCC 668*** holding that where there are two suits and decrees in the same case, based upon the same judgment, and the matter decided concerns the entire suit, there is no question of the application of principle of *res judicata*. The ratio of law laid down in ***Narhari's case (supra)*** came up for consideration before the Constitution Bench judgment in ***Badri Narayan Singh v. Kamdeo Prasad Singh, AIR 1962 SC 338***. Constitution Bench found that in ***Narhari's case (supra)*** there existed one point of contention common to both appeals. Thus, the same was not applicable. The Constitution Bench further found that in the case before Supreme Court in ***Narhari's case (supra)***, the decision of High Court in two appeals, though stated in one judgment, amounted to two decisions, and not one decision common to both appeals. The appellant having preferred an appeal against order passed in one appeal

by the High Court, he cannot be allowed to question the findings returned in other appeal.

9. Four Judges Bench in the case of ***Sheodan Singh vs. Daryao Kumar (Smt.), AIR 1966 SC 1332***, referring to the ratio of law laid down by Supreme Court in ***Narhari's case (supra)***, observed that the same was not applicable as there was only one suit which led to filing of two appeals. The appeals were heard together and disposed off by the same judgment though separate decrees were prepared. An appeal was taken up against one of the decrees. In these circumstances, it was held that it was not necessary to file two separate appeals and the fact that one of the appeals was time barred did not affect the maintainability of the other appeal and the question of *res judicata* did not at all arise where there is only one suit.

10. Supreme Court in ***Sheodan Singh's case (supra)*** held that where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom, and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be *res judicata* and the appeal court must be deemed to have heard and finally decided the matter. Reference can be made to following observations:-

> *"xxxx xxxx xxxx*
>
> *22…….Our conclusion on the question of res judicata raised in the present appeals is this. (Where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with*

the result that the trial court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be res judicata whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal court does not result in the confirmation of the decision of the trial court given on the merits, as for example, where the appeal court holds that the trial court had no jurisdiction and dismisses the appeal even though the trial court might have dismissed the suit on the merits.) In this view of the matter, the appeals must fail, for the trial court had in the present case decided all the four suits on the merits including the decision on the common issues as to title. The result of the dismissal on a preliminary ground of the two appeals arising out of Suits Nos. 77 and 91 was that the decision of the trial court was confirmed with respect to the common issues as to title by the High Court. In consequence the decision on those issues became res judicata so far as appeals Nos. 365 and 366 are concerned and Section 11 of the Code of Civil Procedure would bar the hearing of those common issues over again. It is not in dispute that if the decision on the common issues in Suits Nos. 77 and 91 has become res judicata, Appeals Nos. 365 and 366 must fail.

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11. The issue was further debated in ***Premier Tyres Ltd. vs. Kerala State Road Transport Corporation, 1993 Supp (2) SCC 146***, wherein the Supreme Court observed as under:-

"xxxx xxxx xxxx

3. The validity of this finding has been assailed by Shri Raja Ram Aggarwal, the learned senior advocate appearing on behalf of the appellant. It is urged that Section 11 of the Civil Procedure Code does not apply as such. According to him since both the suits were connected and decided by a common order the issue in neither suit can be said to have been decided in a former suit. Therefore, the basic ingredient of Section 11 of the CPC was not satisfied. The submission derives some support from observations in Narhari v. Shanker [1950 SCC 668 : AIR 1953 SC 419 : 1950 SCR 754] that, 'even when there are two suits it has been held that decision given simultaneously cannot be a decision in the former suit'. But this decision was distinguished in Sheodan Singh v. Daryao Kunwar (Smt) [(1966) 3 SCR 300 : AIR 1966 SC 1332] as it related to only one suit, therefore, the observations extracted above were not relevant in a case where more than one suit were decided by a common order. The Court further held that where more than one suits were filed together and main issues were common and appeals were filed against the judgment and decree in all the suits and one appeal was dismissed either as barred by time or abated then the order operated as res judicata in other appeals,

> *"In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from suit Nos. 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail."*

In Ramagya Prasad Gupta v. Murli Prasad [(1974) 2 SCC 266] an effort was made to get the decision in Sheodan Singh [(1966) 3 SCR 300 : AIR 1966 SC 1332] reconsidered. But the Court did not consider it necessary to examine the matter as the subject-matter of two suits being different one of the necessary

ingredients for applicability of Section 11 of the CPC were found missing.

4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suit is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from.

5. Mention may be made of a Constitution Bench decision in Badri Narayan Singh v. Kamdeo Prasad Singh [AIR 1962 SC 338 : (1962) 3 SCR 759 : 23 ELR 203] . In an election petition filed by the respondent a declaration was sought to declare the election of appellant as invalid and to declare the respondent as the elected candidate. The tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The Court observed,

> *"We are therefore of opinion that so long as the order in the appellant's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect."*

6. Thus the finality of finding recorded in the connected suit, due to non-filing of appeal, precluded the court from proceeding with appeal in other suit. In any view of the matter the order of the High Court is not liable to interference.

xxxxx xxxx xxxx"

12. Again, the issue came up for consideration in the case of ***Sri Gangai Vinayagar Temple v. Meenakshi Ammal, (2015) 3 SCC 624***. Analysing the importance of application under Section 11 CPC, the Supreme Court observed as under:-

"xxxx xxxx xxxx

24. We must additionally advert to a four-Judge Bench decision in Sheodan Singh v. Daryao Kunwar [Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 : (1966) 3 SCR 300] , in which this Court has lucidly enumerated five constituent elements of Section 11, namely :

> *"(I) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;*
>
> *(II) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;*
>
> *(III) The parties must have litigated under the same title in the former suit;*
>
> *(IV) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and*
>
> *(V) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.*
>
> *Further Explanation I shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided so that even if a suit was filed*

> *later, it will be a former suit if it has been decided earlier."*

The conundrum in Sheodan Singh [Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 : (1966) 3 SCR 300] was only marginally different to what has arisen before us. The appellate court was confronted with five appeals from five different suits between the same parties in which the issues were common. Two of the appeals were dismissed, albeit, not on merits. It was in those premises argued and accepted by this Court that the principles of res judicata became operational with regard to the decrees passed in the two suits in respect of which the appeals filed there against had been dismissed. It was pithily observed that otherwise :

> *"13. … all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties."*

Sheodan Singh [Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332 : (1966) 3 SCR 300] took note of several judgments of the High Courts, which preferred to overlook procedural technicalities ostensibly in the interests of the merits of the matter, but did not state its final opinion, which has propelled us to do so in order so that the divergent opinions be interred and dissonance be removed.

25. On the issue of applicability of res judicata in cases where two or more suits have been disposed of by one common judgment but separate decrees, and where the decree in one suit has been appealed against but not against the others, various High Courts have given divergent and conflicting opinions and decisions. The High Court of Madras and the erstwhile High Courts of Lahore, Nagpur and Oudh have held that there could be no res judicata in such cases whereas the High Courts of Allahabad, Calcutta, Patna, Orissa and the

erstwhile High Court of Rangoon have taken contrary views. It should also be noted that there are instances of conflicting judgments within the same High Court as well. The decision of Tec Chand, J. in Full Bench judgment of the Lahore High Court in Lachhmi v. Bhulli [AIR 1927 Lah 289] and Full Bench judgment of the Madras High Court in Panchanada Velan v. Vaithinatha Sastrial [ILR (1906) 29 Mad 333] and of the Oudh High Court in B. Shankar Sahai v. B. Bhagwat Sahai [AIR 1946 Oudh 33] appear to be the leading decisions against the applicability of res judicata. Without adverting to the details of those cases, it is sufficient to note that the hesitancy or reluctance to the applicability of the rigours of res judicata flowed from the notion that Section 11 of the Code refers only to "suits" and as such does not include "appeals" within its ambit; that since the decisions arrived in the connected suits were articulated simultaneously, there could be no "former suit" as stipulated by the said section; that substance, issues and finding being common or substantially similar in the connected suits tried together, non-filing of an appeal against one or more of those suits ought not to preclude the consideration of other appeals on merits; and that the principle of res judicata would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment.

26. On the other hand, the verdict of Full Bench of the Allahabad High Court in Zaharia v. Debia [ILR (1911) 33 All 51] and decisions of the Calcutta High Court in Isup Ali v. Gour Chandra Deb [37 Cal LJ 184 : AIR 1923 Cal 496] and of the Patna High Court in Gertrude Oates v. Millicent D'Silva [ILR (1933) 12 Pat 139 : AIR 1933 Pat 78] are of the contrary persuasion. These decisions largely proceeded on the predication that the phraseology "suit" is not limited to the

court of first instance or trial court but encompasses within its domain proceedings before the appellate courts; that non-applicability of res judicata may lead to inconsistent decrees and conflicting decrees, not only due to multiplicity of decrees but also due to multiplicity of the parties, and thereby creating confusion as to which decree has to be given effect to in execution; that a decree is valid unless it is a nullity and the same cannot be overruled or interfered with in appellate proceedings initiated against another decree; that the issue of res judicata has to be decided with reference to the decrees, which are appealable under Section 96 CPC and not with reference to the judgment (which has been defined differently), but with respect to decrees in CPC; that non-confirmation of a decree in appellate proceedings has no consequence as far as it reaching finality upon elapsing of the limitation period is concerned in view of Explanation II of Section 11, which provides that the competence of a court shall be determined irrespective of any provisions as to right of appeal from the decision of such court; and that Section 11 CPC is not exhaustive of the doctrine of res judicata, which springs up from the general principles of law and public policy.

27. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the courts by Section 151 CPC, as clarified by this Court in Chitivalasa Jute Mills v. Jaypee Rewa Cement [(2004) 3 SCC 85]. In the instance of suits in which common issues have been

framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that the appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and the processual law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the tenant diligently filed an appeal against the decree at least in respect of OS No. 5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all.

xxxx xxxx xxxx"

13. Supreme Court in ***Patiala Urban Planning & Development Authority vs. Tarlochan Singh, (2020) 17 SCC 224*** observed as under:-

"xxxx xxxx xxxx

14. It was also submitted on behalf of the landowners that since the appeals have been preferred by development authority as

against decision in appeals, filed in the High Court for the purpose of reduction in compensation and not against the decision in appeals of landowners, in which the compensation has been enhanced, this Court should not interfere on this technical ground. The submission is factually incorrect as in order to meet the objection separate appeals have also been filed by the development authority as against the decision of the High Court allowing appeals filed by the landowners. Moreover, even if no fresh appeals would have been filed, in that case also, in substance, the claim of the development authority is that the compensation could not have been enhanced by the High Court and the compensation as awarded by the Reference Court may also be reduced. Thus, in essence, their appeal is against the entire determination made by the High Court. It cannot be said to be a case like that of two decrees passed by the High Court in which two separate appeals are required to be filed. The substance of the appeal has to be seen and we have no hesitation in rejecting the submission raised by the learned counsel appearing on behalf of landowners.

xxxx xxxx xxxx"

14. Mr. Sagar, learned Senior counsel for the respondents/defendants heavily relied upon ***Sri Gangai Vinayagar Temple's case (supra)***. Therein, the Supreme Court observed that the appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment. The decree not assailed thereupon metamorphoses into the character of a "former suit". Thus, wherein there are two decrees drawn at any stage of proceeding, the aggrieved parties are required to challenge the

same until it attains the character of former suit. Applying the aforesaid ratio to the present case, this Court finds that even though the counter-claim forms a separate suit but the main suit as well as counter-claim having been decided and adjudicated by common judgment and by drawing a common decree, counter-claimant was not required to file a separate appeal i.e. two separate appeals against the same judgment and decree. Even if it is said to be desirable, the same was not necessary. Filing of a single appeal by the counter-claimant brought the entire dispute under the lens of the Appellate Court and made the same *sub judice*. Appeal being against the entire determination made by the Lower Court, the non-filing of the other appeal against the same judgment and decree passed by the Court of First Instance, cannot be held to be a ground to invoke the principle of *res judicata* in the facts and circumstances of the present case. Until there is a separate decree drawn that metamorphoses into the character of a former suit, *res judicata* will not be applicable. Thus, the first issue framed herein above is answered against the appellant/plaintiff and in favour of the respondents/defendants.

ISSUE NO.(ii)

15. The jurisdiction of the Civil Court to entertain the counter-claim is claimed to be barred by the appellant relying upon Section 34 read with Section 17 of the SARFAESI Act. Section 34 and Section 17 of the SARFAESI Act read as under:-

> *"**34. Civil Court not to have jurisdiction:***
> *- No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under*

this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993

17. Application against measures to recover secured debts—

(1) Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(1-A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(a) the cause of action, wholly or in part, arises;
(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

(4-A) Where—

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

(a) has expired or stood determined; or

(b) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate

Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

16. Learned Senior Counsel for the appellant has contended that since the counter-claimant is aggrieved of the measures taken by bank under Section 13(4) of the SARFAESI Act and thus the matter being within the power of the Tribunal, jurisdiction of the Civil Court to entertain any suit or proceeding is barred.

17. The issue regarding jurisdiction of Civil Court came up for consideration before the Supreme Court in the case of ***Mardia Chemicals Ltd.'s case (supra)***, wherein while dealing with the issue, Supreme Court observed as under:-

"xxxx xxxx xxxx

50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be

said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely, V. Narasimhachariar [AIR 1955 Mad 135] , AIR at pp. 141 and 144, a judgment of the learned Single Judge where it is observed as follows in para 22:

> *"22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: Adams v. Scott [(1859) 7 WR 213, 249] . I need not point out that this restraint on the exercise of the power of sale will be exercised by courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary: Law of Mortgages, Vol. II, 4th Edn., p. 784.)"*
>
> *xxxx xxxx xxxx"*

18. Thus, the Civil Court has the limited jurisdiction to entertain the claim only in the case where action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe. Therefore, the answer to issue No.(ii) shall depend upon adjudication of issue No.(v).

ISSUE NO.(v)

19. As per the counter-claimant, hypothecated stock of the claimant, which was valued at more than Rs.5 lakhs, was duly insured by the bank, but was misappropriated. Plant, machinery and civil works which were not hypothecated were illegally sold at throwaway prices. Nothing material has been stated by the counsel representing the appellant on the findings recorded by the Lower Appellate Court regarding fraud at the hands of the bank officials in selling the assets of the counter-claimant. It was admitted by PW1 Ram Kumar Gupta, Manager, Punjab National Bank,

Branch Sector 17, Chandigarh that is no record with respect to inspection by the bank officials regarding stock. He admitted that as Ex.P16 value of 4 Bigha 16 Biswa and 0 Bigha 11½ Biswa of land was assessed and the reserved price was fixed at Rs.6,30,000/-. He admitted that plant, machinery and building were not hypothecated, but the same were sold. He admitted that the plaintiff-bank under Section 13(4) of the SARFAESI Act took possession of 4 Bigha 16 Biswa and 11½ Biswa of land on 05.02.2004 without informing any revenue officer. He admitted that before taking possession and after taking possession, apart from notice dated 19.01.2004, no notice was dispatched to the defendants. He admitted that in communication dated 19.01.2004, there is no mention of taking possession of building, plant and machinery. It only talks of land measuring 4 Bigha 16 Biswa and 11½ Biswa of land. Vide communication dated 04.05.2004, the bank resolved to invite sealed tender *qua* sale of land. However, as per record no sealed tender was invited. Letter dated 04.05.2004 was neither withdrawn nor was complied with. He admitted that as per record he could not articulate as to which officer took decision for open auction and there is no document on record to show that such decision was ever taken. He admitted that borrower was never informed about date of auction. No information was imparted to Tehsildar, Panchkula or Sub-Registrar, Panchkula and no effort was made to ascertain the collector rate of the land. The land was auctioned on 22.06.2004. 4 Bigha 16 Biswa and 11½ Biswa of land was sold for a total consideration of Rs.4,67,000/-. Stone crushing and screen machine structure was sold at Rs.36000/-. He admitted that as

per communication dated 25.06.2004 the value of water well, labour quarter and cover shed of 2000 sq. feet approx. was assessed, but the same was neither auctioned nor there is any record of sale proceeds with the bank. He admitted that there is no record available as to how many people participated in the auction and what bid was received. He further admitted that there is nothing on record to prove that the property of the defendant/counter-claimant was auctioned on 22.06.2004. There is no record with respect to auction proceedings on 22.06.2004. He admitted that as per letter dated 12.05.2004 the property was valued at Rs.9 lakhs, whereas the amount realization value was Rs.6.30 lakhs. As per communication dated 25.06.2004, the land was sold for Rs.5,03,000/-.

20. The aforesaid admissions made by plaintiff/appellant have been held to be an act of fraud by the Lower Appellate Court. Supreme Court in the case of ***General Manager, Electrical Rengali Hydro Electric Project, Orissa vs. Sri Giridhari Sahu, (2019) 10 SCC 695***, while discussing definition of "fraud", as contemplated under Section 17 of the Indian Contract Act, 1872, has observed as under:-

> *"xxxx xxxx xxxx*
>
> *44. A perusal of the definition of the word "fraud", as defined in Section 17 of the Contract Act, would reveal that the concept of fraud is very wide. It includes any suggestion, as a fact, of that which is not true, by a person who does or does not believe it to be true. It may be contrasted with Section 18(1) of the Contract Act which, inter alia, defines "misrepresentation". It provides that it is misrepresentation if a positive assertion is made by a person of that which is not true in a manner which is not warranted by the information which he has. This is despite*

the fact that he may believe it to be true. In other words, in fraud, the person who makes an untruthful suggestion, does not himself believe it to be true. He knows it to be not true, yet he makes a suggestion of the fact as if it were true. In misrepresentation, on the other hand, the person making misrepresentation believes it to be true. But the law declares it to be misrepresentation on the basis of information which he had and what he believed to be true was not true. Therefore, the representation made by him becomes a misrepresentation as it is a statement which is found to be untrue. Fraud is committed if a person actively conceals a fact, who either knows about the fact or believes in the existence of the fact. The concealment must be active. It is here that mere silence has been explained in the Exception which would affect the decision of a person who enters into a contract to be not fraud unless the circumstances are such that it becomes his duty to speak. His silence itself may amount to speech. A person may make a promise without having any intention to perform it. It is fraud. The law further declares that any other act fitted to deceive, is fraud. So also, any act or omission, which the law declares to be fraudulent, amounts to fraud. Running as a golden trend however and as a requirement of law through the various limbs of Section 17 of the Contract Act, is the element of deceit. A person who stands accused of fraud be it in a civil or criminal action, must entertain an intention to commit deception. Deception can embrace various forms and it is a matter to be judged on the facts of each case. It is, apparently, on account of these serious circumstances that fraud has on a legal relationship or a purported legal relationship that the particulars and details of fraud are required if pleaded in a civil suit or a proceeding to which the CPC applies.

xxxx xxxx xxxx"

21. The facts of the present case which are evident from the admissions made by plaintiff's witness, when sieved through ratio of law laid down by Supreme Court in ***Sri Giridhari Sahu's case (supra),*** it is evident that concealment at the hands of the bank authorities *qua* the records of auction, in which the secured as well as unsecured assets belonging to the counter-claimant/respondents were sold, is evident and active. They have opted not to produce before Court any record pertaining to the auction and have remained conspicuously silent. This Court finds that the refusal to share details of the sale of assets is with an intent to deceive. Thus, the act of the bank authorities in concealing the records of auction related to assets of the counter-claimant/respondents has been rightly found to be an act of fraud by the Lower Appellate Court.

22. Resultantly, this Court finds that findings on issue Nos.(ii) and (v) also need to be answered in favour of respondent. It being a case where the counter-claimant detailed out the fraud committed by the bank authorities and the same can be inferred from the admissions made by PW1 – the Bank Manager, the Civil Court cannot be held to be barred from entertaining the counter-claim filed by defendants, more so when the bank was already before the Civil Court seeking recovery of the secured amount.

ISSUE NO.(iii)

23. In order to invoke Section 34 of the Specific Relief Act, it will be apt to peruse the provisions of law as well as the prayer made in the counter-claim. The same read as under:-

> *"34. Discretion of court as to declaration of status or right.— Any person entitled to any legal character, or to any right as to*

any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee."

"***Prayer made in Counter-Claim:***

The defendants therefore, pray:-

(i) For the grant of a Decree of Declaration in favour of the defendant, to the effect that the sale of the land of defendant No. 2 measuring 4 Bighas and 16 Biswas in Khewat No 20 Khatauni No. 22 Khasra No 306 and land measuring 11.5 Biswas in Khewat No 35 Khatauni No 57-58 Khasra No 119 (10-1) and 122(1-11 Kite 2, measuring 12-11 Biswas of 72/1440 shares. Total land of defendant No 2 measuring 5 Bighas and 7.5 Biswas situated at Village Chandimandir Hadbast No 391 vide Jamabandi for the year 1989-90 for the recovery of Rs 7,90,578/- under the Securitization Act is the result of cheating and fraud played by the staff of the plaintiff bank on the defendant no 2 and is void;

(ii) For grant of a decree for cancellation of the sale deeds of the land of defendant No 2 measuring 5 Bighas and 7.5 Biswas situated at Village Chandimandir Hadbast No 391 vide Jamabandi for the year 1989-90, fraudulently

executed by the plaintiff bank under the Securitization Act for the recovery of the said Rs 7,90,578/-.

(iii) For grant of a direction to the plaintiff Bank to submit the detailed documents and enumerate the procedures adopted and state the amount recovered by way of sale of the buildings, plant and machinery of Kohinoor Stone Crusher Chandimandir, for the alleged recovery of the said Rs 7,90,578/- and after adjusting the sale proceeds, state the recoverable balance amount.

(iv) Decree for recovery of an amount of Rs 76 lac (Rs.76,00,000/-) towards damages and compensation, on account of loss suffered by the defendants on account of illegal and unlawful actions and an amount of Rs.1 Crore on account of loss and damages in business which has been virtually shut-down by the actions of the plaintiff and additional amount of Rs.50,00,000/- on account of damage to the social reputation and status of the defendant No.2 along with interest @ 12% calculated with effect from the date when plaintiff took over the possession in unlawful manner till the date the decretel amount is actually realized, may kindly be passed in favour of the defendants and against the plaintiff in the interest of justice, equity and fair play.

(v) It is, therefore, respectfully prayed that the present suit be dismissed with exemplary heavy costs being false, fraudulent, frivolous and vexatious in nature.

(vi) A decree for recovery of amount claimed by way of counter claim may kindly be passed in favour of defendants and against the plaintiff along with interest accruing with effect from the date the plaintiff took over possession of the premises of defendants @12% per annum along with future interest till the realization of

decretal amount, in the interest of justice, equity and fair play.

(vii) It is, further respectfully, prayed that this Hon'ble Court may recommend appropriate penal action against the plaintiff for deliberate misstatement of facts and abuse of process of law through submission of false, and incorrect facts supported by forged documents in the manner this Hon'ble Court may deem fit. in the interest of justice, equity and fair play.

(viii) It is, further prayed that proper notice of willful concealment even in the prayer clause No. iv may kindly be taken as the plaintiff is praying for something which they have already committed without jurisdiction and authority in illegal and unlawful manner. The plaintiff is seeking order for disposing of the property which has already been disposed of by the plaintiff and an attempt is being made to mislead this Hon'ble Court and the present suit may kindly be dismissed on this short ground with the interest of justice, equity and fair play."

24. As per Section 34 of Specific Relief Act, any person entitled to any legal character, or right to any property, may institute suit claiming the same. However, where the plaintiff is able to seek further relief than a declaration of title, mere declaration cannot be granted. Applying the said principle to the present case, the counter-claimant sought declaration to the effect that sale of his assets is the result of cheating and fraud by the staff of plaintiff-bank and is void. He also sought decree of declaration seeking cancellation of sale. He failed to seek further possession of the suit property, though he claimed decree for recovery of damages. The question arises if he was required to seek the said relief, then against whom he could have sought

the relief ? Definitely, if relief of possession was to be sought, the same was to be sought against auction purchaser. As per the plaintiff, they have no record as to who purchased the property in auction. Plaintiff-bank themselves having concealed the details of the auction purchaser, cannot be allowed to raise the plea regarding the counter-claim being not maintainable invoking Section 34 of the Specific Relief Act, 1963. Hence, this issue is answered against the appellant.

ISSUE NO.(iv)

25. The issue with respect to deficiency of court fee on the counter-claim was raised by the plaintiff by filing application under Order VII Rule 11 CPC seeking rejection of the counter-claim. The application was allowed by the Trial Court vide order dated 06.10.2007. The respondents were required to affix *ad valorem* court fee on the amount of Rs.76 lakhs. Thereafter, the application was moved by the respondents/defendants seeking amendment of the counter-claim. Proposed amendment was *qua* addition of Para 41 in the counter-claim. The same reads as under:-

> *"41. That value of the suit for the purposes of counter claims of Rs. 76 Lacs on account of loss suffered due to illegal, unlawful actions, another sum of Rs. 1 Crore on account of loss and damages in business, another additional amount of Rs. 50 Lacs on account of damage to the social reputation and status of applicant/defendant No. 2 is valued as Rs. 2.26 Crore, however, for the purpose of value and jurisdiction of the counter claim at present a tentative value of the counter claim is assessed at Rs. 500/-, on which a Court fee stamp of Rs. 50/-has been affixed on the counter claim. The applicant will affix the*

deficiency of Court fee as and when directed by the Court i.e. after passing of a decree of amount assessed by the Court on the counter claim claimed by the defendant No. 2".

26. The amendment was allowed. The bank filed application for recalling order of amendment. The application was dismissed.

The Court of the First Instance while deciding issue No.2 observed as under:-

"56. As the plaintiff bank has examined the witnesses and has proved the authority of original Manager Shri K.K. Mahajan, who has filed the suit, by examining PW1 Shri Ram Kumar Gupta, Manager (Loan) and there is no other flaw in the case of the plaintiff bank. Its claim is even supported by the statement of account. The action of the plaintiff bank which is being assailed, could only be assailed by the defendants before the Debt Recovery Tribunal, then the balance amount of Rs.3,18,158.25 paisa is recoverable by the plaintiff bank. The defendants despite specific directions of the Court have not affixed the ad valorem court fee and their counter claim is not maintainable as the alleged fraud is not proved by them. Accordingly, the findings over issue No.1 are returned in favour of the plaintiff bank and over issue No.2 are returned in favour of the defendants/counter claimants upto the above discussed extent."

27. The counter-claim was dismissed with costs. Counter-claimant preferred appeal. No court fee was paid upon memorandum of appeal. The Lower Appellate Court while dealing with the issue of court fee observed as under:-

"26. Lastly, with regard to the affixation of advalorem court fee on the counterclaim, there is no dispute the appellants themselves raised specific counterclaim for Rs.76 lacs and were

directed by the learned trial court to affix the advalorem court fee and specific order in this regard was passed on 06.10.2007 and same attained finality. It is proven fact on the record of the learned trial court despite specific directions, the appellants did not affix the advalorem court fee on the counterclaim of Rs.76 lacs. Once the appellants had not affixed the advalorem court fee on the counterclaim, the appropriate course with the learned trial court was not to permit the appellant to prosecute the counterclaim. No specific order was passed in this regard and the learned trial court proceeded to decide the case on merits, it is also sheer illegality committed by the learned trial court. Once the suit including the counterclaim has been decided on merits, there is no bar for the appellate court to grant some time to the concerned party to affix the appropriate court fee. The appellants are liable to affix the advalorem court fee on the counterclaim treating its value Rs.76 lacs. While filing the appeal before the appellate court, the appellants have affixed the court fee of Rs.25 only on the memorandum of appeal, whereas the appellants at least were required to affix the advalorem court fee on the counterclaim of Rs.76 lacs as they pressed the counterclaim before the appellate court also. The respondent-Bank has not raised any objection in this regard, but appeal could not have been prosecuted without affixation of appropriate court fee. It is a legal issue and this court is in its competency to also grant time to the appellants to affix the advalorem court fee on the memorandum of appeal, treating its value Rs.76 lacs. The findings of the learned trial court qua affixation of advalorem court fee on the counterclaim of the appellants are hereby maintained.

27. Hence, the appeal filed by the appellants is, partly, accepted, with costs, subject to affixation of advalorem court by the appellants on the counterclaim of Rs.76 lacs and also

advalorem court fee on the memorandum of appeal, equivalent to the amount of court fee affixed on the counterclaim, within the period of one month from the date of judgement, failure to which, their appeal shall be treated to be dismissed. The appellants are held entitled to recovery of Rs.45 lacs only being counterclaim minus Rs.5 lacs already recovered on 22.06.2004 by sale of movable and immovable properties of the appellants i.e. Rs.40,00,000/-, further minus Rs.2,90,578/- (being balance amount as per statement of account Ex.P9) along with interest at the rate of 11% per annum with quarterly rests from the date of filing the suit till actual realisation. After affixation of court fee by the appellants, as ordered herein before, the respondent-Bank will make payment of the balance amount qua the counterclaim of the appellants, to them within the period of one month from the date of affixation of court fee by the appellants and in case the same is not paid/deposited in the court within the stipulated period of one month, as ordered herein before, then the appellants shall be entitled to interest at the rate of 11% per annum from the date of expiry of one month, from the date of affixation of court fee by them, till actual realisation. None of the counsel for the parties furnished fee certificate, hence, Rs.5,000/- is assessed as counsel fee for each of the parties. Preliminary decree sheet be drawn, accordingly and final decree shall be prepared on affixation of appropriate court fee by the appellants within stipulated period. In case the appellants fail to affix the appropriate court fee on the counterclaim claim as well as on the memorandum of appeal as ordered herein before, within the stipulated period, unless extended by the court, then, this preliminary decree shall be treated to be final decree and the respondent-Bank shall be entitled to recover Rs.2,90,578/- from the appellants along with interest at the rate of 11% per annum with quarterly rests from

the date of filing the suit, till actual realisation. Record of the trial court along with copy of this judgement and decree drawn by this court be sent back, immediately, and record of this court be consigned to the records after due compliance."

28. Learned Senior Counsel for the appellant claims that the Lower Appellate Court was not within its jurisdiction in extending the time to affix *ad valorem* court fee on the counter-claim, once the same was rejected after counter-claimant failed to affix *ad valorem* court fee on the directions issued by the Trial Court.

29. It has been contended by counsel for the counter-claimant/respondents that since the counter-claim was adjudicated upon on merits and is ordered to be dismissed, the Lower Appellate Court was right in extending time to make deficiency good. It has been further contended that now the court fee on counter-claim as well as the memorandum of appeal having already been paid, the issue does not survive.

30. Counsel for the counter-claimant/respondents has relied upon Section 149 of the Code of Civil Procedure to submit that the Court has discretion at any stage to allow party to pay the whole or a part of the Court fee, as the case may be, and upon such payment the document, in respect of which fee is payable, shall have the same force and effect as if such fee had been paid in the first instance. He, thus, submits that the objections raised by learned Senior Counsel for the appellant regarding non-payment of court fee in time and thus the appeal being barred by time, *sans* merit.

31. Learned Senior Counsel for the appellant submits that discretion vested in the Court under Section 149 CPC needs to be exercised

judiciously and for a sufficient cause. Wherever party fails to show sufficient cause, the jurisdiction cannot be exercised, as the same amounts to taking away the right vested in the opposite party that accorded in his favour after the limitation has expired.

32. In order to appreciate the rival contentions, it will be apt to peruse Section 149 CPC. The same reads as under:-

> ***149. Power to make up deficiency of court-fees.***—*Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as is such fee had been paid in the first instance.*

33. The same came up for consideration before the Supreme Court in the matter of ***Sansar Chand vs. Union of India, 1965 SCC OnLine SC 385***, wherein the Supreme Court observed as under:-

> *"xxxx xxxx xxxx*
>
> *2. The first contention of the learned counsel for the appellants was that the appeal filed in the Court of the Judicial Commissioner, Himachal Pradesh, was barred by limitation. Some facts are necessary to appreciate this contention. The appeal was presented on November 29, 1957, with a court fee of Rs 1523-8-0 under the Himachal Pradesh Court Fees (Amendment) Act, 1952. The correct court fee payable was Rs 1875. There was, therefore, a deficiency of Rs 351-8-0. The said deficiency was made good on July 9, 1958. On June 21, 1959, an application was filed by the appellants in the Court of*

the Judicial Commissioner for excusing the delay in paying the deficit court fee. The learned Judicial Commissioner, for the reasons mentioned in his judgment, excused the delay. The result was that in law it must be held that the memorandum of appeal was filed with the requisite court fee. The argument was that the learned Judicial Commissioner had no jurisdiction to extend the time for paying the deficit court fee after the appeal was barred by limitation and, therefore, his order excusing the delay could not have rectified the defeat. This argument, if we may say so, was in the teeth of the express provisions of Section 149 of the Code of Civil Procedure, which read:

> *"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."*

Under this section the court may exercise the discretion at any stage. The expression "at any stage" is very wide and it does not impose any limitation such as that the discretion should be exercised only within the period of limitation prescribed for the filing of the appeal. The court cannot obviously circumscribe the wide phraseology used in the section by extraneous or equitable considerations. The decision of this Court in Mahant Ramdas v. Ganga Das [AIR 1961 SC 882] relied upon by the learned counsel for the appellants in support of his contention does not bear him, out. There, the High Court made a peremptory order fixing the period for payment of deficit court fee and the appellant made an application for extension of time before the time fixed had run out, but the application came on for hearing before a Division Bench after the period had run out. It was held on a construction of Sections 148 and 149 of

the Code of Civil Procedure, that an order extending the time for payment, though passed after the expiry of the time fixed, could operate from the date on which the time fixed expired. That decision was concerned only with the situation where a court fixed the period for payment but the amount was not paid within that time but the application for excusing the delay was filed within the prescribed time. Here we are confronted with a different situation. In the present case there was no order of a court prescribing the time for payment of court fee. The case directly falls within the express terms of Section 149 of the Code of Civil Procedure which clearly confers a discretionary power on the court to excuse delay at any stage. On the merits of the application for excusing the delay, the learned Judicial Commissioner had given relevant reasons, for excusing the delay. It is not for this Court to take a different view. This objection was, therefore, overruled.

xxxx xxxx xxxx"

34. The issue was again addressed by Supreme Court in the case of ***Mannan Lal vs. Chhotaka Bibi, (1970) 1 SCC 769 at Pg. 777*** as under:-

"xxxx xxxx xxxx

15. In the case of Gavaranga Sahu v. Botokrishna Patro [ILR 32 Mad 305 (FB)] a Full Bench of the Madras High Court was called upon to adjudicate on the question of the validity of a plaint presented on a paper insufficiently stamped to start with but where the deficiency was made good within the time given by the court under Section 54(b) of the Code of Civil Procedure, 1882. Section 54(b) of the Code of 1882 is reproduced in Order 7, Rule 11 of the Code of 1908. Under the said provisions a plaint has to be rejected if the relief sought is properly valued but the plaint is written upon a paper

insufficiently stamped and the plaintiff on being required by the court to supply the requisite stamp within a time to be fixed by it fails to do so. The argument advanced in that case before the court appears to have been to the effect that a plaint which was not sufficiently stamped within the period of limitation was not a valid plaint at all. In the order of reference the law on the subject was set forth in some detail and the learned referring Judge opined that an insufficiently stamped plaint did not become a new plaint when the deficiency was supplied. The learned Judges of the Full Bench fully agreed with the view taken in the order of reference and with the reasons upon which it was based and merely added that Section 149 of the Civil Procedure Code of 1908 was in accordance with this view.

16. The Judicial Committee of the Privy Council gave a decision much to the same effect in Faizullah v. Mauladad [AIR 1929 PC 147]. In this case the suit was filed for accounts and the settlement of the sums due in connection with the affairs of a partnership firm, the plaintiffs valuing the suit at Rs 3000 for the purpose of court fees and asking for rendition of accounts and a decree for Rs 3000 with the statement that if more than that amount was found due the plaintiffs would pay an additional court fee. The defendant asked for a decree in his own favour for Rs 29,000. The trial Judge passed a final decree in favour of the defendant for Rs 19,991 and no sum was found due by him to the plaintiffs under their claim for Rs 3000. The judgment was appealed from by both parties. The plaintiffs-appellants challenged the decree against them and maintained that not only that decree be set aside but one in their favour for Rs 3000 or less or more should be granted. They valued the appeal for purposes of court fee at Rs 19,991and paid fees thereon amounting to Rs 975. The question as to the invalidity of the appeal on the ground of insufficiency of court fee was

answered by the Judicial Committee by holding that the memorandum of appeal did state in terms of the Act (i.e. the Court Fees Act) the amount at which the relief was sought and that determined the appeal. According to the Judicial Committee even if it was held that the fee payable was insufficient it was the duty of the court in exercise of its discretion to give an opportunity to add to the amount lodged the extra sum of Rs 70 or 80 required for deferring the question of the amount of fee under the Court Fees Act until final value was ascertained. Referring to the provisions of Section 149 of the Code the Board observed that the discretion under that section "extended to the whole or any part of any fee prescribed and could be exercised at any stage in the case, while finally, upon the extra payment being made, the document is to have the same effect as if it had been paid in the first instance". The Board further held that as the decree of the Subordinate Judge was dated 24th March, 1924, the first appeal was on 27th May and the Second Appeal on 2nd June the time for limitation of the appeal being 90 days both appeals were within time. It was further held that the appeals were not a nullity and on the contrary they were documents duly presented to and accepted by the court, and as to the court fee thereon, should the valuation be unsatisfactory or in the end insufficient, that is validated by the additional payment, the result of which payment is that the document, namely, the memorandum of appeal, stands good from its date and the appeals are accordingly not time-barred.

17. On a parity of reasoning it is difficult to see why if a memorandum of appeal insufficiently stamped is not to be rejected as barred under the Limitation Act, why a different conclusion should flow as regards compliance with the Court Fees Act in view of the express provisions of Section 149 of the

Code. In our opinion Section 149 will cure the defect as from the date when the memorandum of appeal was filed alike for the purpose of Limitation Act and the Court Fees Act and the appeal must be treated as one pending on 9th November 1962 and as such unaffected by Section 3 of the U.P. Act of 1952.

In Wajid Ali v. Isar Bano [AIR 1951 All 64 (FB)] Section 149 was interpreted as a proviso to Section 4 of the Court Fees Act in order to avoid contradiction between the two sections. The court was, however, careful to lay down that discretion had to be exercised in allowing deficiency of court fees to be made good but once it was done a document was to be deemed to have been presented and received on the date on which it was originally filed. This was a case of a plaint.

18. In another Full Bench, Hari Har Prasad Singh v. Beni Chand [AIR 1951 All 79] of the same year dealing with a case of a memorandum of appeal which was found defective for want of proper court fee and not admitted in view of Section 4 of the Court Fees Act but returned or rejected on that ground it was held that the memorandum could not be treated as an appeal. It was there observed:

> *"If Section 4 of the Act (i.e. Court Fees Act) had stood by itself, an unstamped or insufficiently stamped memorandum of appeal, chargeable with fees, could not have been received by the High Court for any purpose .... There is nothing in Section 149 of the Code which overrides the provisions of Section 4 of the Court Fees Act, it merely postpones the operation of that section for the time being. If the whole or part of the requisite court fee is not paid within the time allowed by the Court, Section 149 of the Code ceases to have effect, and the Court is precluded from filing or recording an unstamped or insufficiently stamped memorandum of appeal in court."*

19. According to Stroud, a legal proceeding is "pending" as soon as commenced, and until it is concluded, i.e. so long as the

court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein.

20. When the deficiency in the payment of court fees is made good and the document or memorandum of appeal is to be given the force and effect which it would have had if there had been no deficiency, the appeal must be treated as pending on 12th November, 1962. In Nagendra Nath v. Suresh [AIR 1932 PC 165] which turned on the interpretation of Article 182(2) of the Limitation Act of 1908 as regards the validity of an appeal presented in an irregular form the Board observed that although there was no definition of "appeal" in the Civil Procedure Code any application by a party to an appellate court asking it to set aside or revise a decision of a Subordinate Judge, is an appeal within the ordinary acceptation of the term, and that it was no less an appeal because it was irregular and incompetent.

21. The words used in that judgment are no doubt of wide import. But however that may be in the case before us there can be no difficulty in holding that an appeal was presented in terms of Order 41 Rule 1 of the Code inasmuch as all that this provision of law requires for an appeal to be preferred is the presentation in the form of a memorandum as therein prescribed. If the court fees paid thereon be insufficient it does not cease to be a memorandum of appeal although the court may reject it. If the deficiency in the fees is made good in terms of an order of the court, it must be held that though the curing of the defect takes place on the date of the making good of the deficiency, the defect must be treated as remedied from the date of its original institution.

xxxx xxxx xxxx"

35. In view of above, the consistent view of the Courts has been that Section 149 CPC is a cure to the defect in deficiency of court fee. Once such defect is cured, the memorandum of appeal/plaint has to be treated as the one pending on the date it was filed.

36. In ***A. Nawab John and others vs. V.N. Subramaniyam, (2012) 7 Supreme Court Cases 738***, the Supreme Court specifically noticed ratio of law laid down in ***Mannan Lal's case (supra),*** but held that the issue is different, wherein the matter relates to Tamil Nadu Court Fees and Suits Valuation Act, 1955 as Section 12(2) of the said Act expressly provides for defendant's right to raise the issue of court fee. Reference can be made to the following observations made by Supreme Court in the case of ***A. Nawab John's case (supra)***:-

> *"xxxx xxxx xxxx*
>
> *23. That the question of court fee is a matter between the plaintiff and the court is a principle which has been followed for a long time. The Madras High Court in S.L. Lakshmana Ayyar v. T.S.P.L.P. Palaniappa Chettiar [AIR 1935 Mad 927] held: (AIR p. 928)*
>
> > *"… Under the prevailing usage, the court fully goes into the question relating to the court fee, only upon an objection taken in the written statement by the defendant, but as the Judicial Committee points out in Rachappa Subrao Jadhav v. Shidappa Venkatrao Jadhav [(1918-19) 46 IA 24 : 36 MLJ 437] the Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, and from that view it follows, that although in actual practice a defendant is permitted to object that the proper court fee has not been paid, he has, strictly speaking, no legal right to raise such a plea, but his function must be deemed to be,*

> *subject to the court's leave, merely to assist it in coming to a proper decision."*

Though this judgment does not refer to any statutory provisions, Section 12 of the Court Fees Act, 1870 supports this view. Paragraph (i) gives finality to the decision of the trial court on the questions relating to valuation.

> *"12. Decision of questions as to valuation.—(i) 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."*

Paragraph (ii) however provides that the appellate or Revisional Court can direct the deficiency to be made good if it comes to the conclusion that the lower court had decided the issue to the detriment of the Revenue.

> *"12. (ii) 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, and the provisions of Section 10, paragraph (ii), shall apply."*

In view of the finality attached under Section 12(i) to the decision of the trial court and the time of the limited scope of the appellate court's power to examine whether the lower court wrongly decided the question to the detriment of the Revenue, the conclusion obviously is inevitable the defendant has no right to file a revision petition against the decision of the trial court.

24. <u>However, the position under the Tamil Nadu Court Fees and Suits Valuation Act, 1955 is different. Section 12(2)</u>

expressly provides for the defendant's right to raise the question of the court fees:

> *"12. (2)Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub-section, not later, plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the court shall fix a date before which the plaint shall be amended in accordance with the court's decision and the deficit fee shall be paid. If the plaint be not amended or if the deficit fee be not paid within the time allowed, the plaint shall be rejected and the court shall pass such order as it deems just regarding costs of the suit."*
>
> *xxxx xxxx xxxx"*

37. In the present case, the learned Senior Counsel for the appellant/plaintiff has not been able to show any provision under which the defendant can raise issue with respect to court fees. The same primarily remains a dispute between the litigant and the Court. Reference can be made to the following observations made by this Court in ***Arun Kumar Goyal vs. Payal Aggarwal, (2013) 4 RCR (Civil) 93*** :-

> *"xxxx xxxx xxxx*
>
> *9. Admittedly, the plaintiff filed a suit for specific performance of contract dated 8.3.2006 and has affixed ad valorem court fee*

on an amount of Rs. 15 lacs which was agreed sale price of the suit property. There was an alternative prayer clause that in case specific performance cannot be granted due to some technicalities or reasons, in that eventuality, the defendant be directed to pay double the amount of the earnest money. In the present case, the main relief of the plaintiff is for seeking specific performance of contract for which she has affixed appropriate court fee. For second relief, the question of court fee comes into operation only when it is found that specific performance cannot be granted. The application filed by the defendant was dismissed on the ground that there is no need to affix the court fee on the alternative prayer at this stage and application was dismissed.

10. Admittedly, the dispute is of the court fee. Learned counsel for the respondent before raising any argument on the merits of the case has raised a preliminary objection that no revision is maintainable in case of payment of court fee. It has been held in various judgments that the question of non-payment of court fee is a dispute be tween the litigant and Registry whether it arises at the stage of presentation of plaint or the appeal and the respondent is normally not interested in such a dispute. As per ratio of judgment in case ti tled Shamsher Singh v. Rajinder Prashad, 1973 PLJ 686, revision or appeal can be filed if there is a dispute of jurisdiction. In case the question of jurisdiction is not involved then revision cannot be filed. This issue was interpreted by the Kerala High Court in Vasu v. Chakki Mani, AIR 1962 Kerala 84 wherein it was held that no revision will lie against the decision on the question of in adequacy of court fee at the instance of the defendant. The judgment of Apex Court in Sri Rath navarmaraja's case (supra) was also followed by the Full bench of this Court in Arjan Motors v. Girdhara Singh, 1978 PLJ 36. As per Full Bench judgment of this Court it was

held that question of court fee cannot be agitated by the litigants in a petition under Section 115 of the CPC.

xxxx xxxx xxxx"

38. Court fee is more of an issue of revenue. The fraudulent act of the appellant/plaintiff cannot be allowed to go scot-free. Trite it is, act of fraud vitiates every solemn act. Bank cannot be allowed to take benefit of its fraudulent act shielding behind delay in payment of court fee by the respondents.

39. In view of above, this Court finds that no fault can be found with the concession given by the Lower Appellate Court to the counter-claimant/respondents to make deficient court fee good by extending time, more so when the deficiency had already been made good. Resultantly, issue No.(iv) is also answered against the appellant/plaintiff.

40. As a sequel of discussion held hereinabove, since all the five issues have been decided against the appellant/plaintiff, this Court finds no merit in the present appeal. The same is ordered to be dismissed. No costs.

41. Pending application(s), if any, shall also stand disposed off.

(PANKAJ JAIN)
JUDGE

May 21, 2025
ashish

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No