

APPRECIATION OF EVIDENCE IN SUITS

The Concept

Written & Presented by

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'Appreciation of evidence' is not only the 'Art'¹ but also falls under the scope and ambit of science², because, 'Art'¹ is a skill acquired by continuous practice and, through 'real time' experiences of an individual, as such, it is 'normative'³; while, it is a science², because, while appreciating the evidence, a 'systematic' approach need to be adopted under the 'Governance' of certain rules framed either by the Legislature or, under the due adherence to the verdicts of the Hon'ble Appellate Courts at the level of the State and; the Honourable Supreme Court of India.

As could be under-stood, from the topic assigned; the key words that need to be nurtured, to have an imperative understanding are: **"Appreciation", "Evidence", "Suits"**.

So, appreciation: according to **Black's Law Dictionary** is **"know"** or **"understand"** or **"realize"**. Unlike normal English usage, which means admiration, the word appreciation must for all purposes is a distinct word in the legal application or rather sense.

While, as per **Tomlin's Law Dictionary**; evidence means an inference Logically drawn as to the existence of a fact. It consists of proof by testimony of witnesses on oath, or by writings or records.

The key words in the said context, refers to 'inference'; to be drawn Logically, means that by use of reasoning, conclusion or derivatives must be drawn.

Though, it is quizzizing amongst living beings: **Homosapiaens** are bestowed by divinity or super natural power; the

power of reasoning, which is intellectuality drawn as faculty by which conclusions are drawn.

Adding further element to it, it also means; and includes:

- i) *All statements which the Court permits or required to be made before it. By witnesses, in relation to matters of fact under inquiry, such statements are called material evidence;*
- ii) *All documents produced for the inspection of the Court; such documents are called documentary evidence.*

Oxford Dictionary and Thesaurus 21st edition provides one of the meanings to suit as, "Law suit".

In a reported Judgment between Tam Taru Municipality Vs State of Punjab reported in: AIR-1967 Punjab-369,373, the word suit means a proceeding instituted in a Civil Court by the presentation of a plaint.

Further, in a Judgment reported in **Provas Chandra Poddar Vs Visayraju Kasiviswanadhan Raju** reported in: **AIR 1962, Ori, 149,154**, the word 'suit' is generally construed to include appeal.

Therefore, in a broader sense, the suit is; any proceeding in a Court of Justice on which the plaintiff pursues his remedy to recover a right or claim. **The Law lexicon written by Ramanatha Aiyer, Narrates** that the suit is a prosecution or pursuit of some claim, demand or request; the act of suing, the process by which one endeavors to gain an end or object; attempt to attain a certain result; The act of suing; the process by which one gains an end or object, an action or process for the recovery of a right or claim; the prosecution of some demand in a Court of justice; any proceeding in a Court of Justice in which plaintiff pursues his remedy to recover a right or claim; the mode and manner adopted by law to redress Civil injuries; a proceeding in a Court of justice for the enforcement of right"

It is advent from the Historical manuscripts that "Administration of Justice" is a divine function, as such, Judgments are being styled or referred as the "Power of Attorney Holders of Lord the

Almighty-' connotes that the persons or individually approach the temple of justice to get remedy or for their grievances.

Hence, Judgments rendered in any Hierarchy is a stupendous task to 'sieve' grain from chaff in order to dispense justice and has to find out truth accordingly.

It is in this context, the significance of "appreciation of evidence" in suits 'Dawns' and that in the ages of modern mechanism of dispensation of justice; the Judge of any cadre, unlike "REX" during ancient and medieval times; has to consider the testimony both oral and documentary in order to conclude without bias, on the system of reasoning so as to **Anchor** the facts to the 'Harbor of truth' in order to demonstrate, make it clear or to ascertain the truth of the very fact or point in issue either on the one side or on the other.

Hence, appreciation is one of the foremost tests to consider credential of the evidence brought by the parties in a suit, who propounds their respective theory of rights.

Thus, evidence determines how the parties are to convenience the Court to the existence and that the state of facts, which, according to the provisions of the 'substantive Law' would establish the existence of the Rights, Liability, or Disability, which they assert to deny in a suit or proceeding.

It is well known that "Proof" **is the fact or result of evidence; while evidence is the medium of proof.**

This should be the Endeavour of a Judge in adjudication or determination of rights with the motto "**Satyameva Jayate**" means "Truth alone **Triumths**"

After all, the very purpose of the judicial inquiry is nothing but the ascertainment of certain right or liability, prior to advent of pronouncing upon the rights, duties and liabilities of the parties; the Court of justice invariably has to find what facts exist. It is for the parties to convince the Court as about existence of that state of facts which should be in accordance to the provisions of the substantive law: would establish the existence of right or liability which they lodge to exist.

The Journey of a Judge in the Civil litigation, begins in presentment of plaint; verifying the same; issuance of summons; receiving the written statement; framing of issues; recording of evidence; hearing arguments and pronouncing Judgment.

This looks simple: yet, complex in executing the matters towards achieving the finality in the dispute 'set' by the parties.

As matter of concern, the passage from the speech of Sir Winston Churchill, the then Prime minister of England made in the British Parliament about Judges, being extracted to here:

*“The Judge has not only to do justice between man and man. He also- and its one of the most important functions considered in comprehensible in some large parts of the world has to do justice between citizen and the state. He has to ensure that administration conforms with the law, and to adjudicate upon the legality of the exercise by the executive of its powers; perhaps only those who have led the life of a Judge can only know the responsibility which rests upon him....the services rendered by Judges demands the highest qualities are not to be measured in terms of **pounds, shilling, and pence** according to the quantity of work done. The form of life and conduct, far more severe and restricted than that of ordinary people is required from Judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct.”*

As a matter of relevancy, the observations so proposed by the first **Attorney General of India, who also headed the first law Commission, late Sir M.C.Setalwad** observed the importance of procedural law:

“The object of procedural law has to bring the disputants together for the purpose of trial to ascertain the facts and the law in dispute so as to enable the Court to reach a conclusion after full investigation. The Civil Procedure Code is based on the theory that there must be a full disclosure by each

party of his case to the other, that rival contentions must be reduced as quickly as possible to the form of clear or precise points or issues for decision and there must be a prompt adjudication by the Court on those points. Justice is delayed not so much due to the defects in the procedure as by its faulty application”.

It is apt to observe at this juncture, that the foundation of Civil law would be based on “**preponderance of probability**”, means an out weighing in the process of balance however slight may be the tilt of the balance or the preponderance. As a conjecture 'preponderance' generally signifies that which satisfies the conscience and carries conviction to a intelligent mind. So, preponderance of evidence means to out weight; to weigh more, a clear preponderance may mean that which may be seen in discernible, and may be appreciated and understood. But, it may also convey the idea of certainty beyond doubt.

Therefore, appreciation of evidence in suits, more specifically conjoins with oral and documentary evidence. In discharging the duties, responsibilities and functions as a Judge, it would be an advantage of having able assistance and guidance of the counsel appealing on both sides, while evidence is recorded as per cannons of statutory provisions, while, its relevancy and appreciation is the domain left to the discretion of judges which discretion should not be 'arbitrary' but must be based on sound and established principle and judicial precedent, interpretation and construction of documents, only by certain particulars and guidelines.

Oral evidence of a witness is generally admissible evidence if he has direct and personal knowledge of the fact deposed by him. Whilst, the witness who has no direct knowledge, is commonly referred to as “hear say” evidence; is not to be acted upon.

It is apropos, here to refer 'section 3' **of the Indian Evidence Act**, which says that “**all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence**”. Parties to the suit or other Civil proceedings would be at liberty to examine as many witnesses as could be produced in support of their respective claims or contentions. Here,

Section 134 of Indian Evidence Act says **"No particular number of witnesses shall in any case be required for the proof of any fact"**. It is entirely left to the parties to decide the number of witnesses necessary or required to be examined in order to prove a particular fact or document.

It is, therefore, said that the evidence is to be weighed but not counted. Court will not generally do not keep any embargos on the right of parties in choosing to examine the witnesses. Only in extraordinary circumstances, where the examination of particular witness, quite un-necessary or that the evidence of any witness is irrelevant to the determination of the issues involved or that the examination of witnesses would to protract the trial in suits, the Court will discourage examination of a witness.

On recording entire evidence adduced, it is the duty of the Court, to evaluate the evidence and make in it mind as regards to its believability or otherwise; if believed to what extent, and then record its conclusions which are just, equitable, proper and legal.

While recording oral evidence the trial Judge is expected to be **"ears and eyes"**, which means, that he has to closely observe the demeanor of the witness and note whether he hesitates, weaves, prevaricates or looks around, with a view to gain an insight into the mind of the witness to grasp whether he tells the truth or not, and to see, whether he has under duress of any one or under threat or pressure. So, the assessment of oral evidence by the trial Judge is given more weight by appellate Courts.

Oral evidence is either direct or indirect, that emanates from the personal account and knowledge of what the witness has seen or heard of while other type of evidence is "unoriginal" which is hearsay evidence that emanates from the account of learning the said fact through the medium of the 3rd person. Hence, 'section 60' of the Indian Evidence Act lays down that oral evidence must be direct. It 'eschews' hearsay evidence from consideration.

There is a reason given in **Halsbury's Law of England** for rejection of hear say evidence, that reads: **"the irregularity of original declarant, the depreciation of truth in the process of**

repetition, the opportunities for fraud, which, its admission would offer and waste of time involved in listening to the idle rumour"

As far as appreciation of oral evidence, there are no set of hard and fast rules. It is the Judge, who is to sieve the evidence, so as to separate chaff from the grain and should consider such evidence to be relevant, probable, trustworthy consisting to the facts under consideration and surrounding circumstances thereto.

Therefore, appreciation of oral evidence is not a '**cake-walk**'. It varies from Judge to Judge. It must be a view or conclusion that a "**reasonable**" man ought to consider; without perverse, whimsical or bias.

In weighing evidence, certain considerations are prescribed, such as observation of demeanor; his intellectual capacity, interestedness, notices, consistency of his testimony, discrepancies in material particulars, collateral circumstances, admitted facts, probabilities of the case, burden of proof, necessity of corroboration in case of conflicting evidence, the rule of prudence is, as "BARON-PARKE" the jurist observes:

"to consider what facts are beyond dispute and to examine which of the two cases best accord with these facts according to the ordinary course of human affairs and the usual habits of life".

The second LIMB of appreciation of evidence is 'admissibility and appreciation' of documentary evidence. The Evidence Act; classify document into two types: one is according to section 74 is '**public document**'. Before a document rendered by a party, is received in evidence, the question of its admissibility arises and the same is to be decided in accordance to certain statutory provisions that deal with the admissibility of documentary evidence. It is a cherishing aspect to remember that admissibility of document in evidence is distinct from that of proof of its execution and contents. Even if a document is marked with the consent of both parties, it does not dispense with the necessity to prove the contents and its relevancy, at this juncture; perse, the ratio laid by the Hon'ble Apex Court is as follows:

- i) Mere marking of document as exhibit does not dispense with its proof as held in AIR 1971 Supreme Court-1865;
- ii) Party cannot object to the admissibility of documents marked as exhibits, without any objection from him, as Held in AIR 1972 Supreme Court 608;
- iii) Further, permitting document to be marked by consent only means that the consent by parties waives his right, to have the document in question of proof, as held in AIR 1986 Madras 341.

Whilst, **Section 77 of the Indian Evidence Act**, deals with "Certified copies of document may be permitted in evidence and it presumed that their contents are proved. Various categories of official documents and the method of their proof is laid down in Section 78 of the Indian Evidence Act. Likewise, Section 79 to 90 of the Indian Evidence Act, enumerates various kinds of documents of which presumption as to their genuineness can be drawn. Here, it needs to have special attention, with regard to **Section 90 of the Indian Evidence Act** which speaks about presumption as to document **30** years old, which are usually referred as old document; that are not only admissible in evidence. But, further, it is presumed that the signature and hand writing contained therein are those of that particular person, whose signature it bears or in whose hand writing to it purports to be. This section does away the 'strict rule of proof', by giving place to a presumption of genuineness, provided the document is **30** years old and produced from proper custody. Further Wills do not require to be stamped, but testator may choose to get it registered, at his option. These are not compulsorily registerable documents. Therefore, a document, purporting to be a will can be admitted in evidence.

As a corollary **Section 35 of the Stamp Act**, mandates that the documents not stamped or insufficiently stamped or inadmissible in evidence for any purpose; but, such instrument, can be received in evidence on payment of stamp duty and penalty.

However, there are certain exceptions under section **35**; significant being promissory note and bill of exchange. Un-stamped or not duly stamped promissory note cannot be received in evidence at

all, and the defect cannot be cured by collecting Stamp Duty and Penalty. If an instrument not duly stamped has been admitted in evidence without objection being raised, by the opposite party, such admission cannot be called in question at any later stage of the same suit or proceeding on the ground it is not being duly stamped; as per **section 36 of the Stamp Act**. Then, passing on to instrument compulsorily registerable, **section 17 of Registration Act**, deals with the instruments whose registration is compulsorily means that these documents shall not be admitted in evidence not registered.

Section 49 of the Registration Act, laid down that no document required by section **17** or by any provision of the **Transfer of Property Act**, to be registered, shall be received as evidence of any transaction affecting such party. Therefore, unregistered instrument in respect of immoveable property are clearly inadmissible in evidence. However, by virtue of the proviso **section 49 of Registration Act**, such an unregistered document may be received in evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purpose of **Section 53 (A) of the Transfer of Property Act**, or as evidence of any collateral transaction, not required to be effected by registered instrument.

'Collateral purpose' is a purpose other than that are creating, declaring, assigning, limiting or distinguishing a right to immovable property. Thus, an unregistered partition deed is admissible in evidence only to prove the factum of partition and not its details or terms and also to prove severance in status. Un registered lease deed is admissible to prove the nature and character of possession of the occupant.

Likewise, unregistered deed of gift, mortgage or sale is admissible to prove the nature and character of possession of the occupant. A contract for the sale of immoveable property does not require registration as it is so made specifically clear by the explanation to section 17 of the Registration Act. This is enacted obviously in view of the provisions contained in section 54 of the Transfer of Property Act, wherein it is laid down that a contract of sale does not of it self create any interest in or charge, on such property. Certain exceptions are engrafted to section 17 of the

Registration Act, which are specified in sub-section (2) of section 17. Some of the important documents being, decrees or orders of Courts in respect of immovable properties, grant of immovable property by the government, certificate of sale granted by a Court to purchaser at a Court sale etc. These do not require to be registered. But, a decree comprising immovable property other than which is the subject-matter of the suit or proceeding, requires registration.

Undoubtedly, in order to determine the admissibility of documentary evidence, one must be thorough with the relevant provisions of stamp Act and the Registration Act.

When, documentary evidence produced: several aspects have to be examined depending on the evidence adduced such as, whether the document is actually written by the person alleged to have written it. Under what circumstances or in what context it was written; what is the scope and effect of the writing, whether, it can be taken as admission of the person, as written it; whether, the executants has legal capacity to execute it; whether it was executed with a free mind without being unduly influenced; without fraud being played on him; without force, coercion or mis representation by any one, because, a transaction gets vitiated if it is entered into or a document is executed under coercion, undue influence or fraud, mis representation or the like.

If the execution itself is denied, on the plea of forgery, then the genuiness of document has to be established by evidence in such case, the Court has power vested with it '**Under Section 73 of the Indian Evidence Act**' to compare the signature in the disputed document with the admitted signature of the writing and person or otherwise the said document can be sent for testing with genuiness in accordance with **section 45 of Indian Evidence Act.**

Some documents are required by law to be attested, because without due attestation, they are not to be acted upon, wills under the Indian Succession Act, mortgage deed, gift deed, required attestation at least by two persons. In connection to this, **section 68 of the Indian Evidence Act** enjoins that compulsory attestable documents, shall not be his evidence under which one attesting witness at least is to be examined, to prove their execution if its

execution is denied. But, in case of will, examination of at least one **attestor** is mandatory in all cases. Suppose, if an attestable document is not duly attested, Courts would have no option but to eschew them from consideration. In case of a will, propounder of the will has to establish that the attestor executed it, while, he was in a sound and disposing state of mind out of his own free will and consent.

As far as interpretation or construction of document, the salutary principle is that the document should be read as a whole and construed in a reasonable manner. Which the Court feels, is consistent with the intention of the executants and that which care need to be taken to construe the recital, under which, legacies are created by the testator. Thus, the Hon'ble Supreme Court expressed that "**you should put yourself in the Arm Chair of the testator**" that means a Judge has to make every effort, to find out what the real intention of the testator could be.

By the production of the original documents itself called on primary evidence or by production of copies it is called 'secondary evidence' as per section 65 of the Indian Evidence Act. **As Lord Esher observed:** in simple language in the case of **Lucas Vs Williams (1892 -QB page 116); "primary evidence is evidence which the law required to be given first. Secondary evidence is evidence which may be given in the absence of that better evidence, when a proper explanation of its absence has been given"**.

Section 91 of the Indian Evidence Act, exclude adduction of oral evidence when there is documentary evidence. While **section 92 of the Indian Evidence Act elaborates** this principle providing emphasis to it. '3rd party given evidence' on document may be considered under **section 99 of the Indian Evidence Act**.

Another 'Golden Rule', regarding admissibility of evidence is that no amount of evidence can be looked into on a plea not raised in the pleadings; such evidence should not be allowed and if recorded, such evidence should not be considered on the principle of "**Secundem Allegate at probate**" i.e., a party should not be allowed to succeed where he has not set up the case which he wants to substantiate.

Another river-let in the appreciation of evidence is presumption on one hand and burden of proof on other hand.

Chapter VII in Part III of the Indian Evidence Act deals with burden of proof that lies on the person who asserts a fact and desires the Court to give Judgment with regard to his legal right or liability ; this is laid in **section 101 of the Indian Evidence Act**. Therefore, the fact asserted by a person must be proved by contesting evidence which is admissible, in accordance with law. For example; in a suit on Foreign Judgment 'onus' is on the defendant to prove that it is not subject to foreign jurisdiction.

The presumption of Hindu law in a joint un-divided family is that the whole property of the family is joint estate, as such, the onus lies upon a party claiming any part of such properties as is separate estate.

Likewise, the burden of proving the execution of the Will would be on the **propounder** who is to prove it affirmatively that the testator approving the content and then only shifts upon those oppose the Will to prove fraud or undue influence to displace the case of proving the will. The **propounder** also has to establish that the testator at the time of execution of the will or in a sound state of mind and body as laid down by the Privy Council in a Judgment rendered in *Baikunta Vs Prasanna Moyi* reported in 27 PC 797.

In accordance with section 106 of the Indian Evidence, the fact within the knowledge of a person must be proved as the burden of proof is cast upon him. Suppose money is missing from the safe, whether the person is having the key locked or not is within his knowledge.

The burden of proving a person is dead where he was found to be alive within the past 30 years is on the person who asserts the said fact. If it is proved that the person has not been heard of, for 7 years by those who would have naturally heard to him, if he had been alive, the burden of proving that fact is on the person, affirms it. These aspects shall be dealt Under Section 107 and 108 of the Indian Evidence Act. Section 110 casts the burden of proving on the other person, who affirms that the person in possession is not the owner. Section 111 casts the burden of proving good faith of a transaction between the parties on the party who is in position of active

confidence. Section 112 raises a presumption on the legitimacy of a person born during the continuance of valid marriage between his mother and any man, or within 280 days after its dissolution and the mother remaining unmarried.

Section 114 of Indian Evidence Act gives a wide discretion to the Court to presume the existence of fact and the illustration therein gives guidance as to drawing presumption. An adverse inference against a party is to be drawn during the course of trial, if he deliberately abstains from the adducing better evidence..The Court may presume that if a man refused to answer a question which he is not compelled to answer by law. The answer if he give would be unfavourable to him.

Section 56 to 58 in Chapter III of the Indian Evidence Act, lays down that facts judicially noticeable need not be proved. While, Section 79 and 90 to deal with presumption to be drawn with regard to documents.

In the process of decision making, the appreciation of evidence assumed utmost importance. Appreciation of documentary as well as oral evidence adduced by either party. The Evidence Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor, is any such rule possible for proper appreciation of evidence. It is the matter of experience, common sense and novelty to the human affairs. The law has left it to Courts; to decide whether, the evidence should be believed or not. .

The mere significant area is that certain principles are to be followed while appreciating the evidence:

- i) The credibility of evidence does not depend on the number of witnesses.
- ii) Generally, the testimony of a single witness, no matter of the issue or who the person, may legally suffice as evidence upon which the court may come to a conclusion.
- iii) The mere assertion of any witness does not by itself need be believed, even though he is un-impeached in any manner, because to require such belief would be

given a quantitative and impersonal measure to testimony.

- iv) In determining on the credit due to the witness, the Judge should have regard to the integrity, ability, the number of witnesses and the consistency with each other, the conformity of their testimony with experience and the conformity to their evidence with collateral circumstance”.

While weighing evidence, Judge has to first find out on whom the burden of proof lies, what presumption apply, which documents are conclusive and which documents merely prima facie evidence of the facts recorded and that direct and positive evidence is preferable, to the speculative opinions of experts.

The Judge must know the Art¹ of drawing inference from the fact Upon the premise of probabilities of certain points.

In weighing evidence it must be remembered that there are discrepancies of truth as well as discrepancies of falsehood, and that too minute attention to immaterial discrepancies may lead to failure of justice.

Discrepancies in the statement of witnesses on material point should not be lightly passed over, as to effect previously the value of the testimony.

Section 155 of the Indian Evidence Act, Empowers the Judge to put questions in any form, at any time and further empower to interrogate the witnesses because the position of judge is not that of moderator between contestant in a game.

One of the Renowned Jurist Burke said:

“It is the duty of a judge to receive every offer to evidence, apparently material, suggested to him though the parties themselves through negligence, ignorance or corrupt collusion, should not bring it forward. A Judge is not placed in that high situation merely as a passive instrument of parties. He has a duty to his own, independent of them, and that duty is to investigate truth”

From the statement of Burke, one must understand that a judge is placed on the highest pedestal, as such, he should equip himself with knowledge of law to such a degree that his knowledge will not be doubted by any one, especially the counsel and the parties.

In this context, Lord Denning observes:

"The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetition, to make sure by wise intervention that he follows, the points that the advocates are making and assess their oral, and at the end to make up his mind where the truth lies. If he goes beyond this he drops the mental of a judge and assumes the robe of an advocate, and the change does not become his well"

Further one of the famous Jurist Burch said:

"The purpose of a trial is to ascertain the truth about the matters charged in the indictment or in information, and it is a part of the business of the Judge to see that this end is attained; he is not dumb and mask faced moderator, over a contest between sensitive and apprehensive, or perhaps witty and ingenuous counsel. He is a vital and integral factor in the discovery and elucidation of facts. He must have a full and accurate in comprehension of each and all of the facts.

In appreciating evidence by applying the provisions of evidence Act, the Courts either believed that certain facts exist, or it consider it existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the proposition that be exist, so, the judges have to test the evidence on the basis of probabilities.

To conclude, though the endeavor so far may not able to comprehend the nook and corners of the facets of appreciation of evidence, the journey so far made, at least would give some peanuts and refresh memory about principles to be followed while wielding upon to mince the facts to arrive at a right conclusion, as such, the

skill of appreciation differs from individual to individual and mainly depends on common sense, experience *and* knowledge of man and matters.

Thereby, the essence of a judicial investigation lies in the enforcement of a right or liability which depends on certain facts and the proficiency of a witness. Whether the fact is proved or not is determined by the law of the land where the remedy is sought to be enforce and it is obligatory on the Courts to enforce it on the basis of assessment of evidence. Thus the law of evidence plays a crucial role in the administration of justice.

With these few thoughts, take leave, endorsing sincere gratitude to the Honourable High Court of Andhra Pradesh and to the Honourable District Judge, Srikakulam, for having facilitated the marvelous opportunity of presenting this topic.

To err is human, therefore, I regret if any errors crept in my thought framing, presentation, or in its coherence. More so, I left the remaining to your appreciation.

OXFORD DICTIONARY & THESAURIS – III

- 1) ART MEANS : Certain Branches of Learning of (Page 37)
- 2) SCIENCE MEANS : Systematized observation (Page 679)
- 3) NORMATIVE MEANS : Creating or stating Particular rules of behaviours

WORKSHOP-III

APPRECIATION OF EVIDENCE IN CIVIL CASES

TOPIC:- Appreciation of evidence in civil suits.

Paper presented by

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THE CONCEPT OF 'PREPONDERANCE OF PROBABILITIES':

How a fact is to be proved in Civil case?

The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane, 1975 AIR 1534. This is for the reason that under the Evidence Act, section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

The belief regarding the existence of a fact that thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if no weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact.

As a prudent man, so the court applies this test for finding whether a fact in issue can

be said to be proved. The first step in this process is to fix the probabilities , the second to weigh them though the two may often intermingle. The impossible is weeded out at the first stage , the improbable at the second.

Withing in the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.

Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on promissory note " the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue.

1. The degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear."--- Lord Denning.

2. But whether the issue is one of cruelty or of a loan on promote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved.

3. IN civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

ADMISSSIONS IN CIVIL CASES:

Order 8 Rule 5 CPC:

Order XII Rule 6 CPC:

Order XV Rule 1 CPC : (Judgment on admissions)

In case **R.K. Markan vs. Rajiv Kumar Markan, 2003 AIHC 632 (633) Delhi**, wherein it was observed as under :-“For passing a decree on the basis of admission of the defendants in the pleadings, law is well settled that the admission has to be unequivocal and unqualified and the admission in the written statement should also be taken as a whole and not in part....”

It was also observed in case **Razia Begum v. Sahebzadi Anwar Begum, 1958 SC 886** that order 12 Rule 6 should be read along with proviso to Rule 5 of Order 8 CPC. In this case it was observed that the court is not bound to grant declaration prayed for on the mere admission of the claim by the defendant, if the court has reason to insist upon a clear proof apart from admissions. See also : **Uttam Singh Dugal and Co. Ltd. vs. United Bank of India 2000 (4) R.C.R. (Civil) 89; M/s Puran Chand Packaging Industrial Pvt. Ltd. vs. Smt. Sona Devi and another, 2009 (2) C.C.C. 39.**

APPRECIATION OF DOCUMENTARY EVIDENCE IN CIVIL CASE:-

THE HONBLE SRI JUSTICE RAMESH RANGANATHAN AND HONBLE SRI JUSTICE M.SATYANARAYANA MURTHY, in **P.Madhusudhan Rao vs Lt.Col.Ravi Manan**, CIVIL REVISION PETITION NO.4515 OF 2014, Date of judgment on 12-03-2015, clearly illustrated the rules for interpretation of a document with an aid of rulings of the Hon'ble Supreme Court of India.

The Supreme Court in **Delhi Development of Authority Vs. Durga Chand, 1973 AIR 2609** has also noticed Odgers Rules and quoted them with approval and as the observation of the Supreme Court have the force of law of the land, it may be taken Odgers Rules (known as golden rules of interpretation) have been judicially recognized and may be adopted as Rules for interpretation of the documents in India. These Rules are listed hereunder:

1. The meaning of the document or of a particular part of it is therefore to be sought for in the document itself.
2. The intention may prevail over the words used
3. words are to be taken in their literal meaning
4. literal meaning depends on the circumstances of the parties
5. When is extrinsic evidence admissible to translate the language?
6. Technical legal terms will have their legal meaning.
7. Therefore the deed is to be construed as a whole. Apart from the said seven rules listed by Odger, it would be convenient to list the following rules for the sake of convenience are called additional rules and given number in continuation:
8. Same words to be given the same meaning in the same contract.
9. Harmonious construction must be placed on the contract as far as possible. However, in case of conflict between earlier or later clauses in a contract, later clauses are to be preferred to the earlier;

while in a will, earlier clause is to be preferred to the later.

10. Contra Proferendum Rule-If two interpretations are possible, the one favourable to the party who has drafted the contract and the other against him, the interpretation against that party has to be preferred.

11. If two interpretation of a contract are possible the one which helps to make the contract operative to be preferred to the other which tends to make it inoperative

12. In case of conflict between printed clauses and typed clauses, type clauses are to be preferred. Similarly, in conflict between printed and hand written clauses, hand written clauses are to be preferred and in the event of conflict between typed and hand written clauses, the hand written calluses are to be preferred

13. the special will exclude the general

14. Rule of expression unius est exclusion alterius

15. Rule of noscitur a sociis

16. Ejusdem generic rule will apply both the contract and statute

17. place of Punctuation in interpretation of documents

From the Rules stated above, when the language used in a document is unambiguous conveying clear meaning, the Court has to interpret the document or any condition therein taking into consideration of the literal meaning of the words in the document. When there is ambiguity, the intention of the parties has to be looked into. Ordinarily the parties use apt words to express their intention but often they do not. The cardinal rule again is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, intention will prevail. The most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if, the intention is so collected will not secure with the words used. The answer is the intention prevails. Therefore, if the language used in the document is unambiguous, the words used in the document itself will prevail but not the intention. (As to appreciation of documentary evidence in civil case, also See: Avadh Kishore vs. Ram Gopal, AIR 1979 SC 861; Collector, Raigarh vs. Harisingh Thakur, AIR 1979 SC 472.)

Order 13 Rule 4 sub rule 1 CPC:-

Admission of documents under Order 13 Rule 4 of Civil Procedure Code does not

bind the parties and unproved documents cannot be regarded as proved nor do they become evidence in the case without formal proof.

Case law:- Ferozchin Vs. Nawab Khan, AIR 1928 LAHORE 432.

Hari Singh Vs. Firm Karam Chand, AIR 1927 Lahore 115

Sudir Engineering Company Vs. Nitco Roadways Ltd, 1995 (34) DRJ 86

1. Mere admission of document in evidence does not amount to its proof.
2. Admission in evidence of a party's document may in specified cases exclude the right of opposite party to challenge its admissibility. The most prominent examples are when secondary evidence of a document within the meaning of Sections 63-65 of the Evidence Act is adduced without laying foundation for its admissibility or where a document not properly stamped is admitted in evidence attracting applicability of section 36 of Stamp Act.
3. But, the right of a party disputing the document to argue that the document was not proved will not be taken away merely because it had not objected to the admissibility of the document. The most constructive example is of a Will. It is a document required by law to be attested and its execution has to be proved in the manner contemplated by Section 68 of the Evidence Act read with Section 63 of the Succession Act.
4. '*Admission of a document in evidence is not be confused with proof of a document*'.
5. **Sait Taraj Khimechand Vs. Yelamarti Satvam:-** The mere marking of an exhibit does not dispense with the proof of document.

Two stages relating to documents:-

1. One is the stage when all the documents on which the parties rely are filed by them in Court.
2. The next is when the documents formally tendered in evidence.

See:- *Baldeo Sahal Vs. Ram Chander & Ors, AIR 1931 Lahore 546.*

APPRECIATION OF EVIDENCE

IN A SUIT BASED ON PROMISSORY NOTE:

Scope of The Presumption: Burden Of Proof In Promissory Note Cases:

The Hon'ble Supreme Court in *Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 SC 1316]*, speaking through his lordship K. Subba Rao, J. considering the scope of the presumption had laid down the law thus:

"Section 118 lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia, that the negotiable or endorsed for Consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The phrase "burden of proof" has two meanings- One, the burden of proof as a matter of law and pleading and the other the burden of establishing a case; the former is fixed as a question of law on the basis of the pleading and so unchanged during the entire trial whereas the latter is not constant but shifted as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be directed evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was reflected for a particular consideration should produce the said account books. If such a relevant evidence is withheld by the plaintiff, S.114, Evidence Act enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instrument Act."

See important ruling on Promissory notes: **G. Vasu vs Syed Yaseen Sifuddin Quadri: Citation: AIR 1987 AP 139**

**APPRECIATION OF EVIDENCE
IN A SUIT FOR DECLARATION
AND CANCELLATION OF DOCUMENT:-**

In Civil Appeal Nos. 2811-2813 OF 2010, [Arising out of SLP [C] Nos.6745-47/2009], **Suhrid Singh @ Sardool Singh Vs. Randhir Singh & Ors**, the Hon'ble Supreme Court of India held as follows:-

"where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17 (iii) of Second Schedule of the Act. But if 'B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7 (iv) (c) of the Act. Section 7 (iv) (c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7."

COUNTER CLAIMS IN SUIT:

In the case of Ramesh Chand Ardawatiya Vs. Anil Panjwani which may be of some relevance. Upon considering the ratio of earlier cases in the case of Sangaram Singh Vs. Election Tribunal, Kotah AIR 1955 SC 425, Arjun Singh Vs. Mohindra Kumar AIR 1964 SC 993 and Laxmidas Dayabhai Kabrawala Vs. Nanabhai Chunilal Kabrawala AIR 1964 SC 11, it was held that a right to make a counter claim is statutory and a counter claim is not admissible in a case which is admittedly not within the statutory provisions. It is further observed that :

"Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter-claim against the claim of the appellant preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9.

See:- Nanduri Yogananda Lakshminarasimhachari Vs. Sri Agastheswaraswamivaru AIR 1960 SC 622; **and** Civil Appeal No..6344 OF 2009 in Gayathri Womens Welfare Association vs. Gowramma & Anr;

Relinquishment of Claim under Order II Rule 2 & 'Res Judicata' :

The Supreme Court in **Alka Gupta vs. Narender Kumar** dealt with the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 while also dealing with the concept of 'Res Judicata'. The Court further held that a suit cannot be dismissed by the Courts simply because they are dissatisfied with the conduct of the Plaintiff.

A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.

A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

See rulings: Gurbux Singh v. Bhoora Lal [AIR 1964 SC 1810]; Greenhalgh v. Mallard [1947 (2) All ER 257]; Direct Recruit Class II Engineering Officers'

Association v. State of Maharashtra [1990 (2) SCC 715]; Forward Construction Co. v. Prabhat Mandal [1986 (1) SCC 100];

RE-OPENING EVIDENCE AND INHERENT POWERS OF THE COURT :

The Supreme Court in *K.K. Velusamy v. N. Pallanisami* has examined the power of the Courts with regard to re-opening the evidence and recalling witnesses. The Court while examining the relevant provisions of the Code of Civil Procedure, 1908 has culled out the principles for invoking the inherent powers of the Court.

The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide **Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate - 2009 (4) SCC 410**]. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in- chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

The Hon'ble Apex Court however agrees that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions (See :Padam Sen vs. State of UP-AIR 1961 SC 218; Manoharlal Chopra vs. Seth Hiralal - AIR 1962 SC 527; Arjun Singh vs. Mohindra Kumar - AIR 1964 SC 993; Ram Chand and Sons Sugar Mills (P) Ltd. vs. Kanhay Lal - AIR 1966 SC 1899; Nain Singh vs. Koonwarjee - 1970 (1) SCC 732; The Newabganj Sugar Mills Co.Ltd. vs. Union of India- AIR 1976 SC 1152; Jaipur Mineral Development Syndicate vs. Commissioner of Income

Tax, New Delhi - AIR 1977 SC 1348; National Institute of Mental Health & Neuro Sciences vs. C Parameshwara - 2005 (2) SCC 256; and Vinod Seth vs. Devinder Bajaj - 2010 (8) SCC 1). We may summarize them as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

A CIVIL SUIT BASED ON WILL - APPRECIATION OF EVIDENCE – HOW TO PROVE A WILL?

In **Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others**, the Honourable Apex Court held that as follows; "There is also a large body of case law about what are suspicious circumstances surrounding the execution of a Will which require the propounder to explain them to the satisfaction of the Court before the Will can be accepted as genuine. A Will has to be proved like any other document except for the fact that it has to be proved after the death of the testator. Hence, the person executing the document is not there to give testimony. The propounder, in the absence of any suspicious circumstances surrounding the execution of the Will, is required to prove the testamentary capacity and the signature of the testator. Some of the suspicious circumstances of which the Court has taken note are (1) The propounder taking a prominent part in the execution of a Will which confers substantial benefits on him; (2) Shaky signature; (3) A feeble mind which is likely to be influenced; (4) Unfair and unjust disposal of property. Suffice it to say that no such circumstances are present here."

In **Apoline D' Souza v. John D' Souza [(2007) 7 SCC 225]**, the Hon'ble Supreme Court held that the question as to whether due attestation has been established or not will depend on the fact situation obtaining in each case. Therein, it was held :

" Section 68 of the Evidence Act, 1872 provides for the mode and manner in which execution of the will is to be proved. Proof of attestation of the will is a mandatory requirement."

"In **P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar** it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind."

APPRECIATION OF EVIDENCE IN A SUIT BASED ON GIFT DEED:-

What factors are to be appreciated in a suit based on Gift deed under Hindu Law?

i) Relinquishment of one's proprietary right in the property. Yet it should be without any consideration.

ii) Merely registering the gift deed does not afford to pass the title of the property.

iii) Creation of right of any person must be completed by acceptance.

iv) A gift is totally different from a surrender by a Hindu widow where she does not in fact or in law purport to transfer any interest in the property surrenders.

v) In addition to that in the case of *Karunamoyee vs Maya Moyi*, it was observed that the widow simply withdraws herself from the estate and the reversioner steps into the inheritance as a matter of law.”

vi) Yet, in the case of *Narbada Bai vs Mahadeo*, it was held that in case of transfer of the whole estate, the reversioner takes the same subject to the liability for her maintenance. It is thus vividly known that the reversioner is responsible for her debts, if she relinquishes the same.

vii) Where delivery of possession is enough to complete the transaction of a gift, is abrogated under section 123 of the Transfer of Property Act. However, the restrictions on power to enter into the transaction of gift under personal law exist without any change.

See:- 1. *Giano vs Puran And Ors.*, AIR 2006 P H 160; 2. *Ramjeet Mahto And Ors. vs Baban Mahto And Ors.* ,2003 (4) JCR 268 Jhr; 3. *Smt. Takri Devi vs Smt. Rama Dogra And Ors.*, AIR 1984 HP 11.

APPRECIATION OF EVIDENCE

IN SUITS BASED ON GPA / SALE AGREEMENT/ WILL:

Validity of Sale by Execution of General Power of Attorney / Agreement to Sell / Will :

The Supreme Court in an order passed in *Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana & Anr.* has discussed the ill effects of transfer of property by means of a General Power of Attorney / Will / Agreement to Sell, and the practical problems the same is causing.

By an earlier order dated 15.5.2009 [reported in Suraj Lamp & Industries Pvt.Ltd. vs. State of Haryana & Anr. - 2009 (7) SCC 363], the Hon'ble Apex Court had referred to the ill - effects of what is known as General Power of Attorney Sales (for short 'GPA Sales') or Sale Agreement/General Power of Attorney/Will transfers (for short 'SA/GPA/WILL' transfers). Both the descriptions are misnomers as there cannot be a sale by execution of a power of attorney nor can there be a transfer by execution of an agreement of sale and a power of attorney and will. As noticed in the earlier order, these kinds of transactions were evolved to avoid prohibitions/conditions regarding certain transfers, to avoid payment of stamp duty and registration charges on deeds of conveyance, to avoid payment of capital gains on transfers, to invest unaccounted money ('black money') and to avoid payment of 'unearned increases' due to Development Authorities on transfer.

Scope of an Agreement of sale:-

Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam and Anr. (1977) 3 SCC 247, observed:

A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See Rambaran Prosad v. Ram Mohit Hazra [1967]1 SCR 293.

Scope of Power of Attorney:-

A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan vs. Basant Nehata- 2005 (12) SCC 77, this Court held :

"A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see sections 69 and 70 of Indian Succession Act, 1925).

Registration of a will does not make it any more effective.

APPRECIATION OF EVIDENCE IN A SUIT FOR PARTITION:

Presumption of Joint Hindu Family :

The Supreme Court in **Appasaheb Peerappa Chandgade vs Devendra Peerappa Chandgade** has ruled on the presumption regarding joint family property under the Hindu law. The Supreme Court after considering various precedents on the subject, held that there is no presumption of joint family property, and whoever alleges the existence of the same must prove it through evidence. The Supreme Court

further added that if it is shown that the properties were acquired out of the family nucleus, the initial burden is discharged by the person who claims joint Hindu family, and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property by cogent and necessary evidence.

In the case of **Srinivas Krishnarao Kango v. Narayan Devli Kango and Ors.**, their Lordships held that proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. Therefore, so far as the proposition of law is concerned, the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden, it shifts to the party who claims that the property has been purchased by him through his own source and not from the joint family nucleus. Same proposition has been followed in the case of **Mst. Rukhmabai v. Lala Laxminarayan and Ors.**

Similarly, in the case of **Achuthan Nair v. Chinnammu Amma and Ors.**, their Lordships held as follows:

Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law.

Also see:- **Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe and Ors.**; **Surendra Kumar v. Phoolchand (dead) through LRs and Anr.**

Family Arrangement : Essentials :

In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

- (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
- (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
- (3) The family arrangement may be even oral in which case no registration is necessary;
- (4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of s. 17(2) of the Registration Act and is, therefore, not compulsorily registrable;
- (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property 'It which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;
- (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, which we shall discuss presently. In *Lala Khunni Lal & Ors. v. Kunwar Gobind Krishna Narain and Anr.*(1) the statement of law regarding the essentials of a valid settlement was fully approved of by their Lordships of the Privy Council.

DEVOLUTION OF PROPERTY UNDER S. 8 OF THE HINDU SUCCESSION ACT : WHETHER JOINT OR SELF ACQUIRED PROPERTY?

The Supreme Court in a subsequent judgment entitled **Yudhishter vs. Ashok Kumar reported as AIR 1987 SC 558**. In the aforesaid judgment, it was held as below:

"10. This question has been considered by this Court in Commr. Of Wealth Tax. Kanpur v. Chander Sen (1986) 3 SCC 567; (AIR 1986 SC 1753), where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore, whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Karta of his own undivided family but takes it in his individual capacity. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. In that view of the matter, it would be difficult to hold that property which devolved on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-à-vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellant authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house." (emphasis added)

See:- in Pratap v. Shiv Shanker has recapitulated the law relating to the devolution of property under S. 8 of the Hindu Succession Act. While following the dicta laid down by the Hon'ble Supreme Court of India, the Court held that property devolving under S. 8 of the Hindu Succession Act would be self acquired property of an individual vis-a-vis his sons.

RIGHT TO PROPERTY OF AN ILLEGITIMATE CHILD :

The Supreme Court in *Revanasiddappa & Anr. vs Mallikarjun & Ors.* has

examined the question whether an illegitimate child is entitled to a share in coparcenary property or his share is only limited to the self-acquired property of his parents under Section 16(3) of the Hindu Marriage Act? While examining the various judicial pronouncements on the subject the Court took a different view from earlier decisions and has accordingly referred the matter for reconsidered by a larger Bench of the Court.

DEVOLUTION OF COPARCENARY PROPERTY TO HINDU FEMALES :

The Supreme Court in *Ganduri Koteswaramma Vs. Chakiri Yanadi* has discussed the law relating to intestate succession by Hindu females and the effect of the amendment to the Hindu Succession Act. While dealing with the effect of the amendment in the Hindu Succession Act, in a suit for partition of ancestral property, the Supreme Court has observed as under;

" 1956 Act is an Act to codify the law relating to intestate succession among Hindus. This Act has brought about important changes in the law of succession but without affecting the special rights of the members of a Mitakshara Coparcenary. The Parliament felt that non-inclusion of daughters in the Mitakshara Coparcenary property was causing discrimination to them and, accordingly, decided to bring in necessary changes in the law..." (See:- The statement of objects and reasons of the 2005 Amendment Act)."

SUIT FOR PERMENANT INJUNCTION:

As is clear from Section 37 (2) of Specific Relief Act, 1963 (hereinafter referred to as the Act), a perpetual injunction can only be granted by the decree made at the hearing and upon the merit of the suit. The defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an - act which would be contrary to the right of the plaintiff. Section 38 of the Act further provides the circumstances where the perpetual injunction may be granted in favour of the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication. In contractual matters when such obligation arises, the Court has to seek

guidance by the rules and provisions contained in Chapter II of the Act dealing with specific performance of contracts. Sub- Section (3) of Section 38 in clauses (a), (b), (c) and (d) further illustrates the circumstances where a perpetual injunction may be granted by the Court. The mandatory injunctions are contemplated under Section 39 of the Act where it is necessary to prevent the breach of an obligation and the erring party may be compelled to perform certain acts. Section 40 provides for granting damages in lieu of or in addition to injunction. Section 41 provides circumstances where the injunction should be refused. Section 42 provides for grant of injunction to perform a negative agreement. It was made clear at the beginning that the Law of Injunction is vast and expansive jurisdiction and It forcefully illustrates the power of equity in spite of the fetters of codification to march with the times and adjust the beneficial remedies to altered social conditions and the progressive needs of the humanity.

LATEST CASE-LAW:-

SERVICE OF NOTICE: PRESUMPTION

M.K. Tirupathi Rao versus Deputy General Manager, Syndicate Bank, Industrial Relations Section, Zonal Office, Hyderabad. 2016 (3) ALT 363 (DB)

Under section 14 of Indian Post Office Act,1898 and under section 16 of Evidence Act,1872, when a registered letter is sent to a person and when it is returned by Postman with the endorsement 'absent', the endorsement made on the registered cover is a prima facie evidence of taking the said letter to the address of the person noted on the registered cover and that the noting thereon is prima facie proof of absence of addressee. (See :- para 32 and 41). Presumption as to service of registered letter- in view of provisions of section 114 Illustration (f) of Evidence Act,1872 and Section27 of Gneral Cluases Act, 1897, there is a presumption that the addressee has received the letter sent by registered post.

2016 (3) ALT 399

M.A. Fatheem Uddin vs. Shaik Nayeem and another

HELD:- If the defect in election petition is curable, an opportunity shall be given to cure the defect.

DECLARATION SUITS:

2016 (3) ALT 92

G.Lalitha Bai and others vs. G.R.Jaya Rao and other

Under Section 35 of the Specific Relief Act,1963, a declaratory decree is not only binding on the pareties to the suit but also the persons claiming through them as representatives in interest even though they were not parties to the suit.

ADMISSIONS:-

Under section 21 of Evidence Act,1872, admissions may be proved as against the person who makes them or his representatives in interest.

Admissions, though not conclusive proof, they estop the person who made such admissions or the representatives in interest to contend otherwise, in view of section 31 of Evidence Act,1872.

ESTOPPEL:

The principle of estoppel is rule of evidence whereas doctrine of res judicata is rule of procedure.

PRESEUMPTION AS TO OWNERSHIP:

Presumption as to ownership of property is in favour of the person who purchased it till it is rebutted by adducing any satisfactory evidence.

TESTS FOR DETERMINING BENAMI NATURE:

The source from where the purchase money came and the motive why the property was purchased benami are the most important tests for determining whether the sale standing in the name of one person is in reality for the benefit of another. Intention of the parties is the essence of benami transaction.

PRE- TRIAL DECREE:-

2016 (3) ALT 132

Sarala Jain and others vs. Sangu Ganadhar and others

Held:- When the plaintiff sought for appointment of Advocate Commissioner to survey schedule property with the help of Surveyor and fix boundary stones to his land, appointment of Advocate Commissioner by trial court for demarcating schedule property and to fix boundary stones to the land of respondents amounts to granting pre-trial decree.

No Judicial Order on memo:-

2016 (2) ALT 557

Syed Yousuf Ali vs. Mohd. Yousuf and others

No judicial order on memo:

HELD:- No judicial order can be passed by Court on a memo filed by a party.

Stamp duty on possessory contract of sale:-

Held:- When the document on the face of it is a possessory contract of sale and when plaintiff in th suit claims delivery of possession thereunder, stamp duty on such a document executed nly on stamp paper worth of Rs.100/- is laible to be paid as if it is a sale under Explanation to Article 47-A of Schedule 1-A of Stamp Act.

RESERVATION IN PROMOTIONS OF MEMBERS OF SCHEDULE CASTES AND SCHEDULE TRIBES

Union of India rep., by the Secretary (Establishment),

Ministry of Railways,Railway Board, New Delhi. And others.

vs. B. Lakxmi Narayana,

2016 (2) ALT 367 (DB)

Referred Citations:

- 1) (2006 (8) SCC 212
- 2) (2011) 1 SCC 467
- 3) (2012 (7) SCC 1
- 4) (2011) 12 SCC 695: (2011) 12 SCC 695
- 5) (1987)2 SCC 555
- 6) (2008) 17 SCC 491
- 7) (2012) 5 SCC 370
- 8) 167 L Ed 2d 929 : 127 S Ct 1955
- 9) (2013) 5 SCC 427)
- 10) AIR 1953 SC 235
- 11) (2010) 4 SCC 518
- 12) (2011) 11 SCC 786
- 13) (2010) 2 SCC 733
- 14) (2010) 9 SCC 157
- 15) 1993 Suppl (1) SCC 594
- 16) (1999) 7 SCC 303
- 17) (2001) 8 SCC 133
- 18) (2006) 6 SCC 666

- 19) (2009) 14 SCC 406
- 20) (2007) 5 SCC 447
- 21) (2012) 3 SCC 442
- 22) (2008) 9 SCC 242
- 23) (1975) 4 SCC 285
- 24) (1976) 2 SCC 895
- 25) (2000) 2 SCC 48
- 26) (2001) 6 SCC 637
- 27) (2007) 9 SCC 274
- 28) (2008) 1 SCC 210
- 29) (2009) 1 SCC 168
- 30) (2010) 12 SCC 471
- 31) (1974) 1 SCC 317
- 32) (1969) 1 SCC 110
- 33) 1995 Supl. (3) SCC 231
- 34) (1996) 6 SCC 267
- 35) (1995) 5 SCC 680
- 36) (2013) 12 SCC 489
- 37) (2014) 1 SCC 144
- 38) (2011) 6 SCC 570
- 39) (1984) 4 SCC 251
- 40) (2009) 1 SCC 768
- 41) (1974) 4 SCC 335
- 42) (1983) 3 SCC 601
- 43) AIR 1993 SC 477
- 44) (1995) 2 SCC 745
- 45) (1999) 7 SCC 209
- 46) (2012) 7 SCC 41
- 47) (2008) 6 SCC 1
- 48) (Judgment in Civil Appeal No.209 of 2015 dated 09.01.2015)
- 49) (2015) 1 SCC 347
- 50) 1991 Supp (2) SCC 497

HELD:

As the Tribunal has merely followed the law laid down by the Supreme Court in *M. Nagaraj*, in allowing the O.As, the orders of the Tribunal, to the extent it declared the action of the Railways in providing reservation in promotion without fulfilling the parameters laid down in *M. Nagaraj* to be illegal, do not necessitate interference. **The fact however remains that, despite the amendment to the Constitution by insertion of Articles 16(4-A) and (4-B) nearly fourteen years ago, the members of the Scheduled Castes and the Scheduled Tribes still face uncertainty on**

whether or not they are entitled for reservation in promotion, and to be extended the benefit of consequential seniority. This predicament, they find themselves in, is for no fault of theirs but is on account of the failure of the Union of India to gather data, and form its opinion, on the parameters laid down by the Supreme Court in M. Nagaraj¹. The prevailing uncertainty can only be put an end to if the petitioner-Railway is directed to undertake the aforesaid exercise, and take a decision, within a specified time frame.

The Writ Petitions are, accordingly, disposed of directing the petitioner-Railways to undertake and complete the exercise of gathering data, and forming its opinion on the parameters laid down by the Supreme Court in M. Nagaraj¹, with utmost expedition and, in any event, not later than six months from the date of receipt of a copy of this Order. As this stalemate cannot be permitted to effect railway administration, and the services it renders to the public at large, it is open to the petitioner-Railways to make in-charge arrangements in the interregnum, making it clear to those, who are given charge of the posts, that this arrangement is temporary and would continue only till the exercise of formation of opinion, on the need to provide reservation in promotion, is completed. The miscellaneous petitions pending, if any, shall also stand disposed of. No costs.

2016 (2) ALT 14 (DB)

Tamilnadu Mercantile Bank Ltd., rep. By its Branch Manager

Versus

M/s Sunita Industries, rep., its Propretor, Laxminarayana Goel (died) per Lrs and others

Held:-

Admission in written statement:-

Admission made in written statement are judicial admissions. They are conclusive in nature in view of Section 58 of Evidence Act and therefore need noo further proof.

Secondary evidence:-

When, in the absence of any objection by otherside, photostat copies of documents are received and admitted in evidence assigning exhibit number by Court, it amounts to applying mind by Court and impliedly permitting thparty to adduce secondary evidence even though no specific order is passed permitting to adduce secondary evidence.

Termination of contract:-

Contract of insurance is contract of indemnity as defined under section 124 of Contract Act and when once contract is terminated, liability under the contract ceases to exist.

2016 (1) ALT 394

Angalakurthy Venkata Narayanamma vs. Molakapalli Lakshamma and others

Natural family property:

A person adopted by another family, ceases to be member of his natural family, and unless any property is already vested prior to his adoption either in partition or otherwise, he cannot claim a share in the natural family property.

Composite family:-

In order to constitute a composite family, there must be a custom or an agreement between two families.

Family custom:-

A family custom is a category of special custom, and it should have the attributes of antiquity, certainty and uniformity.

Adverse possession:-

Payment of land revenue would not constitute adverse possession. Entries in revenue records are only for fiscal purpose.

APPRECIATION OF DOCUMENTARY EVIDENCE IN CIVIL CASE:-

THE HONBLE SRI JUSTICE RAMESH RANGANATHAN AND HONBLE SRI JUSTICE M.SATYANARAYANA MURTHY, in **P.Madhusudhan Rao vs Lt.Col.Ravi Manan**, CIVIL REVISION PETITION NO.4515 OF 2014, Date of judgment on 12-03-2015, clearly illustrated the rules for interpretation of a document with an aid of rulings of the Hon'ble Supreme Court of India.

The Supreme Court in **Delhi Development of Authority Vs. Durga Chand, 1973 AIR 2609** has also noticed Odgers Rules and quoted them with approval and as the observation of the Supreme Court have the force of law of the land, it may be taken Odgers Rules (known as golden rules of interpretation) have been judicially recognized and may be adopted as Rules for interpretation of the documents in India. These Rules are listed hereunder:

1. The meaning of the document or of a particular part of it is therefore to be sought for in the document itself.
2. The intention may prevail over the words used
3. words are to be taken in their literal meaning
4. literal meaning depends on the circumstances of the parties
5. When is extrinsic evidence admissible to translate the language?
6. Technical legal terms will have their legal meaning.
7. Therefore the deed is to be construed as a whole. Apart from the said seven rules listed by Odger, it would be convenient to list the following rules for the sake of convenience are called additional rules and given number in continuation:
8. Same words to be given the same meaning in the same contract.
9. Harmonious construction must be placed on the contract as far as possible. However, in case of conflict between earlier or later clauses in a contract, later clauses are to be preferred to the earlier; while in a will, earlier clause is to be preferred to the later.
10. Contra Proferendum Rule-If two interpretations are possible, the one favourable to the party who has drafted the contract and the other against him, the interpretation against that party has to be preferred.
11. If two interpretation of a contract are possible the one which helps to make the contract operative to be preferred to the other which tends to make it inoperative
12. In case of conflict between printed clauses and typed clauses, type clauses are to be preferred. Similarly, in conflict between printed and hand written clauses, hand written clauses are to be preferred and in the event of conflict between typed and hand written clauses, the hand written calluses are to be preferred
13. the special will exclude the general
14. Rule of expression unius est exclusion alterius

15. Rule of noscitur a sociis
16. Ejusdem generic rule will apply both the contract and statute
17. place of Punctuation in interpretation of documents

From the Rules stated above, when the language used in a document is unambiguous conveying clear meaning, the Court has to interpret the document or any condition therein taking into consideration of the literal meaning of the words in the document. When there is ambiguity, the intention of the parties has to be looked into. Ordinarily the parties use apt words to express their intention but often they do not. The cardinal rule again is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, intention will prevail. The most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if, the intention is so collected will not secure with the words used. The answer is the intention prevails. Therefore, if the language used in the document is unambiguous, the words used in the document itself will prevail but not the intention.

Appreciation of evidence in Appeal Suits and Miscellaneous Appeals

Submitted by
Smt. M. Babitha,
Addl. District & Sessions Judge,
Sompeta

INTRODUCTION:-

The expression 'Appeal' has not been defined in the Code of Civil Procedure, 1908. It is an application or petition to appeal Superior Court for consideration of the decision of appeal trial Court. Generally, *the right to appeal must be given by Statute*. In Civil cases, the word 'Appeal' is a significant factor. In general sense, the word '**Appeal**' means, 'a legal proceeding by which a case is brought before a higher court for review of the decision of trial court. (Ref: Merriam-webster dictionary). Similarly, in general sense, the word '**Suit**' means, an action or process in a court for the recovery of right or claim. Adjudication of civil disputes and enforcement of the rights of the parties to the disputes in terms of adjudication are matters provided under the Code of Civil Procedure i.e., the procedure established by law, (**Nitin Gunwant Shah vs Indian Bank, (2012) 8 SCC 305**) it embodies the principles of natural justice. CPC is a comprehensive legislation containing, more or less, detailed procedure to be followed from the stage of initiation of judicial proceedings till the final disposal of the case and enforcement of the rights of the parties in terms of the decision. (**P.Puneeth, Civil Procedure, XLVIII Annual Survey of Indian Law (2012), 101**).

What does Appreciation of evidence mean?

First the undisputed or satisfactorily proved facts should be ascertained. Then the evidence regarding other facts which are in dispute should be examined to see

whether the same is consistent or fits in properly with the undisputed facts. (Ref: 2016 (5) LJSOFT 78). It is needless to stress that **appreciation of evidence** is a seminal function of a judicial officer while deciding the civil cases. We know that a civil suit begins with the institution of plaint and to rebut the plea of the plaintiff, defendant files a written statement.

General Provisions for Appeal:-

Section 96 of CPC gives the right of appeal to litigant to appeal from original decree. Section 100 CPC provides right to appeal from an appellate decree in certain cases. Section 109 of CPC gives him right to appeal to Supreme Court in certain cases. Section 104 of CPC gives him right of appeal from orders as distinguished from decrees.

Section 96 of CPC makes it clear that no appeal lies from appellate decree passed by the Court with consent of the parties. But, an appeal may lie from original decree when it is passed ex parte. No appeal lies against the decree passed by small cause court, if the value of the subject-matter does not exceed Rs. 10,000/- except on appeal question of law.

Right to Appeal:-

To state explicitly, Right to appeal is statutory and substantive right. It is not just procedural right. Statutory right of appeal means it must be conferred by the Statute unless provides there will not be any right of appeal to prefer an appeal. Where Statute confers a right to appeal, it may constitute appeal machinery where shall the appeal lie. It is needless to say that a civil suit shall be filed subject to condition of jurisdiction. Right to appeal cannot be taken retrospectively because of the general rule of specific interpretation. Substantive law operates prospectively unless an express statute provides so.

Preliminary Decree and Final Decree- Appeal:

In some cases, where both preliminary decree and final decree are required to

be passed, and if a party aggrieved by preliminary decree does not prefer an appeal, subsequently, he cannot be permitted to raise plea about correctness of such decree in any appeal against final decree.

Who can appeal?

1. Any party to the suit, who is adversely affected by the decree or the transferee of interest of such party has been adversely affected by the decree provided his name was entered into record of suit.
2. An auction purchaser from an order in execution of a decree to set aside the same on the grounds of fraud.
3. Any person who is bound by the decree and decree would operate res judicata against him.

Kaleidoscope India Pvt. Ltd. v. Phoolan Devi reported in AIR 1995 Delhi 316, in this case, the Trial Court judge prohibited the exhibition of film both in India and abroad. Session Judge permitted the exhibition of film in abroad. Subsequently, a party who moved in appeal did not have locus standi. It was reversed by division bench saying that its not proper on the part of judge as he entertained the suit on which party has no locus standi.

Power of Appellate Court:-

The powers of the first appellate court are co-extensive with those of the civil court of original jurisdiction. See: **Manik Chandra Nandy vs. Deddas nandy and other, AIR 1986 SC 446**. As was held in **Gopala Krishna vs. Meenakshi, AIR 1967 SC 155**, In determining the appellate forum, the value of subject matter of the suit is material and not the claim in appeal.

Section 107 of CPC deals with Powers of Appellate court : .

- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

The apex court in **Mudhusudan Das Vs Narayanibai and Ors, AIR 1983 SC 114** categorized the three requisites normally to be present before an appellate Court can reverse a finding of a fact recorded by a trial court. Viz.,

1. It applied its mind to reasons given by the trial court,
2. **It had** no advantage of seeing and hearing the witnesses, and
3. It records cogent and convincing reasons for disagreement with trial court.

As early as in year 1950 the Supreme Court exquisitely dealt the instant matter by observing that, “the question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has to bear in mind that it has no advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge.

The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge’s notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact.” (See:- **Sarju Pershad Vs Jwaleshwari Pratap, AIR 1951 SC 120= 1950 SCR 7839**).

The Supreme Court having considered a number of English and Indian decisions in laying down the subtle principle on the point regarding the powers of the first appellate court in appreciation of evidence and interference with finding of fact recorded by the trial court in **Radha Prasad Vs Gajadhar Singh, AIR 1960 SC 115** and held that, “the position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appellate Court to consider what its decision on the question of facts should be; but coming to its own decision it should bear in mind that it is looking at the printed record and had no opportunity of seeing the witnesses and that it should not lightly reject the Trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court.

But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified.”

As was held in **Madhusudan Das Vs Smt. Narayanibai and Ors, reported in AIR 1983 SC 11440, it was held that** “at this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that, it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact.”

An appeal is a continuation of suit:-

An appeal is a continuation of suit, **Dilip Vs Mohd. AzizulHaq, (2000) 3 SCC 6074**In this case after referring to various decisions on the point the Supreme Court held that once a decree passed by a court of original jurisdiction has been appealed against, the matter becomes subjudice and the appellate court is seisin of the whole case. A court of appeal shall have the same powers and shall perform as nearly as may be the same duties as conferred and imposed on the court of original jurisdiction. The hearing of appeal is thus rehearing of the suit or original proceeding.

Thereby for the appellate court too, the same canons of the appreciation of evidence applies as that of the trial Court. Ordinarily, however the appellate court

should not interfere with findings of facts recorded by the trial court particularly when the decision hinges upon credibility of witnesses. (See: **T.D.Gopalan Vs H.R.& C.E, Madras, AIR 1972 SC 1716 (1719)**).

Doctrine Of Merger:-

In *Ram Chandra Abhyankar v. Krishnaji Dalladarya* AIR 1970 SC 1, Supreme Court laid down three conditions for the application of Doctrine of Merger:

1. the superior jurisdiction should be appellate or revisional in nature
2. jurisdiction should have been exercised after the issuance of notice.
3. after a full hearing in presence of both the parties i.e. **on lu** the part where the superior court's order goes into detail of issue, to that extent only inferior court's order gets merged.

It will depend on the nature of jurisdiction exercised, the content and subject matter challenged capable of being laid down. The superior court should be capable of reversal or modifying or affirming the order put in issue before it. In writ jurisdiction, the jurisdiction is not appellate or revisional but it is a collateral challenged on the principle of natural justice.

Whole evidence must be appreciated:-

As was held in *State of T.N. Vs S. Kumaraswamy* AIR 1977 SC 2026, it is the duty of appellate Court to decide an appeal in accordance with law after considering the evidence as a whole. The judgment of the appellate court must clearly show that it has applied its judicial mind to the evidence as a whole. Further more, in **ONGC Ltd Vs Western Geco International Ltd, (2014) 9 SCC 263, Para 38** Apex court cautioned that non application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind, and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence, that, it can be described as fundamental policy of Indian law.

Appellate court cannot interfere with decree for technical errors. Section 99 of the Code enacts that a decree which is otherwise correct on merits and is within the jurisdiction of the court should not be upset merely for technical and material defects. The underlying object of section 99 is to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation. See **Kiran Singh Vs Chaman Paswan, AIR 1954 SC 340 (342)43**. In the above case the Supreme Court observed that when a case has been tried by a court on merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice.

Admissibility of a document in appeal:-

In State of Bihar and Ors. v. Sri Radha Krishna Singh & Ors., AIR 1983 SC 684, the Apex Court considered the issue in respect of admissibility of documents or contents thereof and held as under:

"Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil."

How to appreciate evidence and decide case in Appeal ?

Order XLI, Rule 31 CPC:

The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: [Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr.](#), AIR 1963 SC 146; [Girijanandini Devi & Ors. v. Bijendra Narain Choudhary](#), AIR 1967 SC 1124; This was observed by Supreme court in **H. Siddiqui (D) By Lr vs A. Ramalingam, Civil Appeal No. 6956 of 2004.**

The appellate Court to reverse or affirm the findings of the trial Court:-

In B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy, JT(2010) 10 SCC 551, while dealing with the issue, this Court held as "The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a

valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law.

Manik Mandal And Ors. vs Bharosi Singh, AIR 1959 Pat 225, 1958 (6) BLJR 848, it was observed that where an order of dismissal of a suit for default has been set aside under Order 9, Rule 9 of the Code of Civil Procedure, the propriety of that order cannot be challenged in appeal from the final decree passed in the suit under Section 105 of the Code of Civil Procedure.

In *Venkatanarasu v. Kotayya*, 51 Mad LJ 119: (AIR 1926 Mad 900), were considered in the case of AIR 1946 Mad 344, referred to above and their Lordships held that "The principle that is deducible from the above cases seems to us to be that where the effect of the order is to prevent an enquiry into merits such an order would come within the scope of Section 105, Civil Procedure Code, as affecting the case on merits but where the orders do not affect the decision of the case on merits such orders would not come within the scope of Section 105, Civil Procedure Code."

In **Santosh Hajari Vs Purushottam Tiwari, (2001) 3 SCC 179** the Hon'ble Supreme Court observed that the task of the appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice.

In a juxta position to the above, the Supreme Court sound a note of caution in **Girijanandini Devi Vs Bijendra Narayan Chaudhary, AIR 1967 SC 1124** that expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it.

The High Court of AP clearly held in **Kondamuri Anasuyamma v Dist. Judge, W.G. Dist at Eluru and Others, AIR 1991 AP 47** that where the original court, which has got the opportunity of observing the demeanour of witnesses, came to a finding, the appellate court cannot brush aside that finding merely because there are some discrepancies. If the evidence is considered on appreciation and when it is accepted by the original court, the appellate court cannot interfere with a particular finding when it is supported by documentary evidence.

On the contrary, where the appraisal of oral evidence by the trial court did not depend upon demeanour of the witnesses examined before it, the appellate court would have power to reappraise the evidence on record

and could upset the finding recorded by the trial court if it suffered from any mistake of law or fact. **Ref:-** 1987 All L J 752=(1987) 13 All L R 60

Perceptive functions of the trial judge:-

The Supreme Court in *Chinthamani Ammal vs Nandagopal Gounder And Anr*, AIR 2007 SC (Supp) 593=2007 (5) ALT 65 has recognised the well known limitation on the powers of the appellate court to re-appreciate the evidence, by holding that, thus the area in which the question lies in the present case is the area of the perceptive functions of the trial Judge where the possibility of errors of inference does not play a significant role. The question whether the statement of the witnesses in regard to what was amenable to perception by sensual experience as to what they saw and heard is acceptable or not is the area in which the well known limitation on the powers of the appellate court to re-appreciate the evidence falls. The appellate court, if it seeks to reverse those findings of fact, must give cogent reasons to demonstrate how the trial court fell into an obvious error.

In a recent decision rendered by the apex court in **Hardevinder Singh Vs Paramjit Singh, (2013) 9 SCC 26145** the Supreme Court reiterating the general rule observed that, there is no prohibition in law for the appellate court to reappreciate the evidence where compelling and substantial reasons exist. The findings can also be reversed in case convincing material has been unnecessarily and unjustifiably stood eliminated from consideration. However the evidence is to be viewed collectively. The statement of a witness must be read as a whole as reliance on a mere line in a statement of witness is not permissible. The judgment of the court can be tested on the touchstone of dispassionate judicial scrutiny based on a complete and comprehensive appreciation of all views of the case, as well as on the quality and credibility of the evidence brought on record.

Assessment of the evidence

The High Court of Madras in **Ramakrishna Gounder Vs Kannappa Mudaliar, (1986) 99 LW (JS) 5546** elaborately dealt on the powers of appellate court vis-a-vis appreciation of evidence by summing that, “there is a mandate in the code of civil procedure to the first appellate court to advert to the evidence placed in the case and it must come to its own independent conclusion on a consideration of such evidence. It must not forget that as a final court of fact, it is duty bound to give an independent and comprehensive consideration and assessment of the evidence and to come to its own conclusion one way or the other. There is no excuse to skip over this obligation; merely on the ground that first appellate court affirms the judgment of the first court. The duty cast upon the first appellate court is an undoubted one and it must review the recorded evidence and draw its own conclusions and inferences. It should independently enter into all questions including appreciation of the evidence in the case, and give reasons of its own for its ultimate decision. The object of these mandates are obvious.

Firstly, it will enable the party affected by the decision of the first appellate court to know and understand the reasons or grounds for such decision, so that, if there is a necessity felt to go by way of a second appeal, the party will be in a position to formulate his opinion in this regard over such reasons or grounds.

Secondly, this court when a second appeal comes before it, must be facilitated to find out as to whether the first appellate court has properly appreciated the case and has proceeded to decide it, independently applying its mind to it and considering the totality of the material evidence placed in the case.

Language:-

The Hon'ble Supreme Court in **Ishwari Prasad Mishra Vs Mohd. Isa, AIR 1963 SC 1728** cautioned the Courts not to use intemperate language in recording judicial conclusions by the appellate courts. Further added that the same approach should be followed in the matter of criticism of witnesses examined in the case.

Conclusion:-

The Hon'ble Supreme Court in **Lakshmibai Vs. Bhagwantbuva, (2013) 4 SCC 977** held that, “when substantial justice and technical considerations are pitted against each other the cause of substantial justice deserves to be preferred and the courts may in a larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best.” further, Section 108 deals with the procedure in appeals from appellate decrees and orders. The provisions of this Part relating to appeals from original decree shall, so far as may be, apply to appeals- (a) from appellate decrees, and (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

MISCELLANEOUS APPEALS:-

An Interlocutory Order means the decision of the Court which does not deal with the finality of the case but settles subordinate issues relating to the main subject matter which may be necessary to decide during the pendency of the case due to the time-sensitivity of those issues. Such order is given mainly to ensure that the interests of either party are not harmed due to and during the process of justice.

Appeal from orders

Order 43. CPC appeals from order. Therefore, it is important to see this provision in this context. It reads as follows:-

1 . Appeal from orders.- An appeal shall lie from the following orders under the provisions of section 104, namely:— (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court except where the procedure specified in rule 10A of Order VII has been followed;

(b) Omitted by Act 104 of 1976, w.e.f. 1-2-1977

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a Suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside a decree passed ex parte;

(e) [* * * *]

(f) an order under rule 21 of Order XI;

(g) [* * *]

(h) [* * *]

(i) an order under rule 34 of order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set

aside a sale;

(ja) an order rejecting an application made under sub-rule (1) of rule 106 of order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that order is appealable;

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

(m) [* * *]

(n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(na) an order under rule 5 or rule 7 or Order XXXIII rejecting an application for permission to sue as an indigent person;

(o) [* * *]

(p) order in interpleader suits under rule 3, rule 4 or rule 6 of Order XXXV;

(q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;

(r) an order under Rule 1, Rule 2, Rule 2A Rule 4 or Rule 10 of Order XXXIX;

(s) an order under Rule 1 or Rule 4 of Order XL;

(t) an order of refusal under Rule 19 of Order XLI to re-admit, or under Rule 21 of Order XLI to re-hear, an appeal;

(u) an order under Rule 23 or Rule 23A or Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

(v) Omitted by Act 104 of 1976, w.e.f. 1-2-1977

(w) an order under Rule 4 of Order XLVII granting an application for review.

Section 104 Order from which appeal lies:

An appeal lie from the following orders and save as otherwise expressly provided in the body of the code or by any law for the time being in force, from no other orders:-

(ff) an order under section 35 A

(ffa) an order under section 91 or section 92 as the case may be

(g) an order under section 95

(h) an order under any of the provisions of this code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree

(I) any order made under rules from which an appeal is expressly allowed by rules

provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no , or an order for the payment of a less amount, ought to have been made

(2) No appeal shall lie from any order passed in appeal under this section.

SUPPLEMENTAL PROCEEDINGS:-

As per section 94 of the Code of Civil Procedure 1908 :

In order to prevent the ends of justice from being defeated the Court may, if it so prescribed

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Schedule 1 of the C. P. C. (Various Orders and Rules) deals with the procedural aspect in greater detail.

Appeals in miscellaneous matters:

Generally, under following orders delivered in trial court, appeals will be preferred during the pendency of main suit.

1. Appointment of Commissioner to conduct search and seizure
2. Temporary Injunctions
3. Appointment of Court Receiver to collect rent or payments
4. Payment into court
5. Re-call and re-opening of evidence applications
6. Amendment of pleading under ORDER 6 rule 17 of CPC
7. Expert Opinion application under section 45 of Evidence Act.
8. Attachment before judgment orders under Or.38 Rule 5 CPC

Sub-Committee of Judicial Accountability v. Union of India, reported in AIR 1992 SC 63 it was held that The Supreme Court will abstain from passing an interlocutory order if the passing of such an order has an effect or tends to be susceptible of an inference of pre-judging some important and delicate issue in the main matter.

What are basic key principles for passing interlocutory orders in civil side?

Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is, to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. (See:- **Anand Prasad Agarwalla v. State of Assam vs. Tarkeshwar Prasad & Ors. AIR 2001 SC 2367; and Barak Upatyaka D.U. Karmachari Sanstha (2009) 5 SCC 694**).

No strait-jacket formula:-

Grant of an interim relief, the nature and extent thereof depends upon the facts and circumstances of each case as no strait-jacket formula can be laid down. There may be a situation wherein the defendant/respondent may use the suit property in such a manner that the situation becomes irretrievable. In such a fact situation,

interim relief should be granted (vide **M. Gurudas & Ors. Vs. Rasaranjan & Ors. AIR 2006 SC 3275; and Shridevi & Anr. vs. Muralidhar & Anr. (2007) 14 SCC 721**).

Grant of temporary injunction:-

Grant of temporary injunction, is governed by three basic principles, i.e. prima facie case; balance of convenience; and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case. But it may not be appropriate for any court to hold a mini trial at the stage of grant of temporary injunction (Vide S.M. Dyechem Ltd. Vs. M/s. Cadbury (India) Ltd., AIR 2000 SC 2114; and Anand Prasad Agarwalla's case supra.

This Court in Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hira Lal, AIR 1962 SC 527 held that the civil court has a power to grant interim injunction in exercise of its inherent jurisdiction even if the case does not fall within the ambit of provisions of Order 39 Code of Civil Procedure.

In **Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., AIR 1999 SC 3105**, the Hon'ble Supreme Court observed that the other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below :

- (i) Extent of damages being an adequate remedy;
- (ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor ;
- (iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;
- (iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case- the relief being kept flexible;
- (v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;
- (vi) Balance of convenience or inconvenience ought to be considered as an

important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise.”

Sound exercise of judicial discretion:-

In **Dalpat Kumar & Anr. Vs. Prahlad Singh & Ors.**, AIR 1993 SC 276, the Supreme Court explained the scope of aforesaid material circumstances, but observed as under:-

“The phrases ‘prima facie case’, ‘balance of convenience’ and ‘irreparable loss’ are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man’s ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts rest eloquent and speak for themselves. It is well **nigh** impossible to find from facts prima facie case and balance of convenience.”

Interfere with the orders of interim nature

In **Deoraj vs. State of Maharashtra & Ors.** AIR 2004 SC 1975, this Court considered a case where the courts below had refused the grant of interim relief. While dealing with the appeal, the Court observed that ordinarily in exercise of its jurisdiction under Art.136 of the Constitution, this Court does not interfere with the orders of interim nature passed by the High Court. However, this rule of discretion followed in practice is by way of just self-imposed restriction. An irreparable injury which forcibly tilts the balance in favour of the applicant, may persuade the Court even to grant an interim relief though it may amount to granting the final relief itself. In **Bombay Dyeing & Manufacturing Co. Ltd. Vs. Bombay Environmental Action Group & Ors.** (2005) 5 SCC 61, this Court observed as under:-

“The courts, however, have to strike a balance between two extreme positions viz. whether the writ petition would itself become infructuous if interim order is refused, on the one hand, and the enormity of losses and hardships which may be suffered by others if an interim order is granted, particularly having regard to the fact that in such an event, the losses sustained by the affected parties thereby may not be possible to be redeemed.”

In Shahabhanu @ Susheela Bai V. Saval Sakharam and others reported in 2015 (5) ALT 265

An appeal under Order 43 Rule-1(r), CPC lies against an order of temporary injunction under Order 39 Rules 1 and 2, CPC and not a revision petition under Article 227 of Constitution of India.

CONCLUSION:-

The law on the issue emerges to the effect that interim injunction should be granted by the Court after considering all the pros and cons of the case in a given set of facts involved therein on the risk and responsibility of the party or, in case he loses the case, he cannot take any advantage of the same. The order can be passed on settled principles taking into account the three basic grounds i.e. prima facie case, balance of convenience and irreparable loss. The delay in approaching the Court is of course a good ground for refusal of interim relief, but in exceptional circumstances, where the case of a party is based on fundamental rights guaranteed under the Constitution and there is an apprehension that suit property may be developed in a manner that it acquires irretrievable situation, the Court may grant relief even at a belated stage provided the court is satisfied that the applicant has not been negligent in pursuing the case.

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Latest Decisions on civil side:

In Sarala Jain and others Vs. Sangu Gangadhar and others reported in 2016(3) ALT 132

To appoint an advocate Commissioner Court has to keep in mind the following:

The trial court appointed advocate Commissioner for fixing boundaries to the property of the respondents only though the petitioner sought for appointment of advocate Commissioner to demarcate schedule property and fix boundary stones to his property and the property of the respondents. Apart from that, the relief under clause (b) in the plaint is only to confirm the boundaries since the property was already demarcated twice. As such, appointment of advocate commissioner for the same purpose does not arise. If the suit is filed for fixing boundaries by the Court, then appointment of advocate commissioner would serve purpose to decide the real controversy between the parties but it is not even the case of the petitioner that schedule property is not demarcated. In such case, appointment of advocate commissioner is wholly unnecessary and it is beyond the scope of the suit. The trial court did not look into the reliefs claimed in the suit; plea of the petitioner regarding survey of land and fixation of boundary stones; and the purpose for which commissioner is sought to be appointed. In those circumstances, the order passed by the trial court cannot be sustained as it amounts to granting pre-trial decree in view of the law declared in Mohd. Mehtab Khan and it is, therefore, liable to be set aside.

G.Lalithabai v G.R. jayarao and others reported in 2016 (3) ALT 92

Admissions – under Section 21 of Evidence Act, 1872, admissions may be proved as against the person who makes them or his representatives in interest.

Presumption as to ownership – presumption as to ownership of property is in favour of the person who purchased it till it is rebutted by adducing any satisfactory evidence.

Referred: Ramarao V. Srikrishna Murthi (7) 1961 ALT 974 = 1961 (2) An.W.R.271 = AIR 1962 AP 226, this court laid down four tests to determine the nature of a transaction, they are as follows:

- 1) Motive for taking the sale deed in the name of another.
- 2) Custody of the sale deed and connected vouchers.
- 3) Passing of consideration; and
- 4) Possession of the property”.

According to Section 35 of the Act of 1963, a declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of declaration, such parties would be trustees.

Admissions though not conclusive proof, they estop the person who made such admissions or representatives in interest in view of Section 31 of the Act of 1872.

Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.

In view of the plain language used under Section 115 of the Act of 1872, even representative in interest of the person who made a declaration, act or omission, intentionally permitting another person to act upon such representation, the representative of such person is precluded to dispute the truth of such statement.

In M.K.Tirupathirao V. Deputy General Manager, Syndicate Bank, Industrial relations Section, Zonal Office, Hyderabad reported in 2016 (3)Part-10 ALT 363 (DB)wherein it was held that

Respondent Bank issued notice to petitioner under Clause 17 (a) of BPS to his last known address calling for an explanation for his absence or to report to duty within 30 days. In view of the Section 14 of the Indian Post Office Act, 1898, a presumption can be drawn that the endorsements made on the notices are a prima facie evidence of taking the notices to the address of the petitioner

Further, in view of the provision of Section 114 Illustration (f) of the Evidence Act and Section 27 of General Clauses Act, 1897, when a registered letter was sent to the proper address, there is a presumption that the addressee has received the letter sent by registered post and that the letter be deemed to have been served on the addressee even though it was returned with an endorsement 'absent'.

In M.A. Faheem Uddin Vs. Shaik Nayeem and another reported in 2016 (3) ALT 399 wherein it was held that

Non-compliance of mandatory provisions of Section 72 read with Section 74 OF GHMC ACT

Therefore, by applying the law declared by various courts, this Court has no option except to reject the contention of the 1st respondent-election petitioner, holding that the election petition is not maintainable for non compliance with Section 72 read with Section 74(b).

In Union of India rep. by the Secretary (Establishment), Ministry of Railways, Railway board, New Delhi and others Vs. B.Lakshmi Narayanana and others reported in 2016 (2) ALT 371(DB)

(1) Reservation in promotion – State before providing reservation in promotion to employees of Scheduled castes, and scheduled Tribes must gather quantifiable data as to their backwardness and inadequacy of their representation in public employment keeping in mind the need to maintain overall administrative efficiency and form an opinion on the need to provide reservation in promotion.

(2) Parity in treatment – All similarly situated persons should be treated similarly – Normally, when a particular set of employees are given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit – where the judgment pronounced by the Court is a judgment in rem, the benefit thereunder should be given to all similarly situated persons whether they had approached the Court or not.

In Syed Yousuf Ali V. Mohd. Yousuf reported in ALT 2016(2) 559:

1) No judicial order can be passed by Court on a Memo filed by a party.

(2) When the document on the face of it is a possessory contract of sale and when plaintiff in the suit claims delivery of possession thereunder, stamp duty on such a document executed only on stamp paper worth Rs.100/- is liable to be paid as if it is a sale under Explanation to Article 47-A of Schedule 1-A of Stamp Act.

WORKSHOP-III

RECEIVING OF ADDITIONAL EVIDENCE AT APPELLATE STAGE.

TOPIC:- Receiving of Additional evidence.

**Paper presented by
Smt.V.B.NIRMALA GEETHAMBA
Principal District Judge,
Srikakulam.**

RECEIVING OF ADDITIONAL EVIDENCE AT APPELLATE STAGE.

Order 41 Rule 23, 23(A), 26(A), Section 107 and Order 41 Rule 27 are interlinked sections for the purpose of receiving additional evidence in appeal stage. Receiving additional evidence in appellate stage will arise in two conditions; (1) at the instance of the either party; (2) by the court itself. Filing of application of receiving additional evidence by party can't claim as a matter of right and it is depends on the circumstances and limitation specified under Order 41 Rule 27 C.P.C.

Section 107 of Civil Procedure Code enables the appellate court to take additional evidence or required such evidence to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. There was an exception under section 107 (d) is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule or found to exists under Order 41 Rule 27 of the Civil Procedure Code.

Under section 107 of Civil Procedure Code, the appellate court

- (1) shall have power to determine the case finally under section 107 (a);**
- (2) shall have power to remand the case under section 107 (b);**
- (3) Shall have power to frame issues and refer them for trial u/sec.107 (c);**
- (4) Shall have power to take additional evidence or to require such evidence to be taken under section 107 (d);**
- (5) Shall have power to perform the same duties as may be conferred and imposed by Civil Procedure Code on the courts of original jurisdiction in respect of the suits.**

Under Rule 27 of Order 41, production of additional evidence, whether oral or documentary, is permitted only under three circumstances which are:

- 1) the trial Court had refused to admit the evidence though it ought to have been admitted;**
- 2) the evidence was not available to the party despite exercise of due diligence; and**

- 3) the appellate court required the additional evidence so as to enable it to pronounce better judgment or for any other substantial cause of like nature.

The same was clarified by our Honourable High Court in a case of Y.V.V.Jagannadha Gupta v. Veju Venkateswara Rao, AIR 2002 AP 369 (372, 372).

So, it clearly shows that under the three circumstances, the appellate court can exercise powers to receive additional evidence; (1) when the trial court refused to receive the evidence ought to have admitted; (1) when the party is not secured the document at trial stage even despite exercise of due diligence and (3) the appellate court itself required document to pronounce the better judgment or if it is not possible to pronounced a judgment without such documents.

In the above three circumstances, the appellate court may receive the additional evidence in appellate stage.

The parties must be shown good reason why the evidence was not produced in trial court. Apart from that the discretion given to the court is strictly circumscribed by the limitations specified in the rule. If the additional evidence is allowed contrary to the principles governing its reception it will have to be ignored as if it is non-existent. As per the decision reported in Mahavir Singh v. Naresh Chandra, AIR 2001 SC 134 (136) = 2001 SCC 309.

The principles of rejudicata is not applicable for receiving additional evidence in the appellate court. Merely because application for filing documents was rejected by the trial Court is no bar in moving petition under Order 41 Rule 27 before the appellate Court for production of such documents. The same was clarified in a case of Surjit Kaur v. Nachhattar Singh, 2001 AIHC 556 (P&H).

The provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and fill up the omission in the Court of appeal, it does not authorize any lacunae or gaps in evidence to be filled up {N.Kamalam v. Ayyasamy, (2001) 7 SCC 503 (504)}, where in the Apex Court held that the Court must always be cautious about allowing applications seeking to adduce additional evidence particularly in the form of oral evidence after a long time and should not allow to fill up the latches on his part by way of additional evidence.

Another general caution is where the document came into existence after the judgment of the lower court would not be admitted in evidence unless the essential conditions mentioned under Order 41 Rule 27 has to be established by the party if the case was not covered by any of the circumstances mentioned in the rule, the rejection of additional evidence in appeal was held proper.

The court cannot reject the document to receive as additional evidence if it is not in the language of the court. In the above such circumstances, the court can require filing of certified and translated

copy as per the decision reported in AIR 2004 Karnataka Page 276 and 279.

Where the documents sought to be produced were public documents having bearing on the merit of the case the appellate court can receive the same as an additional evidence. Application to adduce additional evidence must be supported by an affidavit and the applicant must establish that he could not produce such evidence despite due diligence.

If the court wants to receive the additional evidence, the basic principles of admission of additional evidence shall be followed. They are (i) with best efforts such evidence could not have been adduced at first instance; (ii) the party affected should have an opportunity to rebut such additional evidence; and (iii) such evidence is relevant for determination of the issue. The same was observed in a case of Shivaji Rao Nilangekar v. Majhesh Madhab, 1987 SC 294. The same was upheld in several cases by Apex Court that when additional evidence is admitted the other side should be given an opportunity to rebut it. In such circumstances, rebuttal evidence permitted to be adduced must be limited to rebut the additional evidence and cannot be construed to give a free hand to the said party to lead any evidence which he could have adduced at the trial.

When no reason is given for non-production of a document for a period of 8 years, it cannot be allowed to be filed as additional evidence. When there is no satisfactory explanation for not producing the additional documents either in the courts below or even in the High Court, the same cannot be received in Supreme Court as per the decision reported in Roop Chand v. Gopi Chand Thilia, AIR 1989 SC 1416, 1420.

WHETHER ADDITIONAL EVIDENCE CAN BE RECEIVED IN SECOND APPEAL: --

Receiving additional evidence also be entertained even in the second appeal if it is required to decide substantial question of law which is involved in the second appeal. The same was upheld in a decision reported in {Koppula Koteswara Rao v. Koppula Hemantha Rao, 2002 AIHC 4950 (4954) (AP)}, where in our Honourable High Court held that the appellant has filed application under Order 41` Rule 27 CPC for production of additional evidence, dismissal of appeal without deciding the application would result in miscarriage of justice and the judgment passed in the case would be unsustainable. It clearly says that if any party file petition to receive additional evidence that must be decided along with the appeal and the same cannot be disposed of after disposing of the main appeal which will cause miscarriage of the justice to the party who approached the appeal court. In the above circumstance additional evidence if any may be produced in the stage of second appeal. Therefore receiving additional evidence by the application of party is very less chances in the second appeal unless court itself requires such additional evidence to decide substantial question of law.

When appellate court allows additional evidence for appropriate decision, there can be no objection in second appeal under Order 41 Rule 27 (1)© the requirement of receiving additional evidence must be that of the court and not of the party. If the evidence could have been tendered in the lower court and the party has not been vigilant in producing it then that evidence cannot be allowed to be let in at the appellate stage on the supposition that a substantial cause for producing it exists in appeal.

II. AT THE REQUIREMENT OF COURT: --

The Court have power to receive additional evidence when such document is required to pronounce the better judgment or to decide any substantial question of law. When the court is of opinion that without fresh evidence it cannot pronounce judgment and perform its functions, then and then only will it be allowed. The rule is clearly not intended to allow a litigant who had been unsuccessful in the lower court to patch up the weak parts of his case and to fill up the omission in appeal. Additional evidence can be admitted only where the Appellate court requires it, ie finds it needful, to enable it to pronounce judgment, or for any other substantial cause. In either case it must be the court that requires it and not that of any party to the suit.

It is necessary to take notice of the changed circumstances which will have the effect of shortening the litigation and of doing complete justice between the parties in additional evidence in respect of the subsequent events.

Under Order 45, rule 5 of the Civil Procedure Cod, the Honourable Supreme Court recognizes the inherent power to make such orders as may be necessary for the ends of justice or to prevent and abuse of process.

WHEN ADDITIONAL EVIDENCE CAN'T BE ALLOWED: --

Additional evidence will not be admitted when a party had ample opportunity to produce it in trial court.

When no cogent ground is shown to permit any additional evidence when no attempt to produce any evidence was made in any of the courts below up to the High Court or even in the Supreme Court till conclusion of the hearing, additional evidence cannot be permitted. The same is upheld by the Apex Court in a case of Shiv Chander Kapoor v. Amar Bose, AIR 1990 SC 325, 334 or when false reason is given for non-production and document is withheld to avoid penalty under Stamp Act, or to fill up lacuna which is the result of applicant's own negligence. In such circumstances, additional evidence petition cannot be allowed. The same is upheld by Apex Court in a case of N.Kamalan v. Ayyaswamy AIR 2001 (7) SCC 503.

The discretion for allowing additional evidence at appellate stage cannot be exercised for the purpose of inducing altogether new pleas as per the decision reported in State Bank of India v. Kaushal Plastics,

2000 AIHC 3003 (3005) (Rajasthan). No justification for receiving additional evidence after arguments are concluded and judgment reserved, especially when the evidence was in existence before as per the decision reported in Muneswari v. Jugal, AIR 1952 C 368.

Where plaintiff relied on some evidence before the trial court in spite of the objection of his opponent as to its admissibility, no additional can be allowed in the appellate court after rejection of the evidence as inadmissible, as he had ample opportunity in the past i.e., before the trial court.

When additional evidence is taken with the assent of both parties or without objection at the time when it was taken, it is not open to either party to take exception to it and to question the same in 2nd appeal. But consent does not absolve the judge from the duty of satisfying himself. Whether such document is necessary or not have to be decided at the time of pronouncement of judgment and whether they are relating to the suit or not has to be examined.

Mere absence of objection to admission of additional evidence is not a bar to making it a ground for reversal of decision. Absence of objection becomes important only when it is equivalent to consent.

REBUTTAL EVIDENCE: --

It is requirement of principles of natural justice that a party against whom additional evidence is admitted should have an opportunity to rebut it. The party against whom an additional evidence is admitted shall be given an opportunity to rebut it as per the decision reported in The Land Acquisition Officer City Improvement Trust, Bangalore v. H.Nanayanarch, AIR 1976 SC 2403 (2414).

An order of refusal by lower appellate court to admit additional evidence is not appealable.

The second appellate court ordinarily would not interfere with the order of the rejection of additional evidence by the first appellate Court in admitting or refusing to admit additional evidence unless such Court has not exercised its discretion in a judicial manner or in accordance with law as per the decision reported in Khushi Ram v. Findhi, AIR 2003 HP 23 (28).

As per Rule 28, prescribe the Mode of taking additional evidence.—Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

As per Rule 29,-- Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

The last but not least, it is important to note that disposal of application for additional evidence after the disposal of appeal is also improper as the appellate court becomes fructus officio. This applies even for the trial courts as in some cases after disposal of a case, the Officers of the court in some occasions will be realizing that certain applications are pending then and attempt to dispose of those applications as a sequel to the disposal of main matter will be made. Such kind of exercise is not permissible, it leads to miscarriage of justice to other parties. The appropriate stage for admission of additional evidence is final hearing of the appeal when the appellate court is in position to scrutinize and appraise the evidence on record.

The advocate-commissioner can also be appointed as receiving additional evidence.

Therefore, in view of the above discussion, it clearly shows that the appellate court cannot exercise his discretion vaguely and discretion must be exercised within the parameters and limitations under Order 41 Rule 27 of CPC.

Filing application for receiving additional evidence by the party is not a matter of right, it depends on the circumstances mentioned under Order 41 Rule 27 CPC and the party must be vigilant and must show that evidence was not available to him before the trial court despite of exercise of his due diligence and he brought the same and filed before the appellate court to receive the same as additional evidence so as to enable it to pronounce better judgment.

When the additional evidence is received, the court may remand the matter to the trial court under Order 41 Rule 27 of CPC or in exercise the same under Order 41 Rule 23 and 26-A. As per Rule 23 “where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case”.

In Rule 23 (A), where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

CONCLUSION: --

where the Appellate Court remands a case under rule 23 or rule 23A, or frames issues and refers them for trial under rule 25, under order 47 rule 26 (A) it shall fix a date for the appearance of the parties before the Court from whose decree the appeal was preferred for the purpose of receiving the directions of that Court as to further proceedings in this suit. On the other hand, the appellate court straight away record the evidence without remanding the same and give opportunity to the other party to rebut the same and that dispose of the appeal finally after hearing both parties.

SRIKAKULAM DISTRICT; WORKSHOP-III. DATE:18.06.2016.

CHAIRPERSON

NODAL OFFICER

**SRI JUSTICE M.SATYANARAYANA MURTHY
Hon'ble Administrative Judge.**

**SMT.V.B.NIRMALA GEETHAMBA
Hon'ble Principal District Judge.**

VENUE: DISTRICT COURT PREMISES

SUBJECT: APPRECIATION OF EVIDENCE IN CIVIL CASES

- TOPICS:**
- 1) Appreciation of Evidence in Suits.**
 - 2) Appreciation of evidence in Appeal suits and Miscellaneous appeals**
 - 3) Receiving of Additional evidence.**
 - 4) When and how remand order can be passed?**

C O N T E N T S

SRIKAKULAM DISTRICT: WORKSHOP-III. DATE:18.06.2016.

SUBJECT: APPRECIATION OF EVIDENCE IN CIVIL CASES.

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PAPER ON SUBJECT

**“APPRECIATION OF EVIDENCE IN
CIVIL SUITS”**

SUBMITTED BY

**SRI Y.SRINIVASA RAO,
SPECIAL JUDICIAL MAGISTRATE OF
FIRST CLASS
(PROHIBITION AND EXCISE),
SRIKAKULAM.**

PAPER ON SUBJECT

**“RECEIVING OF ADDITIONAL
EVIDENCE”**

SUBMITTED BY

**SMT.V.B.NIRMALA GEETHAMBA,
PRINCIPAL DISTRICT JUDGE,
SRIKAKULAM.**

PAPER ON SUBJECT

**“WHEN AND HOW REMAND
ORDER CAN BE PASSED?”**

SUBMITTED BY

**SMT.K.SUDHAMANI,
JUDGE, FAMILY COURT
CUM-III ADDITIONAL DISTRICT JUDGE,
SRIKAKULAM.**

PAPER ON SUBJECT

**“APPRECIATION OF EVIDENCE
IN APPEAL SUITS AND
MISCELLANEOUS APPEALS”**

SUBMITTED BY

**SMT.M.BABITHA,
VI ADDITIONAL DISTRICT JUDGE,
SOMPETA.**

WHEN AND HOW REMAND ORDER CAN BE PASSED

Under Order 41, Rule 1 CPC the appellate Court is required to state the points for determination, the decision thereon and the reasons for the said decision. Reasons can only be given when the relevant and material evidence on record is considered by the Appellate Court. The duty of the appellate Court in this matter is important. The duty cast upon the appellate Court when it is the only Court where appeal lies on facts is very onerous and must be discharged with a full sense of responsibility. The parties to the litigation must be satisfied that their case has been properly dealt with and they have received justice in accordance with law: **1979 All Ren C 392(393)**.

I. Order 41, Rule 23 CPC: Remand of case by Appellate Court

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

1) Scope of the rule:-

- If the trial Court decided the suit on the merits it is not open to the appellate Court to order a remand under this rule though it may act under Rules 24 and 25: **(1960) 1 Mad LJ 37(37)**.
- Power of remand is discretionary and so long as it is exercised upon relevant consideration it cannot be assailed. **(1994) 24 All LR 386(388): (1994) 2 All Rent Cas 241**.
- The power of remand under this Rule, ought not to be lightly exercised by the appellate Court. Where the lower Court has disposed of the suit on the merits, the appellate Court must dispose of the appeal on the merits and cannot avoid this duty. It is only in exceptional circumstances as where the judgment of the lower Court is wholly unintelligible, that a remand can be made for a fresh trial. **AIR 1965 Mad 417 (419)**.
- Appellate Court not agreeing with findings of trial Court on certain issues – Only two courses were open (i) to reverse findings on said issues or (ii) seek report of trial Court if evidence on such issues is deficient – Remand of case to trial Court for fresh decision on those issues was improper. **AIR 2005 P&H 14(17)**.
- The conditions prescribed for the exercise of the power of remand under Rule 23 of Order 41, are mandatory but not a mere formality. **AIR 1969 Andh Pra 216(220, 221)**.

- The appellate Court should pay sufficient attention to the form and language of its order of remand so that it does not contain any ambiguity. **(1964) 66 Pun LR 340(343, 344)**.
- The distinguishing feature in Order 41, Rule 23 and Order 41, Rule 23A is that in earlier Rule the matter is disposed of on preliminary point, whereas in the later Rule it is decided otherwise than on a preliminary point. **(2002)3 MPHT 400(404)**.
- If there is sufficient material available on record and on that basis judgment can be pronounced, then there is no necessity to remand the matter back. The subject of remand is dealt with in Order 41, Rule 23. **(2001) 3 SCT 214 (J&K)**.
- The appellate Court is required first to make an endeavour to answer disputed findings and where inspite of such findings it would remand suit for fresh trial. **2003 AIHC 917 (919): 2003(95) Cut LT 404 (Orissa)**
- It is cardinal principle of remand that whenever it is found that something which is vital had not been decided by the trial Court and the same cannot be decided by the appellate Court because of lack of proper materials on record: then only remand can be made. **(2003) 3 BLJ 679 (680): (2003) 4 Pat LJR 810**.

2) Distinction between Rules 23 and 25:-

The following are the points of distinction between Rules 23 and 25.

- Where an order of remand is made under this rule, the whole case goes back for decision to the lower Court (except on the point on which the Appellate Court has reversed the finding of the lower court); whereas in the case of an order under Rule 25, the case is retained on the file of the Appellate Court and only issues are remitted to the lower Court for findings. **(1960) 1 Mad LJ 37**.
- If an order of remand is made under this rule the judgment and decree of lower court has to be set aside but it is not necessary to set aside the judgment and decree where the remand order is made under Rule 25. **1982 Punj LJ 105(107)**.
- An order of remand under this rule is appealable but not an order under Rule 25. AIR 1922 Oudh 236 (248), **ILR (1953) 3 Raj 297 (301)(DB)**.
- An order of remand under this rule is a final order which cannot be reconsidered by the Court which passed it except on review, whereas an order under Rule 25, is according to the great majority of cases an interlocutory order which it is open to the court to reconsider. **1954 Raj LW 103(105) (DB)**.

3) “Preliminary point”, meaning of:-

- Where the trial Court rightly or wrongly dismissed the suit by merely giving finding on certain issue as in its opinion it was unnecessary to decide the remaining issues, the suit should be

held to have been decided, on a preliminary point within the meaning of this Rule. **(1979) 1 Rent LR 891 (896) (J&K).**

- The expression “preliminary point” does not mean the same thing as a “preliminary issue”. **AIR 1960 Bom 543 (547).**
- A suit will be held to be disposed of on a preliminary point if it is disposed of on any of the following grounds:
 - (A) That the suit is barred by re judicata. **AIR 1925 Mad 483 (484)(DB).**
 - (B) That the suit is barred by limitation. **(1867)7 Suth WR 331 (331)(DB).**
 - (C) That the suit is barred by any other rule of law. **(1868) 10 suth WR 438(439) (DB).** (Suit under section 230 of Act VIII of 1859 dismissed on a point not arising under the Act.)
 - (D) That the document on which the suit is based is inadmissible in evidence. **AIR 1927 Lah 592 (593).**
 - (E) That the plaintiff is stopped from proving his case. **AIR 1926 Mad 808 (DB).**
 - (F) That the plaintiff has no cause of action. **AIR 1942 Lah 179 (182).** (See also AIR 1931 Cal 604(606) (DB), (Application for prosecution under Cr.P.C. S.476 – Court rejecting application without going to the merits on the ground that there was an ulterior motive behind the application – Decision was on preliminary point.)
 - (G) That the suit is bad for defect in the description of the defendant. **AIR 1925 Cal 716 (717) (DB).**
 - (H) That the matter is concluded by a valid award. **(1899) 22 Mad 172(173) (DB).**
 - (I) That the case raised at the hearing is different from that raised in the plaint. **1884 Bom PJ 128(DB).**
 - (J) That the suit has abated. **(1901) 26 Bom 203 (206) (DB).**
- In a suit for damages for breach of contract, the question as to the factum of contract is a preliminary point although it relates to the merits of the case. **AIR 1921 Mad 118 (119) (DB).**
- The question whether a point is a preliminary one does not depend upon the degree of importance which it may assume during the hearing of the case. **AIR 1927 Mad 1159(DB).**
- A suit may be said to be disposed of on a preliminary point in the following cases:--
 - (A) Whether a decree is passed not after trial on all issues but on the basis of an award. **(1905) 2 All LJ 477(479) (DB).**
 - (B) Decree passed on basis of Commissioner’s report. **AIR 1917 All 148(149) (DB).**

- In a suit for possession and mesne profits in which a question of mesne profits would arise after the decree for possession is passed the dismissal of the suit on the ground that the plaintiff was not entitled to possession is not a decision on a preliminary point. **AIR 1922 Mad 112(113, 114)(DB)**.

4) Where Court decided on all the issues:-

Where all evidence has been duly placed before the trial Court and it has decided the suit on merits on several issues which were framed, the appellate court has no power to remand. **(1996) 2 Cal LJ 541 (544)**.

5) Entire suit must have been disposed of on a preliminary point:-

In a suit for recovery of arrears of rent and for ejection from certain plots of land, one of the questions was as to the amount payable by the plaintiff as the value of improvements effected by the defendant on the plaintiff's land. The trial Court held that the plaintiff should pay Rs.10,000/- as decided in a prior litigation between the parties. On appeal the appellate Court held that the prior decision was not res judicata and remanded the case to assess the then value of the improvements. It was held that this rule did not apply to the case as the decision of only one of the issues in the case and not of the whole suit was based on a preliminary point. **AIR 1932 Lah 219(220)**.

6) Order returning or rejecting plaint, whether disposal on preliminary point:-

- An order returning a plaint for presentation to the proper Court under Order 7, Rule 10 is not a disposal of the suit on a preliminary point and the order of the appellate Court setting aside the order returning the plaint and remanding the case is not an order of remand under this rule. **AIR 1942 Oudh 370(371)(DB)**.
- The rejection of a plaint does not amount to a disposal of the suit on a preliminary point. **AIR 1945 Mad 410(430, 431)**.

7) Decision of lower Court must be reversed:-

- No remand can be ordered under this rule unless the decision of the lower Court on the preliminary point is reversed in appeal. The decision of the lower Court must be definitely reversed. **AIR 1954 Mad 167**.
- The condition precedent for the appellate Court to pass an order of remand under Order 41 Rule 23, CPC is to arrive at a finding on the material on record that the judgment of the trial court is erroneous and is liable to be reversed or set aside. **AIR 2002 AP 340(343): 2002 (3) Andh LT 652**.

8) "The appellate Court may, if it thinks fit, by order remand the case."

- The appellate Court should not, rashly and without sufficient cause, order retrial in any case in which this can possibly be avoided; a remand should not thus be made under this rule in a

case which could, efficiently be dealt with under Rule 25, or under Rule 24. **AIR 1961 Andh Pra 226(228)**.

- A remand cannot be ordered so as to enable a party to fill up the lacunae in his case. **AIR 1969 Andh Pra 216(220, 221)**.
- The question whether a remand should be made or not depends on the facts and circumstances of each case. **AIR 1967 Delhi 61(63)**.
- Where the trial Court has decided the suit on an issue of law and the appellate Court reverses the decision on such issue, it must remand the case and should not decide the issues of facts itself when the appellant has not led evidence thereon. **AIR 1935 Rang 34(35)**.
- Where the trial Court has disposed of a suit or, an issue of law and the appellate Court reverses the decision on such issue and remands the case, it should not make any remark concerning the merits of the claim, as by so doing, it will prejudice the trial on remand. **AIR 1936 Rang 251(252)**.
- The appellate Court should not send back for the decision of the trial Court a question of law. **AIR 1950 Cal 510(511)**.
- Where the trial court in a suit for partition of property passed a preliminary decree clearing the shares of the sons but did not determine the shares of the daughters, the appellate Court could itself determine the daughters shares and there would be no need to remand the case for that purpose. **1989 All WE 65 (2)(66)**.

9) “And may further direct what issue or issues shall be tried in the case.”:-

- When an appellate Court remands a case to the trial Court for fresh disposal it can give directions as to the manner in which the suit when it goes back should be dealt with. **AIR 1961 Mad 410(412)(DB)**.
- If any limits are imposed by the appellate Court while remaining a case, the lower Court has no power to travel beyond those limits. **AIR 1963 Madh Pra 344(347) (DB)**.
- The orders of appellate Court on remand stipulating time frame to dispose of the suit are orders in terrorem and are only meant for impressing upon the trial court to dispose of the suit expeditiously and cannot be construed as a mandate issued by appellate Court. **2002 AIR - Kant HCR 469(473): 2002 AIHC 886**.

10. Inherent power of remand:-

- Rule 23 as amended by the High Courts of Allahabad, Andhra Pradesh, Kerala, Madras, Mysore and Rajasthan embodies the inherent power of the Court and the power is prescribed within certain limits namely that the Court can remand the case in the interest of justice only where it comes to the conclusion that it is necessary to set aside the decree. The appellate Court cannot therefore have inherent jurisdiction under section 151 to remand

a case falling under this rule as amended. **AIR 1952 Mad 66(67).**

- A remand should not, generally speaking, be ordered when the defect in the proceedings has been due to the negligence or default of the party who asks for remand. **AIR 1960 All 655, AIR 1940 Mad 609 (610).**
- The power of remand is inherent in the appellate jurisdiction conferred on an appellate authority and the fact that there is no specific provision, therefor in the statute conferring such jurisdiction does not disable the appellate authority from exercising the power. **AIR 1963 Andh Pra 324(325) (DB).**

11. Grounds of remand:-

- Courts have an inherent power to remand in the following cases:--
 - (A) When the appellate Court directs an amendment of the plaint. **AIR 1968 Mys 266(268).**
 - (B) The addition of fresh parties. **AIR 1916 Mad 957(958) (DB).**
 - (X) When the appellate Court finds that the suit is bad for misjoinder of parties and causes of action. In such a case the appellate Court may remand the case and direct the lower Court to return the plaint for amendment. **AIR 1957 Punj 312 (315) (DB).**
 - (Δ) When the lower Court has dismissed a suit on the ground that the suit has been brought in the name of the wrong person as plaintiff or defendant. **AIR 1925 Cal 716(717) (DB).**
 - (E) When the lower Court has misunderstood the whole case. **AIR 1916 All 345 (346) (DB).**
 - (Φ) When the suit has been disposed of on an erroneous issue. **(1878) 1 Cal LR 431(433) (DB).**
 - (Γ) When the lower Court has failed to determine material issues in the case. **AIR 1995 Punj 312(315)(DB).**
 - (H) Appeal against order passed in suit for possession decreed in favour of defendant - Case remanded only for correct valuation for purposes of court-fee and jurisdiction - Order of remand illegal. **AIR 1983 Punj 426(428).**
 - (I) Decree of suit by first appellate court giving share to the plaintiff in property held by defendants - However extent of share not determined - Case remanded. **1981 UPLJ NOC 188: 1981 All CJ 513.**
 - (ϑ) Appellate Court ordering remand on ground that requisite Court-fee not paid - Such objection was not raised by any party - Remand held illegal. **AIR 1981 Delhi 328(329, 331).**

- (K) Appellate Court not dealing with case point by point but mixing up several points – Case cannot be remanded. **AIR 1981 Kant 163 (165, 166).**
- (L) Consolidation of suits – No objection by parties – Decree passed by court – Decree set aside and matter remanded – Order is illegal. **1981 Land LR 47(48) (Punj).**
- (M) Documents admitted in evidence by Trial Court – Documents not properly signed or endorsed – Case remanded. **1977 Rev LR 170(Punj).**
- (N) Sufficient material before Court – Case should not be remanded. **ILR (1976) 2 Ker 574.**
- (O) To allow parties opportunity to amend their pleadings. **(2001) 3 Pat LJR 399(400): (2001) 3 BLJ 330.**
- The power of remand has to be exercised in the event that the appellate court comes to the conclusion that it cannot decide the dispute on its own with the material available on record but not otherwise. **2005 AIHC 1194(1198): AIR 2005 NOC 281.**
 - Appellate Court can remand case where it finds that impleadment of necessary party was necessary. **(1997) 30 All LR 550(551): (1997) All CJ 1431.**
 - Remand is not to be adopted as a course of action or as an order of the day. It is to be resorted to in special circumstances only as indicated in the rules, as ‘remand’ has got the tendency of delaying the final decision unduly and of causing harassment and undue loss to parties and their generation. **AIR 2004 Guj 102(114): 2003(3) Guj LR 2563(DB).**
 - Where the trial Court should have admitted and considered certified copies of public document in evidence, its failure to do so vitiates the judgment and renders a remand necessary. **AIR 1975 Goa 32(33).**
 - In the guise of giving leave to the defendant to adduce additional evidence, the Court cannot order a remand under Order 41 Rule 23. **(1988) 1 Kant LJ 402: ILR (1988) Kant 1654.**
 - Where in order that effective justice be done to the parties it was wholly necessary to depute a Civil Court Commissioner to make local investigation, measure the plots belonging to both the parties and then furnish his report and map showing identity of the suit land and as the trial Court had failed to do so, the matter could be remanded back. **(1987) 64 Cut LT 298 : (1987) 2 Civ LJ 370(373).**
 - Failure to frame issue – Both the parties leading evidence and also knowing the pleadings – Parties knowing the case that was being fought – Plea that no proper issue was framed cannot be a ground for remand. **AIR 1975 Orissa 55(57).**
 - In dispute regarding specific performance of contract where plaintiff has sold property to third person matter is liable to be remanded to give opportunity to third person to prove that he is bona fide purchaser, having no knowledge of earlier contract. **(2002) 3 ICC 478 (481) (Cal).**

- Absence of proper pleadings and facts – Trial not proper and suffering from errors, omissions and irregularities – Remand necessary. **AIR 1958 Manipur 22(26)**.
- Where in a suit for declaration of title and for direction to defendant to put plaintiff in possession; the trial court declined to consider and determine the question of the title; first appellate court's direction to remand case for fresh trial with direction to decide the question of title would be proper. **(2000) 3 Mad LJ 503(508): (2001) 1 ICC 572**.
- Where the suit was based on agricultural custom and plaintiffs case on Hindu Law would not be decided effectively without giving opportunities to the parties to amend the pleadings or to lead evidence on the amended pleadings, the suit was remanded to trial court for decision afresh on merits. **(1998) 119 Pun LR 280(2891): (1998) 2 Land LR 145**.
- Change in law effected subsequently to the filing of second appeal – Case may be remanded to trial Court. 1957 Ker LT 237(238).
- Failure to frame and decide essential issues and conflicting findings on issues framed – Case is fit for remand. **AIR 1950 Pat 356(357,358) (DB)**.
- Where the Court had proceeded ex parte against the defendants and in absence of sufficient evidence had granted a decree, the case should be remanded back for retrial and fresh appraisal of evidence. **AIR 1988 SC 1381(1383): (1988) 2 SCJ 422**.

12) Wrong onus of proof:-

Where the lower Court has thrown the burden of proof on the wrong party, the appellate Court may, if necessary, remand the case for retrial. **AIR 1960 Manipur 11(13)**.

13) Exclusion of evidence:-

- An erroneous exclusion of evidence by the lower Court may be a good ground for remand under the inherent power of the Court. **AIR 1955 Cal 251(254, 255)(DB)**.
- The failure to give a party an opportunity to produce evidence will be a good ground for remand. **AIR 1936 Cal 195 (196) (DB)**.

14). Basing decision on inadmissible evidence:-

Where the lower Court's judgment is vitiated by the admission of inadmissible evidence, the case may be remanded for retrial under the inherent power of the Court. **(1874) 21 Suth WR 257 (DB)**.

15). New plea is not a ground of remand:-

- As a general rule, a remand cannot be ordered for trying a new plea raised for the first time in appeal. **1956 Andh WR 544 (547)**.
- Court can remand suit on question of jurisdiction although such question is not raised in pleadings in lower court. **AIR 1938Par 97 (98) (DB)**.

16). Remand in cases under special and local laws:-

A.P.Rent Control Act (1960): Appellate authority can exercise powers of remand in proceedings under A.P.Buildings (Lease, Rent and Eviction) Control Act, 1960. **2003 AIHC 2078 (2081) : (2003) 3 Andh LT 325.**

17). Remand in appeal from order refusing to set aside ex parte decree:-

The appellate Court, in an appeal from an order rejecting an application setting aside an ex parte order, can treat the appeal as one from the ex parte decree itself and decide the whole case finally. **AIR 1926 Cal 1232 (1233) (DB)**.

18). Remand by consent:-

- A case may be remanded with the consent of parties though a remand may not be permissible otherwise. **AIR 1914 Mad 15 (DB)**.
- The order of remand purely based on consent of parties, is valid only if the procedure under Order 23, Rule 3 is strictly followed. **(1980) 1 Mad LJ 291.**

19). Remand in second appeal:-

- Where a first appeal has been disposed of on a preliminary point the High Court may in second appeal, remand the case if it reverses the decision on the preliminary point. **AIR 1952 Madh Bha 168(170)**.
- Where the High Court had not considered the merits of the appeal, the appeal could be remanded back to it. **AIR 1981 SC 1212 (1214)**
- First appeal disposed of on preliminary point - High Court in second appeal may dispose of appeal without remanding it. **AIR 1916 Oudh 257 (264)**
- Where suit for possession filed by co-sharer against purchasers on ground that he had preferential right to acquire property was dismissed by trial Court and first appellate Court however upheld right of said co-sharer and decreed suit and while second appeal was pending before High Court Amendment which took away right of co-sharer was effected and High Court in view of said amendment dismissed suit without framing substantial question

of law, the matter was remanded back for decision after framing substantial question of law. **2005 AIR SCW 4589 (4592) : (2005) SCC 279**

- Even if a case has not been disposed of on a preliminary point, the High Court in second appeal may remand the case in the exercise of its inherent power to prevent the ends of justice from being defeated.

(A) **Lower Appellate Court acting in excess of its powers. (1865) 3 Bom HCRAC 59 (62) (DB)**

(B) **Lower Court misappreciating true controversy between the parties. (1875) 23 Suth WR 166 (167) (DB)** (Lower Court not examining evidence with reference to the right issues in the case). ****AIR 1927 Lah 480 (481) (DB)** (case decided with reference to irrelevant issues). ****AIR 1921 All 335 (DB)**. (Lower Court misunderstanding nature of the case).

(C) **Failure to decide material issues - case may be remanded. AIR 1976 Pat 5(8).**

(D) **Decision based on an incorrect view of the law applicable. AIR 1931 Mad 577 (579).**

(E) **Improper admission of evidence. AIR 1961 Mys 160 (164) (DB).**

(F) **Improper exclusion of evidence. AIR 1919 Cal 902 (903) (DB).** (First appellant Court excluding admissible evidence.) ****AIR 1917 Cal 78 (79) (DB).**

(G) **Lower Appellate Court not complying with the provisions of Order 41, Rule 31. (1908) 31 Mad 469 (470, 471) (FB). AIR 1917 Cal 233 (234) (DB).**

(H) **Miscellaneous. AIR 1928 Pat 174 (175).**

- Generally speaking, a case will not be remanded for re-hearing on an issue raised for the first time in second appeal. **AIR 1916 PC 126(128,129)**. (Though in exceptional cases for good cause shown and on payment of all costs, a case may be remanded even on such an issue.) ****AIR 1928 Cal 870 (872) (DB) ** AIR 1923 Lah 21 (22) (DB).**
- Where the appellant had made a statement in appeal giving up relief against one of the respondents, the case could be remitted to the High Court for fresh consideration on merits. **1982 UJ (SC) 830.**
- Unless it is absolutely necessary in the interests of justice, to remand a case, a remand will not be ordered under the inherent power of the Court. **AIR 1924 Nag 65.** (Remand of case is unnecessary where points to be urged are questions of law.)
- The High Court cannot in second appeal reverse a finding of fact of the lower Appellate Court, however erroneous it may be, and

cannot remand a case on the basis of such reversal, unless the finding is vitiated by any such illegality or defect as is mentioned in S. 100. **AIR 1922 Pat 575 (577) (DB).**

- Second appeal – Power of remand – Suit for declaration of title – Dismissed holding respondent in adverse possession though issue not framed – Matter remanded to trial Court in second appeal to decide adverse possession – Respondent alleging that his right to appeal and opportunity of being heard on acts by appellate forum was deprived – Said contention does not stand as it would go against the very scope of power of remand. **2001 AIHC 722 (725) : (2000) 2 Mad LJ 806.**
- Remand – Question whether disputed land is appurtenant to plaintiff's house – Question requiring evaluation of oral evidence in the light of documentary evidence – Case remanded since it is proper that oral evidence be evaluated by appellate Court or trial Court and not by High Court in second appeal. **Order 41, Rule 23 - Note 19 (contd.) 1996 AIHC 449 (453) (All).**
- Where the appeal was allowed and cross-objection was rejected and matter was remanded to trial Court, the second appeal against such consolidated order cannot be held to be not maintainable on ground that order of remand is appealable under O.43, R.1. **AIR 2005 Guj 293.**
- Where a suit has been decided on a preliminary point of re judicata on basis of certain admitted facts at the instance of the defendant but the decision is reversed in appeal, it is not open to the defendant in second appeal to contend that the suit should go back to the trial Court for a fresh decision after recording evidence. **AIR 1957 Orissa 201 (203).**
- Where the appellant in the lower appellate Court has taken the risk of depending on a pure question of law, he cannot, in second appeal, ask for a further indulgence for a rehearing of the facts by the lower appellate Court. **1962 BLJR 809 (811) (Pat.)**

20). Appeal against an order of remand under this rule:-

- Order 43, Rule 1(u) gives a right of appeal against an order of remand under this rule if an appeal would lie from the decree of the Appellate Court. **AIR 1950 FC 83 (93).**
- **No appeal lies under O.43, R.1 (u) if the order of remand is not one under O.41, R.23. See the following cases: AIR 1932 Lah 538 (539).**
- Order of appellate Court setting aside order of trial Court rejecting plaint under O.7, R.11 and directing trial Court to proceed with the trial of suit – Such order is not an order under O.41, R.23. **(See AIR 1937 Lah 380(381)).**
- Trial Court rejecting plaint on ground of insufficiency of Court fee – Appellate Court directing trial Court to entertain plaint and proceed with suit – Order does not fall under O.41, R.23. **(See also AIR 1945 Mad 430 (431)).**

- An appeal will lie from an order or remand only in those cases in which an appeal would lie against the decree, if the Appellate Court, instead of making an order of remand, had passed a decree on the strength of the adjudication on which the order of remand was based. The test is whether in the circumstances, an appeal would lie if the order of remand were itself treated as a decree and not as a mere order **AIR 1922 Lah 178 (181,182) (FB)**.
- An appeal lies as to an order regarding costs in an order of remand. **1889 Pun Re No.89, p.324 (FB)**.
- An appeal against an order of remand should be filed as a miscellaneous appeal and not as second appeal. **(1958) 24 Cut LT 485 (486). AIR 1933 Oudh 191 (192) DB**.
- An appeal against an order of remand by Appellate Court can be filed at the instance of any party. Even an appellant also can file an appeal against it. **1978 All LJ 186 (200) (DB)**.
- An appeal against an order of remand would include the right to object not only to propriety or correctness of the order of remand but also the findings on which the order is based. **(1969) 1 Mad LJ 64(68)**.

21). Appeal from order of remand under inherent power:-

- There is no right of appeal against an order of remand under the inherent power of the Court. **AIR 1973 All 93 (94)**.
- The Appellate Court ought to mention the provision of law under which the remand is made. **AIR 1961 Pepsu 130 (132) (DB)**.
- Appellate Court not mentioning the provision of law under which it remands – Order must be presumed to be under R.23 and not under S.151, though R.23 does not apply to the circumstances of the case. **AIR 1969 Andh Pra 216 (219,220) DB**.
- Where several issues were left undecided in the first Court, the disposal of the case must be held to have been on a preliminary point and the order of remand must consequently be held to be under this rule. **AIR 1934 Mad 643**.

22). Order of remand - When will amount to a decree:-

- Remand consequently direction for amendment of plaint – Finding recorded by appellate Court adverse to appellant – No decree. **AIR 1961 Mad 262 (263)**.
- Order of remand not deciding rights of parties – Not a decree. **AIR 1934 Pat 13 (14)**.

23). Letters Patent Appeal:-

- An order of remand by a single Judge of the High Court is a “judgment” within the meaning of Cl.15 of the Letters Patent and is appealable as such.

Remand under O.41 R.23. AIR 1933 All 262 (263) (FB).

Remand under inherent power : AIR 1922 Pat 384 (385) (DB).

- Where the appellant in the first Appellate Court prayed for quashing the order of the Court below and the Appellate Court quashed the order and remanded the case, the appellant cannot be considered to be an aggrieved party since he had got all the reliefs he wanted, and cannot maintain a Letters Patent Appeal against the order of remand. **AIR 1968 Andh Pra 74 (77).**

24). Supreme Court appeal:-

- Where some aspects were disposed of cursorily by High Court, the Supreme Court could remand the case for disposal of those aspects. **AIR 1980 SC 192 (193).**
- When an order of remand was passed by the Supreme Court with direction to decide matter in light of particular Supreme Court judgment, subsequent pronouncements of judgments by Supreme Court; changing view expressed in earlier judgment can be considered by Court of remand while deciding the matter. **AIR 1994 Delhi 189 (193) : (1993) 51 Delhi LT 120.**
- Order of remand by High Court - Correctness cannot be challenged in Supreme Court. **AIR 1979 SC 102 (109).**
- Conclusions reached by High Court in order of remand are binding on both the parties and also upon the Court and can be challenged only in Supreme Court. **AIR 1979 MP 99 (102).**
- Suit by person on allegation that he was occupying kutcha building belonging to company as tenant and same was wrongfully demolished - Application for admission of additional evidence during appeal rejected after Court became functus officio - Suit defended on ground that plaintiff was mere licensee - Application for additional evidence appearing to be of great importance - Company explaining circumstances preventing it from producing documents during trial stage - Case remitted to appellate Court for fresh decision. **AIR 1991 SC 91 (92) : 1991 (2) Supp (2) SCC 282.**
- Suit for injunction on ground that defendant's construction encroaches upon plaintiff's portion - Plaintiff in pleading relying upon schedule of property given in sale deed and not on plan annexed to sale deed - Subsequent amendment sought by plaintiff to rely on measurements given in plan annexed to sale deed - Rejected by Supreme Court an case remanded for trial on pleadings as they exist - Court trying suit on remand cannot rely on plan annexed to sale deed - Damages awarded to plaintiff by relying on plan liable to be set aside. **AIR 2001 SC 797 (799) : 2001 AIR SCW 460.**

25). Powers of High Court in appeal from order of remand:-

The High Court has no power in an appeal from an order of remand to go into any question unconnected with the

correctness of the order of remand. **AIR 1928 Mad 430(432) (DB)**.

26) To what Court remand can be made:-

Ordinarily, a case should be remanded to the Court from whose decree the appeal is preferred and to no other Court. **(1913) 20 Ind Cas 788 (789)(Lah)**.

27) Effect of order of remand:-

- An order of remand implies a reversal of the decision of the lower Court. **AIR 1959 Madh Pra 181(182)**.
- It depends on the terms of remand order whether any of the interlocutory orders are affected by the remand order. Normally, the remand order would not affect any interlocutory orders unless it expressly says so. **1979 Rajdhani 77(Delhi)**.
- Where a party did not take any part in the proceedings of the lower Court and did not appeal against the order of the lower Court, it was held that he could not, after remand in an appeal by other objectors, intervene as an objector on remand. **AIR 1933 Lah 948 (949) (DB)**.
- When a matter is remanded with specific direction for a decision afresh, the jurisdiction of trial Court, after remand depend upon the terms of the remand order and the Court cannot either consider matters other than those specified in the remand order or enter into questions falling outside its limits. **1991 MPRCJ 20 (25)**.

28). Effect of improper order of remand:-

Where an order of remand is passed in circumstances which do not warrant it. Such an order is not one passed without jurisdiction and hence, does not in itself, affect the jurisdiction of the Court and neither the order of remand nor the subsequent proceedings based thereon can be interfered with, unless the decision of the case on the merits or the jurisdiction of the Court in any other respect has been affected. **(1907) 5 Cal LJ 328 (333) (DB)**.

29). Matters decided by order or remand, finality of:-

- A Court dealing with the case after remand under this rule can take notice of subsequent events which have rendered the order of remand nugatory. **AIR 1972 All 360(365)(DB)**.
- The principle that a Court can take notice of subsequent events is subject to the finality of the order of remand under this rule. **AIR 1969 Andh Pra 45 (47)**.

30). Jurisdiction and powers after remand depend upon the order of remand:-

- Where a case is remanded to a particular Court, it is only that Court and no other Court which can try it. **AIR 1923 Mad 351 (352)**.
- If a case is remanded to a District Court, that Court can, under Section 24 of the Code, transfer the case to any other Court subordinate to it which is a competent to try it. **AIR 1922 All 35 (36) (DB)**.

31). Procedure after remand:-

- After an order of remand the parties are entitled to have a reasonable date fixed for further hearing. **(1868) 9 Suth WR 294(295) (DB)**.
- The trial court to which a case is remanded has to issue notice of remand to the contesting defendant but who was set ex parte. **ILR (1980) 1 Kant 678**.

32). Refund of Court-fee on remand:-

Where a remand is made under this rule, the Appellate Court is bound under section 13 of the Court Fees Act, 1870, to order a refund of the court-fee. **AIR 1980 SC 591(592, 593)**.

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II. Remand in other cases Order 41, Rule 23A C.P.C

Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

Inserted by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), S.87 (xi) (1-2-1977).

1) Legislative History:-

Prior to the enactment of the rule by the Amending Act, 1976, it was held that although under Rule 23, an order of remand can be passed only on the reversal of a decree disposing of a suit on a preliminary point, yet, in other cases also, the appellate Court has an inherent power of remanding a case for retrial to the lower Court where it considers it necessary, in the interests of justice, to do so. **AIR 1977 Orissa 194 (196)**.

2) Scope of Rule:-

- Under this rule, a suit may be remanded to the lower Court even though such Court has disposed of the case on merits and not merely on a preliminary point. **1986 LS (AP) 20(24)**.
- The order of remand made without coming to a conclusion that the decision of the trial Court is wrong and that it is necessary to reverse or set aside the decree, is illegal. In this view the necessary conclusion is that the appellate Court has to consider the evidence on record and then to arrive at a conclusion whether the finding recorded by the trial Court cannot be

supported on evidence on record. **(1985) 2 Andh LT 534 (538).**

- It is only in exceptional circumstances the Court may exercise the power of remand dehors the Rule 23 and 23A. To wit, the superior Court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 11, Rule 31 and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate Court should be circumspect in ordering a remand when the case is not covered either by R.23 or R.23A or R.25. An unwarranted order of remand gives the litigant an undeserved lease of life and therefore must be avoided. **AIR 2002 SC 771(776).**
- Order under Order 41, Rule 23-A, C.P.C has to be passed sparingly because a litigation is to be concluded finally as early as possible. But where the court feels that remand is necessary and Rule 25 is not considered to be adequate, order can be passed under Order 41, Rule 23-A C.P.C.**(1986) 2 Orissa LR 654).**
- A retrial is to be ordered under Rule 23-A only in cases where there has not been a proper trial by reason of something done by the Court. **1988 Supp SC 171.**
- Where the defendant could not cross-examine the witnesses examined on behalf of the plaintiff, the entire trial becomes vitiated and remand order would be governed by Order 41, Rule 23A. **(1994) 2 BLJR 1112(1114).**
- Suit for recovery of possession, lease amount and mesne profit - Lessee questioned title of lessor the plaintiff stating that property actually vested with Government - Under circumstances without deciding title of plaintiff controversy could not be decided - Matter remanded with specific direction to trial Court to decide dispute regarding identity of plaintiff property. **(2004) 3 Mad LJ 56.**

3) Restrictions in order of remand:-

- The remand is not meant for filling up lacunae or to give a fresh opportunity to a party to litigate. **AIR 2005 Bom 86(93).**(Merely because there was some illegality while deciding suit, it would be an empty formality to remand suit if same would result in starting another round of litigation). **(1989) 1LS 129 (131)(AP).**
- When a remand is ordered under Rule 23-A, it is not a reversal of a decree merely because the decree is set aside. The appellate Court is required first to make an endeavour to answer the disputed findings and where in spite of findings it would not be in a position to come to a conclusion either way it would remand the suit for a fresh trial. **(1986 1 Orissa LR 198(200).**

4) Amendment of pleadings:-

If the appellate Court finds that the averments made in the plaint suffer from vagueness and require particulars then appellate Court itself would allow amendment of pleading if the

party chooses to do so and not otherwise, but in no case the appellate Court should suo motu remand a suit to the trial judge for fresh trial with discretion for amendment of plaint by the trial judge. **(1998) 2 ICC 258(260)**.

5) "Retrial on fresh evidence":-

Remand of the case for retrial has to be resorted to by the appellate Court only in a situation where either party specifically prays for it. **(1990) 1 Cal LT 379(382)**.

6). Appeal:-

An order of remand under this Rule is appealable under Order 43, Rule 1(u) and hence no revision lies from such an order. **2005(4) Andh LT 78(79)**.

7). Revision:-

As an order of remand under this rule is appealable under Order 43, Rule 1(u), it is not subject to the revisional powers of the High Court. **ILR (1974) Him Pra 33(36)**.

8). Court-fee, refund of:-

- If the case is remanded under Order 41, Rule 22 or 23-A, the appellant is entitled to refund of the Court-fee under section 13 of the Court-fees Act, 1870. **(AIR 1958 Punj 38(FB))**.
- When the matter is remanded on technical objection, the Court-fees paid is refundable. **(1996) 1 Land LR 374(376)**.

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III. ORDER 41 RULE 25 C.P.C : Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from

Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor. a(within such time as may be fixed by the Appellate Court or extended by it from time to time.)

(a) Inserted by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), S.87 (xii) (1-2-1977).

1). Scope of the rule:-

- A remand after reversing the decree of the lower Court is one under Rule 23 or Rule 23-A. **AIR 1960 Bom 543 (546)**.

- Provisions of Order 41, Rule 25 make it clear that the evidence, if any, recorded during original trial of suit subject to all exceptions, be evidence during trial after remand and the trial Court shall try suit with reference to issues that are directed to be framed by appellate Court. **(2003) 2 Andh LT 743(746)**.
- In a remand under this rule, the appellate Court does not reverse the lower Court's decree but retains the matter on its file and only calls for a finding by the lower Court on some issue or issues. **AIR 1966 Pat 422 (424)**.
- This rule enables the appellate Court to remit issue to the lower Court for findings where the lower Court has failed to try any issue or determine any question of fact essential to the right decision of the suit on the merits. **AIR 1965 SC 364(370)**.
- Where the lower Court, in disposing of a suit on merits, has failed to determine one or more material issues, the proper procedure is to remit issues under this rule but not to remand the whole case for retrial. **1986 LS (AP) 20(22)**.

2). Powers of High Court under the Constitution of India to remand entire case:-

The powers of the High Court under Arts.226 and 227 of the Constitution are not restricted by the strict rules of procedure contained in the Code. The High Court under the said Articles can direct a fresh decision of the entire case irrespective of the points taken by the party. **AIR 1972 Cal 401(403)**.

3). "Has omitted to frame or try any issue.":-

- Order of remand can be passed by Court of appeal under Order 41, Rule 25 when trial Court omitted to frame or try any issue - Appellate Court in such circumstances may frame issues and remand matter for limited purpose of determination of said issues. **2005 AIR Jhar HCR 282(287)**.
- Where an issue relating to a material question is ambiguous, an issue may be remitted to the lower Court under this Rule. **AIR 1977 SC 2047(2049)**.

4). "May, if necessary, frame issues":-

- The appellate Court is not bound to remand issues under this rule in every case in which the lower court has failed to frame or decide any issue. **AIR 1928 Mad 635(636) (DB)**.
- The question of remanding issues is one of the exercise of the discretion of the Court in each case. **AIR 1950 PC 80(81)**.
- Remand is not necessary especially where the parties have led evidence fully on the point. **AIR 1927 All 410(411)**.
- In ordering a remand under this rule, the appellate Court should specify the issues to be tried by the lower Court. 1976 J&K LR 534 (541).

5). "Shall direct such Court to take the additional evidence r

equired.”:-

- In a remand under Rule 25 the Court below can take the additional evidence directed to be taken and decide the issue remitted on the appreciation of such evidence. **AIR 1967 Pat 151(152).**
- In an order of remand it is necessary that the direction should be clear, certain and definite and without any ambiguity. **AIR 1961 SC 402(405, 406).**

6). What Court may try the issues remitted:-

- Where issues are referred to the Court from which the appeal was preferred, no other Court has power to try them. **(1907) 29 All 660(662) (DB).**
- Where during the pendency of an appeal to the High Court, the lower Court had lost jurisdiction over the suit area owing to a redistribution of areas but the High Court directed the lower Court to submit findings on certain issues, it was held that the lower Court should be considered to have retained the jurisdiction as regards pending suits, and that even assuming that the lower Court had lost its jurisdiction to try the suit, the direction of the High Court should be considered as a transfer of the case to that Court. **(1910) 7 Ind Cas 864 (DB).**
- The Court of first instance omitted to try a certain issue. The appellate Court, which had no jurisdiction to entertain the appeal however, entertained the appeal and remanded an issue to the Court of first instance. On the return of the findings, the appeal then came before the proper Court. Held that though the order of remand was made by a Court which had no jurisdiction to deal with the case, this was not a fatal objection to the result of the enquiry made in pursuance of the order and that the appellate Court which subsequently dealt with the case could take it into consideration. **(1909) 1 Ind Cas 460 (461) (DB) (Lah).**
- Where an Additional District Judge has remanded the case to a Subordinate Judge, the District Judge has power to transfer the proceedings to another Subordinate Judge. **AIR 1933 Lah 29 (31).**
- District Judge can transfer appeal even after appellate Court has remitted issues and received the findings - Hence transferee Court can hear objections to the findings. **AIR 1962 Cal 265 (267) (DB).**
- Division Bench hearing appeal has power and jurisdiction to remand case to single Judge for getting matter adjudicated on merits. **1996 AIHC 2141 (2142) : (1996) 112 Pun LR 533 (P & H).**

7). Powers and duties of Court to which issues are remitted:-

- A Court to which issues are remitted under this rule can only try the issues and has no power to decide the suit itself. **(1869) 11 Suth WR 77 (78, 79) (SB).**

- A Court to which issues are remitted has no power to refer the case to arbitration. **(1885) 7 All 523 (526) (DB)**.
- The lower Court to which issues have been referred under this Rule cannot go beyond the issues remitted and try any other issue. **AIR 1975 Gauhati 70 (71)**.
- The lower Court cannot raise an objection that the issue remanded did not arise on the pleadings in the case. **(1972) 2 Sim LJ (HP) 325**.
- Where the lower Court is asked to submit a finding on an issue after recording such evidence as may be produced by the parties, it is bound to give an opportunity to both the parties to produce their evidence. **AIR 1921 All 127 (128)**.
- The parties who had no occasion to produce evidence at the trial stage, and were not conscious of the legal position because of the absence of the issue, opportunity must be given to them to adduce their respective evidence on the important provision of law. **1979 Shrinagar LJ 107 (111) (J & K)**.
- Where the Court to which issues are remitted records its findings ex parte without giving any party an opportunity to produce his evidence, it may restore the case and allow him to produce his evidence. **AIR 1921 All 127 (128)**.
- After a case is remanded under this rule the lower Court cannot add new parties to the suit. **1907 Punj LR No.20.p.45**.
- The lower Court can bring on record the legal representatives of a deceased appellant. **(1904) 7 Oudh Cas 17(18)(DB)**.
- When a case is remanded by the High Court to the lower appellate Court, it is the imperative duty of the appellate Court to implicitly give effect to the direction given in the remand order. It has no jurisdiction to go beyond the directions. **AIR 1980 Raj 139(142, 143, 144)**.

8). Order of remand is binding in subsequent stages of the case:-

An order of remand under this rule is an interlocutory order, and unless set aside in appropriate proceedings, is binding on the subsequent Bench disposing of the case, though the views on the merits of the case that might have been expressed by the earlier Bench in the order of remand will be open to reconsideration by the later Bench which finally disposes of the case. **AIR Mys 61(64)(DB)**.

9). New issues raised before the Appellate Court:-

- As a general rule a new point not based on the case pleaded or set up by the parties in the lower Court, cannot be raised for the first time in the Appellate Court, and a remand cannot be ordered for the decision of such point. **AIR 1960 Mys 249(252)**.
- Remand of issues on points not arising on the pleadings as framed can be done only in exceptional circumstances, for good

cause shown, and on payment of all costs thrown away. **AIR 1916 PC 126 (128, 129).**

- A remand can be ordered on a point not raised in the memorandum of appeal. **AIR 1921 Lah 256(258)(DB).**

10). Hearing of appeal after return of findings:-

Rule 26(2) provides for such hearing of the appeal after the return of the remitted issue by the lower Court. The procedure is that objections to the findings, if any, are called off and after the objections are filed or the time fixed (or extended) for filing objections has expired, the appellate Court proceeds to hear the appeal. At such hearing, the entire appeal is opened and the appellate Court cannot confirm the arguments of the parties to the points or which findings were called for. **AIR 1974 SC 170(173).**

11). Remand in second appeal:-

- The High Court in second appeal can remand issues to the lower Court under the rule. **AIR 1977 Raj 87(93) (FB).**
- Where the High Court in second appeal remands to the lower Appellate Court for a finding on an issue of fact and such finding is remitted to the High Court, the High Court cannot interfere with the finding of fact. **AIR 1962 Mys 61(65) (DB).**

12). Appeal:-

Order 43, R.1 does not provide for an appeal from an order under this rule. No appeal, therefore lies against an order remitting issues to the lower Court under this rule. **1954 Ker LT 881 (882).**

13). Inherent power of remand:-

- Grounds on which remand felt necessary specifically covered by R.23 or R.25 of O.41 – Question of resort to inherent powers for remand does not arise. **AIR 1966 Pat 422 (424).**
- Where in a dispute regarding a Will the plaintiffs had not been afforded opportunity for rebuttal of evidence against evidence led by the defendants and the appeal had been pending in the Court for a long time and complete remand would further delay the matter, the case could be remitted under O.41, R.25 to the trial Court to give opportunity to the plaintiffs to lead evidence in rebuttal. **(1990) 2 Cur LJ (C&Cri) 41 (43) (P&H).**

14). Letters Patent Appeal:-

No appeal lies under the Letters Patent against an order remitting issues under this rule. **AIR 1918 Pat 680 (682) (SB).**

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Iç. **PROVISIONS WHICH DISCOURAGE REMAND**

1) Section 97 CPC, 99 CPC, 99-A CPC, Order 41 Rule 24 CPC, Section 167 of Evidence Act:-

2) Other Relevant provisions: Order 22 Rule 5 CPC and Section 64 of A.P.Court Fees Act.

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This is my humble submission of the topic “**When and how remand order can be passed**” designated to me.

I thank one and all.

Bibliography:

The AIR Manual Civil and Criminal - Volume '7' by Manohar & Chitaley.

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