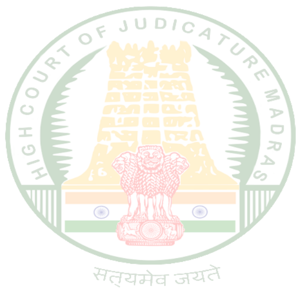
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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 25.04.2022

PRONOUNCING ORDERS ON : 28.04.2022

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Second Appeal Nos.568 and 569 of 2012

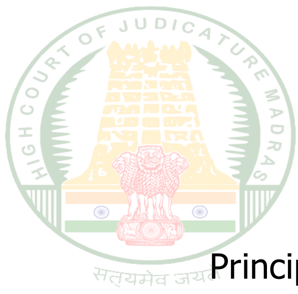
Suresh Kumar Kankariya ..Appellant/Respondent / Plaintiff in both Second appeals

.Vs.

K.Jigibai @ Pushpammal ..Respondent/Appellant/Defendant in both second appeals

Prayer in S.A.No.568 of 2012: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 01.02.2012 passed in A.S.No.131 of 2007, on the file of the Principal District Judge, Thiruvallur, reversing the judgement and decree dated 09.08.2007 passed in O.S.No.69 of 2003 on the file of Subordinate Judge, Thiruvallur.

Prayer in S.A.No.569 of 2012: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 01.02.2012 passed in A.S.No.132 of 2007, on the file of the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Principal District Judge, Thiruvallur, reversing the judgement and decree dated 09.08.2007 passed in O.S.No.25 of 2004 on the file of Subordinate Judge, Thiruvallur.

For Appellants
in Both Appeals : Mr.V.Manohar
For Respondents
in Both Appeals : Mr.P.Valliappan

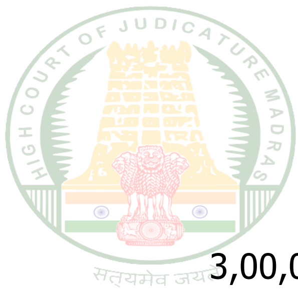
COMMON JUDGMENT

The issues involved in both these Second Appeals are common and hence they are taken up together, heard and disposed of through this Common Judgment.

2. The plaintiff is the appellant in both the Second Appeals.

3. The appellant filed O.S. No. 69 of 2003 seeking for the relief of permanent injunction and O.S. No. 25 of 2004 was filed seeking for the relief of specific performance.

4. The case of the plaintiff is that he entered into an agreement of sale with the defendant on 14.12.1998, marked as Ex.A1. As per the sale agreement, the total sale consideration was fixed at Rs.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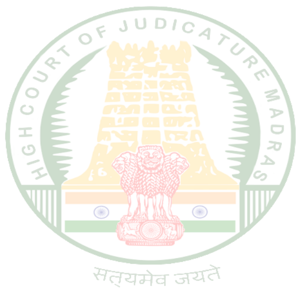
3,00,000/- and the plaintiff paid a sum of Rs.2,00,000/- as advance on the date of the agreement. The agreement further provided that the balance sale consideration of Rs.1,00,000/- will be paid within 12 months i.e., on or before 14.12.1999 and on receipt of the same, the defendant agreed to register a sale deed in favour of the plaintiff. According to the plaintiff, through Ex.A3 receipt dated 15.9.2001, the defendant received a further sum of Rs.85,000/- and agreed to receive the balance amount of Rs.15,000/- from the plaintiff while executing the sale deed in favour of the plaintiff. The plaintiff claims that by virtue of this receipt, the time was extended without fixing any time period.

5. The grievance of the plaintiff is that he was ready and willing to pay the balance sale consideration and the defendant was evading the execution of the sale deed. Hence, a legal notice was issued on 2.5.2003, marked as Ex.A4, calling upon the defendant to receive the balance sale consideration and execute the sale deed in favour of the plaintiff. On receipt of the same, a reply notice was given on 27.5.2003, marked as Ex.A5, wherein the defendant denied executing any sale agreement in favour of the plaintiff.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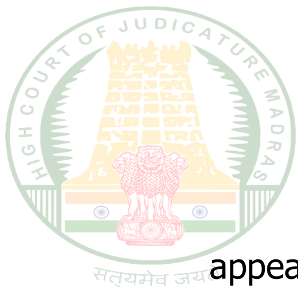
6. In the meantime, an attempt was made by the defendant to sell the property to third parties and hence the first suit was filed in O.S. No. 69 of 2003 seeking for the relief of permanent injunction. During the pendency of this suit, the next suit was filed in O.S. No. 25 of 2004 seeking for the relief of specific performance.

7. The defendant took a stand that the plaintiff's father is a money lender and the brother-in-law of the defendant purchased a lorry under hire purchase and the defendant stood as a surety and had put her signature in blank stamp papers. Inspite of the repayment of the loan amount, the security given by the defendant was not cancelled. Those signed blank documents have been misused and the sale agreement has been fabricated by the plaintiff. The defendant also stoutly denied the execution of a receipt as claimed by the plaintiff. Accordingly, the defendant sought for the dismissal of the suit.

8. The Trial Court decreed both the suits through a Judgment and Decree dated 9.8.2007. It was also confirmed in the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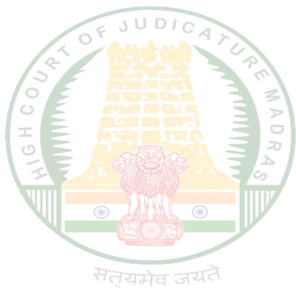
appeal through Judgment and Decree dated 30.4.2008. Aggrieved by the same, the defendant filed two Second Appeals before this Court in S.A. Nos. 1296 and 1297 of 2008. This Court through a Common Judgment dated 31.1.2011, remitted the case to the file of the Lower Appellate Court and the operative portion of the Judgment is extracted hereunder:

> ***"20. In the result, both these second appeals are remitted back to the first appellate court with a direction to decide the newly framed issue, viz., "Whether the suit O.S.No.25 of 2004 for specific performance is barred by Order 2 Rule 2 of CPC in view of non obtention of leave to file such a suit, while filing the earlier suit, which was one for bare injunction?" after entertaining oral and documentary evidence relating to it. The first appellate court also shall hear the arguments on both sides comprehensively on all the issues and render its judgment strictly in accordance with Order 41 Rule 31 of CPC and not cryptically as it was done earlier.***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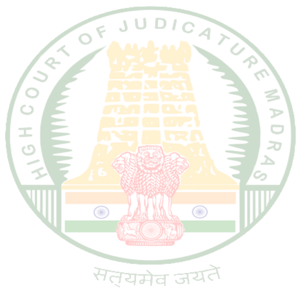
21. Accordingly, both the parties are directed to appear before the first appellate court on 24.02.2011 and the appeals shall be disposed of within a period of three months, thereafter. The first appellate court is expected to dispose of the matter independently, untrammelled and uninfluenced by any of the observations made by this court in remitting the matter back to it."

9. The matter was once again taken up by the Lower Appellate Court and it was dealt with as per the directions issued by this Court. The Lower Appellate Court on re-appreciation of the oral and documentary evidence and after considering the findings of the Trial Court allowed both the appeals through a Common Judgment dated 01.2.2012. Aggrieved by the same, the plaintiff has filed these Second Appeals.

10. When the Second Appeal was admitted, the following substantial questions of law were framed:

a) Whether the suit for specific performance filed in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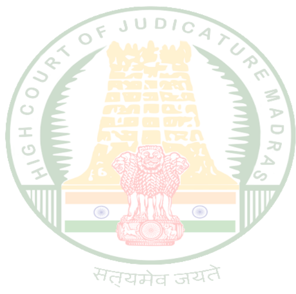
O.S.No.25 of 2004 is maintainable without seeking for a leave under Order 2 Rule 2 of C.P.C. when the first suit filed in O.S.No.69 of 2003 was filed only seeking for the relief of bare injunction?

b) Whether both the Courts below were right in rejecting the suit for specific performance only on the ground that the same is time barred?

c) Whether the findings rendered by the Lower Appellate Court can be termed as perverse due to improper appreciation of the oral and documentary evidence?

11. In the course of arguments, this Court framed the following additional substantial question of law for consideration:

Where a favourable finding has been given in favour of the plaintiff by the Courts below even though the relief was denied, whether such findings can be interfered in the Second Appeal even when a Cross Objection has not been filed by



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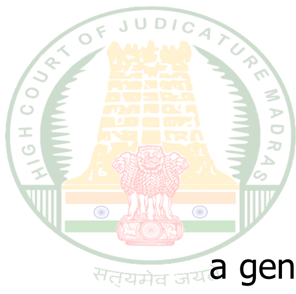
the successful party and what will be the scope of invoking Order XLI Rule 33 of the Code of Civil Procedure, while deciding the Second Appeal where the jurisdiction is

circumscribed by the provisions of Section 100 of the Code of Civil Procedure?

12. Heard Mr.V.Manohar, learned counsel for the appellant and Mr.P.Valliappan, learned counsel for the respondent. This Court also carefully considered the materials available on record and the findings of both the Courts below.

13. The Lower Appellate Court while dealing with the issue regarding the bar under Order II Rule 2 of CPC, held that, since both the suits were tried together and Common Judgment was pronounced, there is no bar and Order II Rule 2 of CPC cannot be invoked against the plaintiff. Having held so, the Lower Appellate Court went into the merits of the case and found that there is a cloud over the genuineness of the sale agreement and that Ex.A3 receipt was not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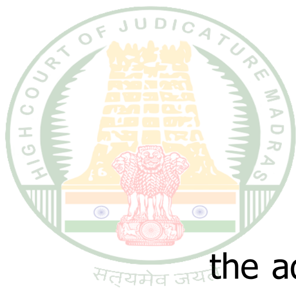
a genuine document and it was created by the plaintiff only to get over limitation and consequently, the suit itself is barred by limitation. Accordingly, the reliefs sought for by the plaintiff were rejected and the appeal was allowed.

14. During the course of arguments, the learned counsel for the respondent questioned the finding of the Lower Appellate Court on the issue pertaining to Order II Rule 2 of CPC. This was objected by the learned counsel for the appellant and he submitted that the respondent has not filed any cross-appeal or cross-objection against the adverse findings of the Lower Appellate Court and hence, the respondent cannot be permitted to question the findings of the Lower Appellate Court in the Second Appeal filed by the plaintiff. The learned counsel also submitted that Order XLI Rule 33 of CPC cannot be invoked in favour of the respondent since the respondent does not satisfy the requirements of that provision and it is not necessary for the Court to invoke the said provision in every other appeal unless the facts of the case warrants the same.

15. It was only after considering the above submissions,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the additional substantial question of law was framed by this Court on 18.2.2022 and the counsel appearing on either side were also heard on the additional substantial question of law.

16. The learned counsel for the appellant, to substantiate his submissions on the issue regarding Order II Rule 2 CPC, relied upon the following judgments:

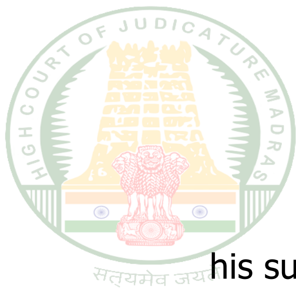
1. *Saraswathi Vs. P.S. Swarnalatha* reported in 2015 SCC OnLine Mad 259. (Madras High Court)

2. *Rathnavathi& Another Vs. Kavita Ganashamdas* reported in (2015) 5 SCC 223. *(*Supreme Court*)*

3. *B. Santhoshamma and another Vs. D. Sarala and another* reported in 2020. SCC OnLine SC 756. *(*Supreme Court*)*

4. *Pramod Kumar and Another Vs. Zalak Singh* reported in (2019) 6 SCC 621. *(*Supreme Court*)*

17. The learned counsel for the appellant while addressing the additional substantial question of law, to substantiate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his submissions, relied upon the following judgments:

1. ***Ku. Shakuntala Guha and others Vs. Jasmit Kaur Narula and others*** **reported in (2017) 173 AIC 368. (Madhya Pradesh High Court)**

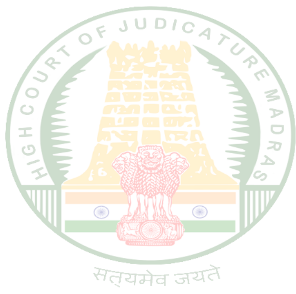
2. ***New India Assurance Co. Ltd. Thru A.M., Legal Cell Vs. Smt. Neelam Jaiswal & Others*** **reported in 2020 SCC OnLine All 85. (Allahabad High Court)**

3. ***RamaswamiGounder Vs. RamaswamiGounder and others*** **reported in (1972) 1 MLJ 417. (Madras High Court)**

4. ***Lakshmanan and others Vs. G. Ayyasamy*****reported in (2016) 13 SCC 165. (Supreme Court)**

5. ***Samudra Devi and others Vs. Narendra Kaur and others*** **reported in (2008) 9 SCC 100. (Supreme Court)**

6. ***Monish Das Vs. Rubina Rathore*** **reported in2021 SCC OnLine Del 5229. (Delhi High Court)**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***7. Banarsi and Others Vs. Ram Phal* reported in (2003) 9 SCC 606. (Supreme Court)**

8. Nirmala Bala Ghose and Another Vs. Balai Chand Ghose and Others reported in AIR 1965 SC 1874. (*Supreme Court*)

18. Per contra, the learned counsel for the respondent to substantiate his submissions with respect to the issue under Order II Rule 2 CPC, relied upon the following judgments:

1. N.V. Srinivasa Murthy and Ors. Vs. Mariyamma (Dead) by proposed L.Rs. and Ors. reported in AIR 2005 SC 2897.(Supreme Court)

2. M/s. Raptakos Brett and Co. Pvt. Ltd Vs. M/s. Modi Business Centre (Pvt.) Ltd. reported in AIR 2006 Mad 236. (Madras High Court)

3. Van VibhagKaramchariGrihaNirmanSahakari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Ors. reported in AIR 2011 SC 41. (Supreme Court)

4. N. Ravichandran Vs. V. Ramachandran reported in AIR 2011 Mad 136 (Madras High Court)

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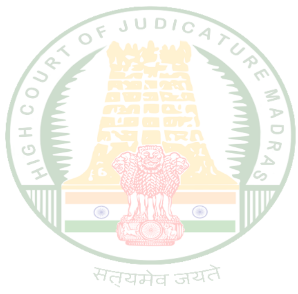
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5. State Bank of India Vs. Gracure Pharmaceuticals Ltd. reported in 2013 (6) CTC 789. (SC)

6. Coffee Board Vs. Ramesh Exports Pvt. Ltd. reported in 2014 (3) CTC 728 (SC).

7. Inbasagaran and Another Vs. S. Natarajan (Dead) Thr. L.Rs.reported in 2014 (6) CTC 445 (SC).

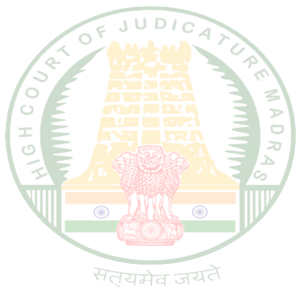
8. B.S.Garg Vs. R. Meena Sundar and Others reported in 2016 (4) CTC 278. (Madras High Court)

9. Subbiah (Died) and Others Vs. Thiruneelapandian and Others reported in 2017 (6) CTC 1. (Madras High Court)

10. V. Venkataravanappa Vs. D. K. Gopal and Anr. reported in AIR 2019 Kar 122. (Karnataka High Court)

11. VurimiPullarao Vs. VemariVyantakaRadharani and Another reported in AIR 2020 SC 395. (Supreme Court)

12. Gajanan R. Salvi Vs. Satish Shankar Gupte and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others reported in AIR 2004 Bom 455. (Bombay High Court)

13. Sornam and Others Vs. A. Venugopal and Another reported in 2010 (5) CTC 563. (Madras High Court)

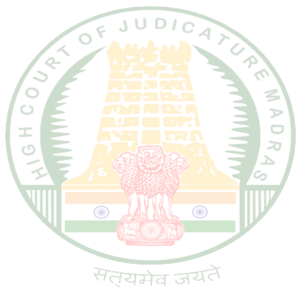
14. Kannammal and 9 others Vs. Palaniammal reported in 2019 (3) MWN (Civil) 406. (Madras High Court)

15. Antony Moses Vs. Roselin and Others reported in 2020 (5) CTC 435. (Madras High Court)

16. Virgo Industries (Engineers) Private Limited Vs. Venturetech Solutions Private Limited reported in 2020 (6) CTC 29. (Madras High Court)

19. The learned counsel for the respondent, in order to substantiate his submissions on the scope of the jurisdiction of the Appellate Court under Order XLI Rule 31 of CPC, relied upon the following judgments:

1. *P. K. Vasudaven Pillai and Another. Vs. Manikandan Nair and Others* reported in 2011 (1)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CTC 55. (Madras High Court)

2. *C. G. Jayaraman and Another Vs. C. Gangadharan*reported in 2011 (2) CTC 642. (Madras High Court)

3. *PoochenduAmmal Vs. Minor Jayamurugan and Another* reported in (2012) 5 MLJ 334. (Madras High Court)

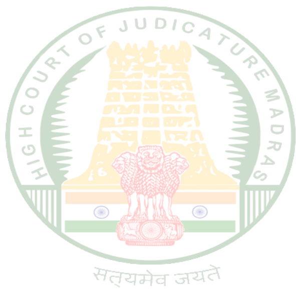
4. *U. Manjunath Rao Vs. U. Chandrasekhar and Anr.* reported in AIR 2017 SC 3591. (Supreme Court)

5. *Jamila Begum (D) thr. L.Rs. Vs. ShamiMohd. (D) thr. L.Rs.and another reported in 2019 (3) CTC 810*. (Supreme Court)

6. *K. Karuppuraj Vs. M. Ganesan* reported in 2022 (1) CTC 674. (Supreme Court)

20. The learned counsel for the respondent in order to substantiate his submissions on the scope of Order XLI Rule 33 of CPC, relied upon the following judgments:

1. Ram Sup Singh and others Vs. Kalap Nath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Singh and others reported in AIR 1948 All 33.(Allahabad High Court)

2. Narayanaswami Naidu Vs. Muthukrishna Chetty and others reported in AIR 1971 Mad 286. (Madras High Court)

3. Koksingh Vs. Smt. Deokabai reported in AIR 1976 SC 634. (Supreme Court)

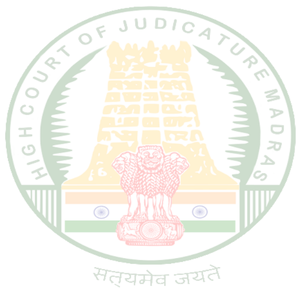
4. Nalini and others Vs. Padmanabhan Krishnan and others reported in AIR 1994 Ker 14. (Kerala High Court)

5. K.MuthuswamiGounder Vs. N. PalaniappaGounder reported in AIR 1998 SC 3118. (Supreme Court)

6. Gopala Gounder Vs. Kasi Ammal and another reported in 1999 1 Law Weekly 106. (Madras High Court)

7. Atul Chandra Kalita Vs. Bano Ram Boro and others reported in AIR 2004 Gau 174. (Gauhati High Court)

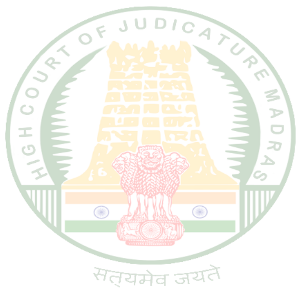
8. Manasa Housing Co-operative Society Ltd. Vs.



Marikellaiah and Others reported in AIR 2006 Kar 273. (Karnataka High Court)

9. Sundararajan and Another Vs. Mahalingam and Others reported in 2009 (6) CTC 169. (Madras High Court)

21. This Court will now consider the scope of Order XLI Rule 22 CPC which deals with cross- objection. By virtue of Order XLII Rule 1CPC, the Rules under Order XLI will apply even to Second Appeals. In view of the same, this Court has to render a finding as to whether the respondent is entitled to question an adverse finding against him in the Second Appeal filed by the plaintiff, without filing a cross-objection. If this Court holds that such filing of cross-objection is mandatory, the next issue to be gone into is as to whether this Court can invoke the power conferred under Order XLI Rule 33 of CPC and render a finding in favour of the respondent even where the respondent has not filed a cross-objection. The findings on these legal issues will ultimately provide the answer for the additional substantial question of law framed by this Court.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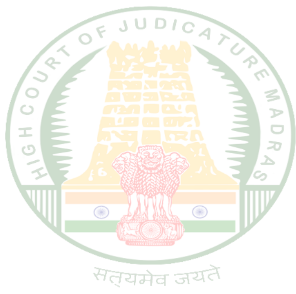
22. In the present case, the respondent/defendant has ultimately succeeded in the appeal and both the suits filed by the plaintiff has been dismissed by setting aside the judgment and decree of the Trial Court. However, there is an adverse finding against the respondent/defendant on the issue of Order II Rule 2 CPC. Admittedly, the respondent/defendant has not preferred a cross-objection against the adverse finding. The question that arises for consideration is as to whether the respondent/defendant can question the adverse findings in the Second Appeal filed by the plaintiff.

23. The question that has been taken up for consideration is no longer *res integra* and it has been answered in the following judgments:-

a) In *State of A.P. v. B. Ranga Reddy* reported in2020 (1) MWN (Civil) 207: (2020) 15 SCC 681, the Hon'ble Supreme held as follows:

> "***18.*** *This Court examined the question as to whether decree for specific performance could be granted once declined by the trial court without filing any appeal or cross-objections. The Court held as under: (Banarsi case [Banarsi v. Ram Phal, (2003) 9 SCC 606] , SCC pp.*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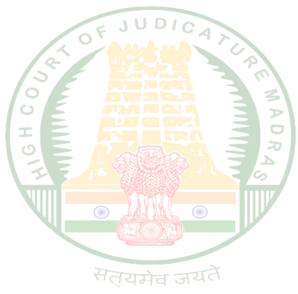
615-16, paras 8-9)

"8. Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. [See Phoolchand v. Gopal Lal [Phoolchand v. Gopal Lal, AIR 1967 SC 1470 : (1967) 3 SCR 153] , Jatan Kumar Golcha v. Golcha Properties (P) Ltd. [Jatan Kumar Golcha v. Golcha Properties (P) Ltd., (1970) 3 SCC 573] and Ganga Bai v. Vijay Kumar [Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393] .] No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against decree and not against judgment.

9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. … A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him. Appeal and cross-objection — both are filed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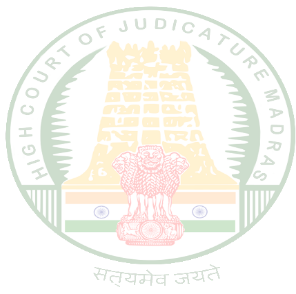
against decree and not against judgment and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended CPC."

(emphasis in original)

19. *This Court while considering the amendments made in the Code in the year 1976, held that even under the amended provisions of Order 41 Rule 22 of the Code, a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objections. However, by an amendment in Order 41 Rule 22 of the Code, it is permissible to file cross-objections against the finding. The respondent may defend himself without filing any cross-objections to the extent to which the decree is in his favour. The Court held as under: (Banarsi case [Banarsi v. Ram Phal, (2003) 9 SCC 606] , SCC pp. 616-17, paras 10-11)*

"10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which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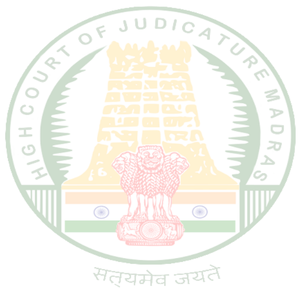
decree is in his favour; however, if he proposes to attackany part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a findingin the judgment which goes against the respondent.

11. In the type of Case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of Cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying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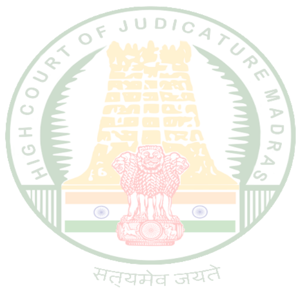
challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objections to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelt out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default, the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

(emphasis in original)

20. *The present is a case where the decree is of dismissal of suit, therefore, entirely in favour of the State and not executable. Though an issue has been decided against the State as falling within second and third situation delineated by this Court. This Court held that in the absence of cross-appeals or cross-objections, the first appellate court did not have the jurisdiction to modify the decree that is to grant decree for specific performance*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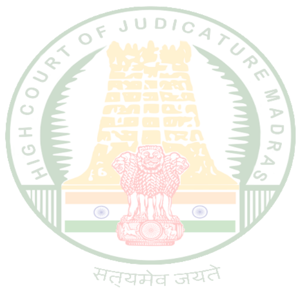
which was not granted by the trial court.

***21.** The Court did not find any merit in the argument that the appellate court was not powerless to grant decree as such decree has been granted in terms of Order 41 Rule 33 of the Code. The Court held as under: (Banarsi case [Banarsi v. Ram Phal, (2003) 9 SCC 606] , SCC p. 619, para 15)*

"15. … While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least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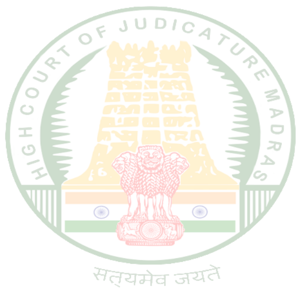
three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41."

22. *Such view of the Court has been followed in a judgment in Hardevinder Singh [Hardevinder Singh v. Paramjit Singh, (2013) 9 SCC 261 : (2013) 4 SCC (Civ) 309] . The said judgment arises out of a suit filed for possession of the suit land, challenging the will said to be executed in favour of the defendants. The suit for joint possession was decreed holding that the will is surrounded by suspicious circumstances and that the suit land was joint Hindu family property. In an appeal, the first appellate court recorded a finding that the property of the deceased Shiv Singh was self acquired and that the will in favour of Defendants 1 to 4 was validly executed. The first*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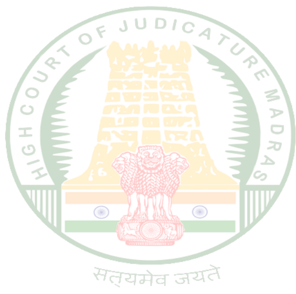
appellate court dismissed the suit for the reason that there is a settlement between the parties. Defendant 5, brother of the plaintiff who had similar interest as that of the plaintiff, aggrieved against the said judgment and decree passed by the first appellate court filed the second appeal, which was dismissed [Hardevinder Singh v. Paramjit Singh, 2011 SCC OnLine P&H 9080 : ILR (2012) 1 P&H 699] as not maintainable. In these circumstances, this Court held that a person has a right to maintain an appeal if such person is prejudicially or adversely affected by a decree. It was held that Defendant 5, brother of the plaintiff, benefited from the decree granted by the trial court but the plaintiff has settled the dispute with Defendants 1 to 4, the rights of Defendant 5 were unsettled and the benefit accrued in his favour became extinct, therefore, he had suffered a legal injury which could be challenged in second appeal. With the said finding, the judgment of the High Court was set aside and the matter was remitted to the High Court to decide afresh. This Court held as under: (Hardevinder Singh case [Hardevinder Singh v. Paramjit Singh, (2013) 9 SCC 261 : (2013) 4 SCC (Civ) 309] , SCC pp. 267-68, para 21)

"21. After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without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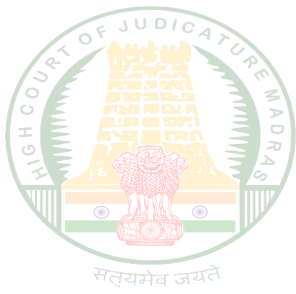
taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In Banarsi v. Ram Phal [Banarsi v. Ram Phal, (2003) 9 SCC 606] , it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, the respondent must file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is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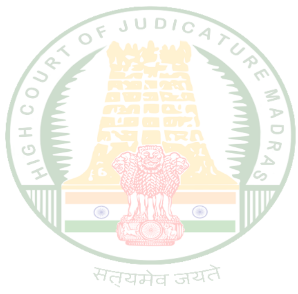
entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code."

(emphasis supplied)

23. *The judgment in Sri GangaiVinayagar Temple [Sri GangaiVinayagar Temple v. Meenakshi Ammal, (2015) 3 SCC 624 : (2015) 2 SCC (Civ) 350] is relied upon by both the parties. The learned counsel for the appellants relies upon para 25 of the order whereas, the counsel for the respondents relies upon para 27 of the order. Both the paragraphs read as under: (SCC pp. 645-47)*

"25. On the issue of applicability of res judicata in cases where two or more suits have been disposed of by one common judgment but separate decrees, and where the decree in one suit has been appealed against but not against the others, various High Courts have given divergent and conflicting opinions and decisions. … Without adverting to the details of those cases, it is sufficient to note that the hesitancy or reluctance to the applicability of the rigorous of res judicata flowed from the



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notion that Section 11 of the Code refers only to "suits" and as such does not include "appeals" within its ambit; that since the decisions arrived in the connected suits were articulated simultaneously, there could be no "former suit" as stipulated by the said section; that substance, issues and finding being common or substantially similar in the connected suits tried together, non-filing of an appeal against one or more of those suits ought not to preclude the consideration of other appeals on merits; and that the principle of res judicata would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment.

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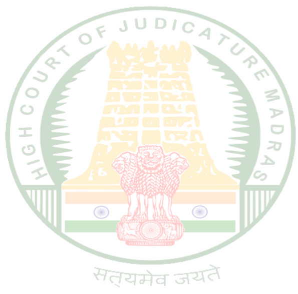
27. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the courts by Section 151 CPC, as clarified by this Court in Chitivalasa Jute Mills v. Jaypee Rewa Cement [Chitivalasa Jute Mills v. Jaypee Rewa Cement, (2004) 3 SCC 85] . In the instance of suits in which common issues have been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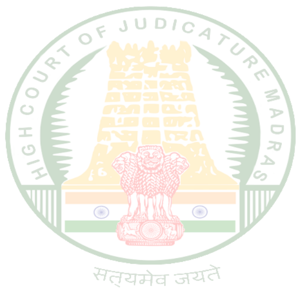
framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and processual law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the tenant diligently filed an appeal against the decree at least in respect of OS No. 5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at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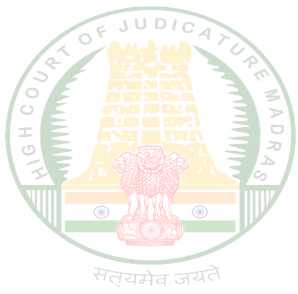
all."

24. *It may be noticed that separate decree is required to be preferred in each suit even though the suits are consolidated. The three-Judge Bench in Sri GangaiVinayagar Temple [Sri GangaiVinayagar Temple v. Meenakshi Ammal, (2015) 3 SCC 624 : (2015) 2 SCC (Civ) 350] has categorically held that where a common judgment has been delivered in cases in which consolidation orders have been passed, the filing of an appeal leads to the entire dispute becoming sub judice again. The aforesaid judgment arises out of the fact whether tenant has filed a suit to protect its possession during the lease period which was coming to an end on 1-1-1983, claiming injunction not specifically challenging the alienation by the trustees of a public trust. The trustees have filed two separate suits for claiming arrears of rent, one for claiming Rs 268 and another for Rs 2600.*

25. *The tenant's suit and the suit for the recovery of Rs 2600 were dismissed. Only one appeal was preferred by the tenant against the decree passed in the suit for recovery of Rs 268. In these circumstances, it was held that since the claim of the tenant in his suit was substantially in respect of the right of the trustees to alienate the property of the trust as alleged by the tenant, which is the issue in the other suits as well, therefore, the decree in the suit for injunction filed by the plaintiff would*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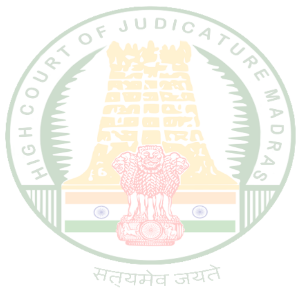
operate as res judicata. But in the present case, an appeal in the first and second suits is pending in which the appellant has right to support decree in terms of Order 41 Rules 22 and 33 of the Code.

26. *The learned counsel for the respondents strongly relies upon a Constitution Bench judgment of this Court in Badri Narayan Singh [Badri Narayan Singhv. Kamdeo Prasad Singh, (1962) 3 SCR 759 : AIR 1962 SC 338] to contend that the findings recorded in one appeal operate as res judicata in the second appeal. To appreciate such argument, some facts leading to the said judgment need to be mentioned. The election of the appellant was challenged before the Election Tribunal on the ground that the appellant was holding an office of profit and, therefore, it is against the provisions of Section 7 of the Representation of the People Act, 1951. There was allegation that the appellant had also committed corrupt practices. On the other hand, the respondent filed a petition praying for the declaration that the election of the appellant was void and also claimed declaration that he was duly elected having polled more votes after appellant elected candidate. The Election Tribunal found that the appellant was not holder of office of profit but held that he is guilty of corrupt practices. The election of the appellant was set aside but did not grant the declaration that the respondent was duly elected candidate. The appellant filed*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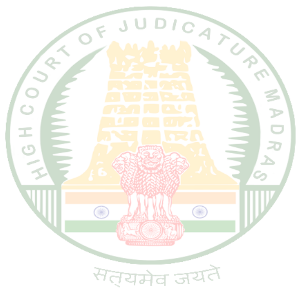
Election Appeal No. 7 of 1958 whereas the respondent filed Election Appeal No. 8 of 1958 in the High Court against the order of the Election Tribunal. The appeal filed by the appellant was dismissed holding that he was holding office of profit but has not indulged in corrupt practice whereas the appeal filed by the respondent was allowed by a common judgment declaring the respondent to be duly elected. The appellant filed appeal before this Court only against the order [Badri Narain Singh v. Kamdeo Prasad Singh, 1959 SCC OnLine Pat 103 : AIR 1961 Pat 41] in Appeal No. 8 of 1958. All the grounds of the appeal relate to the finding of the High Court in Appeal No. 7 of 1958. In appeal before this Court, a preliminary objection was taken that no appeal was preferred by the appellant against the order [Badri Narain Singh v. Kamdeo Prasad Singh, 1959 SCC OnLine Pat 103 : AIR 1961 Pat 41] of the High Court in Appeal No. 7 of 1958. The Court distinguished the earlier judgment in Narhari [Narhari v. Shankar, AIR 1953 SC 419 : 1950 SCR 754] . It held that though Appeals Nos. 7 and 8 of 1958 arose out of one proceeding but the subject-matter of each appeal was different, therefore, the final judgment would operate as res judicata. The relevant findings read as under: (Badri Narayan Singh case [Badri Narayan Singh v. Kamdeo Prasad Singh, (1962) 3 SCR 759 : AIR 1962 SC 338] , AIR pp. 341-42, para 15)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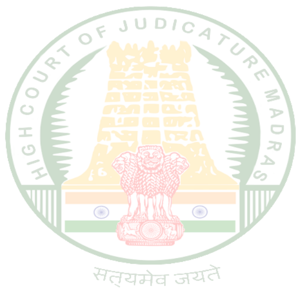
"15. It is true that both Appeals Nos. 7 and 8 before the High Court arose out of one proceeding before the Election Tribunal. The subject-matter of each appeal was, however, different. The subject-matter of Appeal No. 7 filed by the appellant related to the question of his election being bad or good, in view of the pleadings raised before the Election Tribunal. It had nothing to do with the question of right of Respondent 1 to be declared as duly elected candidate. … The finding about his holding an office of profit served the purpose of both the appeals, but merely because of this the decision [Badri NarainSinghv. Kamdeo Prasad Singh, 1959 SCC OnLine Pat 103 : AIR 1961 Pat 41] of the High Court in each appeal cannot be said to be one decision. The High Court came to two decisions. It came to one decision in respect of the invalidity of the appellant's election in Appeal No. 7. It came to another decision in Appeal No. 8 with respect to the justification of the claim of Respondent 1 to be declared as a duly elected candidate, a decision which had to follow the decision that the election of the appellant was invalid and also the finding that Respondent 2, as Ghatwal, was not a properly nominated candidate. We are therefore of opinion that so long as the order in the appellant's Appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a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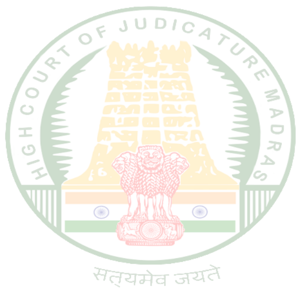
properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect."

(emphasis supplied)

27. *The said judgment has no applicability to the facts of the present case as the decree in Civil Suit No. 274 of 1983 or 276 of 1983 has not attained finality and the same are still subject-matter of appeal before the first appellate court wherein, the findings recorded by the trial court can be set aside while maintaining ultimate decree of dismissal of the suit. In Badri Narayan Singh [Badri Narayan Singh v. Kamdeo Prasad Singh, (1962) 3 SCR 759 : AIR 1962 SC 338] , the decision in an appeal became final, holding the appellant to be not duly elected candidate. Appeal No. 8 of 1958 was in respect of declaration that the respondent shall be deemed to be elected candidate. Therefore, in the absence of finality of judgments, there cannot be any question of such finding binding in the third suit.*

28.*Narhari [Narhari v. Shankar, AIR 1953 SC 419 : 1950 SCR 754] arises out of a suit for possession of ?rd share of land from the two sets of defendants. The suit was partly decreed. The trial court decreed the suit; however, two appeals were preferred by two sets of defendants. Both the appeals were allowed and the suit was dismissed. The*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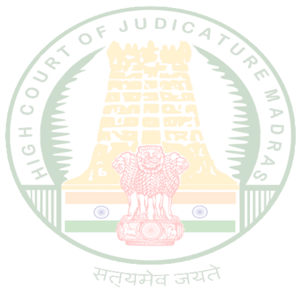
plaintiff filed one appeal after filing the consolidated court fee for the whole suit and by impleading all the defendants as respondents. The argument raised was that the plaintiff has filed only one appeal, therefore, the findings recorded in the other appeal will operate res judicata in the second appeal preferred by the plaintiff. The Court held as under: (AIR p. 420, para 5)

"5. … The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same judgment cannot remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one. Besides, the High Court was wrong in not giving to the appellants the benefit of Section 5 of the Limitation Act because there was conflict of decisions regarding this question not only in the High Court of the State but also among the different High Courts in India."

29.*Ganga Bai [Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393] is the judgment arising out of the proceeding prior to*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amendment of Order 41 Rule 22 of the Code. The High Court held that the first appeal filed by Defendants 2 and 3 was not maintainable even though the suit was wholly dismissed against them. The Court held that right of appeal is a creature of statute and that it is not inherent right. It was held as under: (SCC pp. 398 & 399, paras 17 & 21)

"17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43 Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by Defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court.

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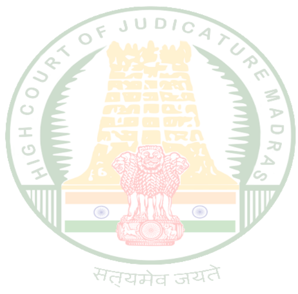
21. Thus, the appeal filed by Defendants 2 and 3 being directed against a mere finding given by the trial court was not maintainable...."

30. *In Ramesh Chandra [Ramesh Chandra v. Shiv CharanDass, 1990 Supp SCC 633 : AIR 1991 SC 264] , the Court held that one of the tests to ascertain if a finding operates as res judicata is that the party aggrieved could challenge it by way of an appeal. The Court held as under: (SCC p. 635, para 4)*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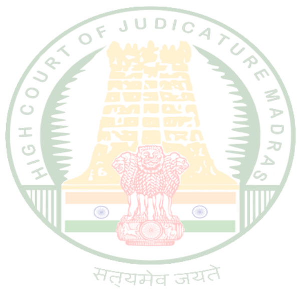
"4. One of the tests to ascertain if a finding operates as res judicata is if the party aggrieved could challenge it. Since the dismissal of appeal or the appellate decree was not against Defendants 2 and 3 they could not challenge it by way of appeal. Even assuming that Defendant 1 could challenge the finding that liability of rent was of Defendants 2 and 3 as they were in possession, he did not file any written statement in the trial court raising any dispute between himself and Defendants 2 and 3. There was thus no occasion for the appellate court to make the observation when there was neither pleading nor evidence."

31. *In another judgment S. Nazeer Ahmed [S. Nazeer Ahmed v. State Bank of Mysore, (2007) 11 SCC 75] , it has been held that the appellant without filing a memorandum of cross-objections in terms of Order 41 Rule 22 of the Code, could challenge the finding of the trial court. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. The Court held as under: (SCC p. 80, para 7)*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"7. The High Court [State Bank of Mysore v. S. Nazeer Ahmed, 2003 SCC OnLine Kar 928] , in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order 41 Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order 2 Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvas the correctness of the finding on the bar of Order 2 Rule 2 rendered by the trial court."

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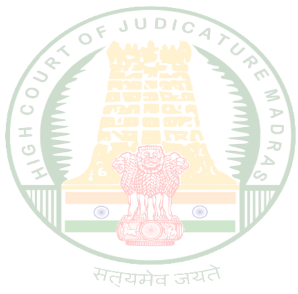
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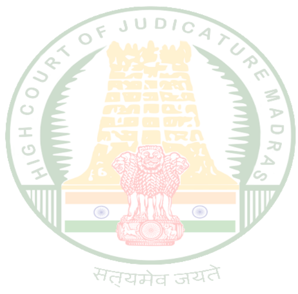
37. *We find that the High Court has failed to draw the distinction between the decree and a finding on an issue. It is the decree against which an appeal lies in terms of Section 96 of the Code. Decree in terms of Section 2(2) of the Code means formal expression of an adjudication conclusively determining the rights of the parties. The defendant State could not file an appeal against a decree which was of a dismissal of a suit simpliciter. The findings on Issue 1 against the State could be challenged by way of cross-objections in terms of amended provisions of Order 41 Rule 22 of the Code but such filing of cross-objections is not necessary to dispute the findings recorded on Issue 1 as the defendants have a right to support the ultimate decree passed by the trial court of dismissal of suit on grounds other than which weighed with the learned trial court. Even in terms of Order 41 Rule 33 of the Code, the appellate court has the jurisdiction to pass any order which ought to have been passed or made in proceedings before it."*

b) In *Shri Saurav Jain & another Vs. A.B.P. Design & another* reported in 2022 (1) CTC 235, the Hon'ble Supreme Court held as follows:

"25. It is apparent from the amended provisions of Order XLI Rule 22 CPC and the above authorities that there are two changes that were brought by the 1976



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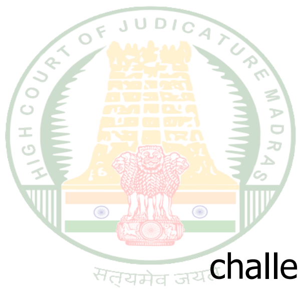
amendment. First, the scope of filing of a cross-objection was enhanced substantively to include objections against 'findings' of the lower court; second, different forms of raising cross-objections were recognised. The amendment sought to introduce different forms of cross-objection for assailing the findings and decrees since the amendment separates the phrase "but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour" from "may also take any cross-objection to the decree" with a semi colon. Therefore, the two parts of the sentence must be read disjunctively. Only when a part of the decree has been assailed by the respondent, should a memorandum of cross-objection be filed. Otherwise, it is sufficient to raise a challenge to an adverse finding of the court of first instance before the appellate court without a cross objection."

24. It is clear from the above judgments that the necessity to file a cross-appeal or a cross-objection will arise only when the impugned decree is partly in favour and partly against the respondent. Where the decree is entirely in favour of the respondent, though there is a finding against the respondent, he need not file a cross-appeal or a cross-objection and the adverse findings can be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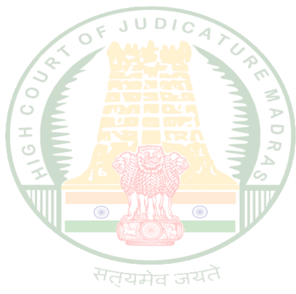
challenged in the appeal filed by the other party and the Court is entitled to decide the same. Even after the amendment that was brought in the year 1976 and an explanation was added to Order XLI Rule 22 of CPC and a right was created for filing a cross-objection against an adverse finding, the same is mandatory only where the decree is partly in favour and partly against the respondent.

25. When the above ratio is applied to the facts of the present case, it can be seen that the decree passed by the Lower Appellate Court was entirely in favour of the respondent and hence the respondent is entitled to question the adverse findings on the issue of Order II Rule 2 CPC rendered by the Lower Appellate Court, in the Second Appeal filed by the plaintiff.

26. In view of the above conclusion, there is no requirement for this Court to go into the scope of Order XLI Rule 33 of CPC to analyse if this provision can be invoked in the absence of a cross-objection filed by the respondent against adverse findings rendered by the Lower Appellate Court. Hence, there is no necessity to answer the additional substantial question of law framed by this Court.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27. This Court will now deal with the issue with regard to the bar under Order II Rule 2 of CPC. When this Court remanded the matter back to the file of the Lower Appellate Court, this issue was specifically directed to be taken up by the Lower Appellate Court and to render a finding on the same. The Lower Appellate Court has dealt with this issue as the fifth point for consideration in the appeal. The Lower Appellate Court has rendered the following finding on this issue:

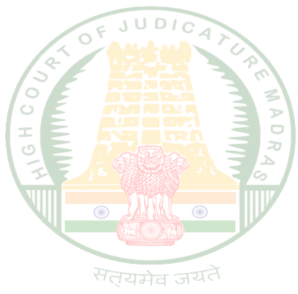
"to attract the bar under Order 2 Rule 2 CPC following three conditions has to be fulfilled.

1) Previous and second suit must arise out of the same cause of action.

2) Both the suits must be between the same parties.

3) The earlier suit must have been decided on merits.

The case on hand, the first two conditions were fulfilled. But the earlier suit O.S.69/2003 was not decided on merits. The earlier suit O.S.69/2003 and the subsequent O.S.25/2004 were jointly tried and common judgment was pronounced. Therefore the defendant cannot invoke Order 2 Rule 2 CPC. This point is answered in favour of the plaintiff and against the defendant."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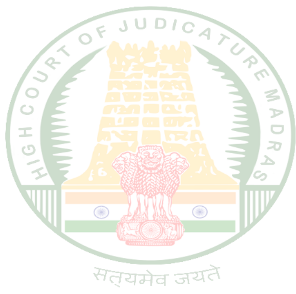
28. When the permanent injunction suit was filed in O.S. No. 69 of 2003, the cause of action was pleaded in that suit in the following manner:

> "*5. Finally, a lawyer's notice was sent by the plaintiff on 2.5.2003 to which the defendant replied denying everything. Further it is learnt that she is trying to sell the properties secretly to third parties. Hence this suit for a permanent injunction. The Plaintiff reserves the right to file a suit for specific performance at a later stage.*
>
> *6. The cause of action for the suit arose at Velanchery village, Firka, Tiruttani Taluk, within the jurisdiction of District Munsif Court, Tiruttani and pecuniary jurisdiction of this Hon'ble Court."*

29. In the subsequent suit filed seeking for the relief of specific performance, the cause of action was pleaded in the following manner: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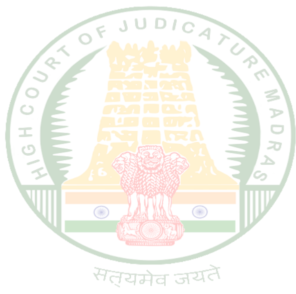
"5. The Plaintiff has sent a lawyer's notice on 2.5.2003 to which the defendant replied denying the agreement. Since the defendant was trying to sell the properties secretly to 3rd parties, the Plaintiff filed 0.S.69/2003 on the file of this Hon'ble Court reserving his right to file this suit for specific performance. Even in that suit O.S.69/2003 in the counter filed by the defendant, she has denied the agreement of sale. Therefore the Plaintiff is compelled to file this suit.

6. The Plaintiff has also issued suit notice on 29.9.2003 stating that he is ready and willing to pay the balance of sale consideration and if she does not come forward, the consequence will be the filing of the suit. To that also the defendant replied through her lawyer on 29.10.2003 again denying the very agreement of sale, the receipt of Rs.2,00,000/- and receipt of Rs.85,000/-. Hence this suit.

7. The cause of action for this suit arose at Velanchery Village, Tiruttani Taluk within the jurisdiction of DMC Tiruttani and pecuniary jurisdiction of this Hon'ble Court on 14.12.98 when the defendant entered into the suit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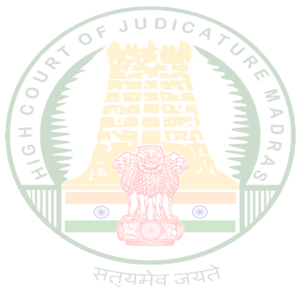
agreement and received Rs.2,00,000/-, On 15.9.2001when the defendant received a further sum of Rs.85,000/ and passed on the receipt enlarging the time,On 2.5.2003 when the plaintiff caused a lawyer's notice,On 27.5.2003 when the defendant replied through her lawyer, On 29.9.2003 when the suit notice was issued by the Plaintiff through her lawyer, On 29.10.2003 when the defendant replied through her counsel denying the execution of the sale agreement."

30. It is clear from the above that even as on the date when the permanent injunction suit was filed by the plaintiff on 19.6.2003, there was a cause of action to seek for the larger relief of specific performance. Admittedly, the plaintiff did not obtain any leave to seek for the relief of specific performance in the subsequent suit filed in O.S. No. 25 of 2004 on 25.2.2004, when the permanent injunction suit was filed in O.S. No.69 of 2003. In this background, this Court has to render a finding as to whether the subsequent suit filed in O.S. No. 25 of 2004 seeking for the relief of specific performance is barred under Order II Rule 2 of CPC.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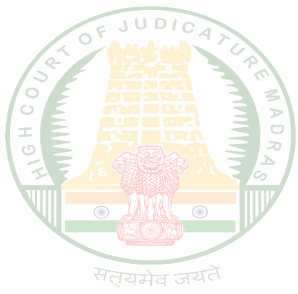
31. It will be relevant to take note of the judgments of the Hon'ble Supreme Court in this regard:-

a) *State Bank of India Vs. Gracure Pharmaceuticals Ltd.* reported in 2013 (6) CTC 789. The relevant portions are extracted hereunder:

"***11.*** *The above mentioned decisions categorically lay down the law that if a plaintiff is entitled to seek reliefs against the defendant in respect of the same cause of action, the plaintiff cannot split up the claim so as to omit one part to the claim and sue for the other. If the cause of action is same, the plaintiff has to place all his claims before the court in one suit, as Order 2 Rule 2 CPC is based on the cardinal principle that the defendant should not be vexed twice for the same cause.*

12. *Order 2 Rule 2 CPC, therefore, requires the unity of all claims based on the same cause of action in one suit, it does not contemplate unity of distinct and separate causes of action. On the above mentioned legal principle, let us*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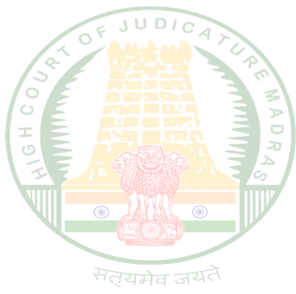
examine whether the High Court has correctly applied the legal principle in the instant case."

b) *Coffee Board Vs. Ramesh Exports Pvt. Ltd.* reported in 2014 (3) CTC 728 (SC) : (2014) 6 SCC 424. The relevant portions are extracted hereunder:

*"**9.** The above Rules are offshoots of the ancient principle that there should be an end to litigation traced in the Full Bench decision of the Court in Lachhmi v. Bhulli [ILR (1927) 8 Lah 384] and approved by this Court in many of its decisions. The principle which emerges from the above is that no one ought to be vexed twice for the same cause. In light of the above, from a plain reading of Order 2 Rule 2, it emerges that if different reliefs and claims arise out of the same cause of action then the plaintiff must place all his claims before the court in one suit and cannot omit one of the reliefs or claims except without the leave of the court. Order 2 Rule 2 bars a plaintiff from omitting one part of claim and raising the same in a subsequent suit. (See Deva Ram v. Ishwar Chand [(1995) 6 SCC 733].)*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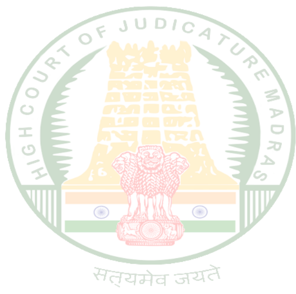
__10.__ Furthermore, this Court in Alka Gupta v. Narender Kumar Gupta [(2010) 10 SCC 141 : (2010) 4 SCC (Civ) 73] stated that: (SCC p. 147, para 12)

"12. … The object of Order 2 Rule 2 of the Code is twofold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action."

__11.__ The bar of Order 2 Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under



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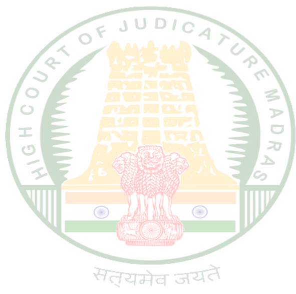
Order 2 Rule 2 must be specifically pleaded by the defendant in the suit and the trial court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in Alka Gupta v. Narender Kumar Gupta[(2010) 10 SCC 141 : (2010) 4 SCC (Civ) 73] which referred to the decision of this Court in Gurbux Singh v. Bhooralal [AIR 1964 SC 1810] wherein it was held that: (Alka Gupta case [(2010) 10 SCC 141 : (2010) 4 SCC (Civ) 73] , SCC p. 147, para 13)

"13. … '6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from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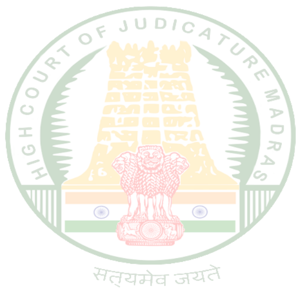
the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar.' (Gurbax Singh case [AIR 1964 SC 1810] , AIR p. 1812, para 6)"

12. *The courts in order to determine whether a suit is barred by Order 2 Rule 2 must examine the cause of action pleaded by the plaintiff in his plaints filed in the relevant suits (see S. Nazeer Ahmed v. State Bank of Mysore [(2007) 11 SCC 75]). Considering the technicality of the plea of Order 2 Rule 2, both the plaints must be read as a whole to identify the cause of action, which is necessary to establish a claim or necessary for the plaintiff to prove if traversed. Therefore, after identifying the cause of action if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the*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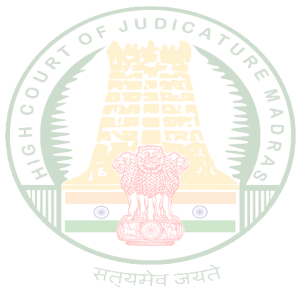
subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order 2 Rule 2."

c) *Inbasagaran and Another Vs. S. Natarajan (Dead) Thr. L.Rs.* reported in 2014 (6) CTC 445 (SC) : (2015) 11 SCC 12. The relevant portions are extracted hereunder:

" ***26.*** *In the light of the principles discussed and the law laid down by the Constitution Bench as also other decisions of this Court, we are of the firm view that if the two suits and the relief claimed therein are based on the same cause of action then only the subsequent suit will become barred under Order 2 Rule 2 CPC. However, when the precise cause of action upon which the previous suit for injunction was filed because of imminent threat from the side of the defendant of dispossession from the suit property then the subsequent suit for specific performance on the strength and on the basis of the sale agreement cannot be held to be the same cause of action. In the instant case, from the pleading of both the parties in the suits, particularly the cause of action as alleged by the plaintiff in the first suit for permanent injunction and the*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cause of action alleged in the suit for specific performance, it is clear that they are not the same and identical."

d) VurimiPullarao Vs. VemariVyantakaRadharani and Another reported in AIR 2020 SC 395 : (2020) 14 SCC 110. The relevant portions are extracted hereunder:

"***20.*** *In the present case, the earlier suit for injunction was instituted on 30-10-1996. Para 2 of the plaint in the suit for injunction contained a recital of the agreement to sell dated 26-10-1995; the price fixed for the bargain between the parties; the payment of earnest money; the handing over of possession; the demand for performance and the failure of the defendant to perform the contract. Indeed, the plaintiff also asserted that she was going to institute a suit for specific performance of the agreement dated 26-10-1995. Under the agreement dated 26-10-1995, time for completion of the sale was reserved until 25-10-1996. Notice of performance was issued on 11-10-1996 to which the defendant had replied on 13-10-1996. The cause of action for the suit for specific performance had arisen*

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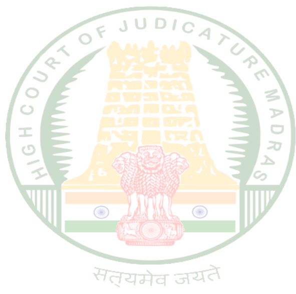
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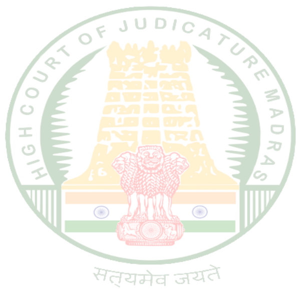
when the plaintiff had notice of the denial by the defendant to perform the contract. On 30-10-1996 when the suit for injunction was instituted, the plaintiff was entitled to sue for specific performance. There was a complete identity of the cause of action between the earlier suit (of which para 2 of the plaint has been reproduced in the earlier part of the judgment) and the cause of action for the subsequent suit. Yet, as the record indicates, the plaintiff omitted to sue for specific performance. This is a relief for which the plaintiff was entitled to sue when the earlier suit for injunction was instituted. Having omitted the claim for relief without the leave of the Court, the bar under Order 2 Rule 2(3) would stand attracted.

21. *But the case of the plaintiff in appeal is that in order that the bar under Order 2 Rule 2 be attracted, it is necessary that the plaint in the earlier suit must be proved in evidence. In the present case, it was submitted that this was not done. The basis of above submission is the judgment of the Constitution Bench in Gurbux*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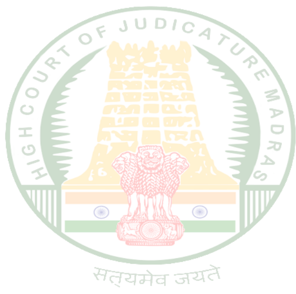
Singh [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810] . Now it is necessary to analyse the facts which led to the decision of the Constitution Bench. The respondent had instituted a suit against the claimant for possession of certain property and for mesne profits. The allegation in the plaint was that the plaintiff was the absolute owner of the property of which the defendant was in wrongful possession and that despite a demand he had failed to vacate the property, thereby attracting the liability to pay mesne profits. The plaint contained a reference to a previous suit instituted by the plaintiff and his mother in which a claim had been made against the defendant for the recovery of mesne profits in regard to the same property. It was also stated that mesne profits had been decreed in the suit. In the written statement, the appellant-defendant raised a plea to the maintainability of the suit on the ground of the bar under Order 2 Rule 2. As an issue was struck it was argued as a preliminary issue. The Court recorded a finding that the suit was barred by the provisions of Order 2 Rule 2. The Court held that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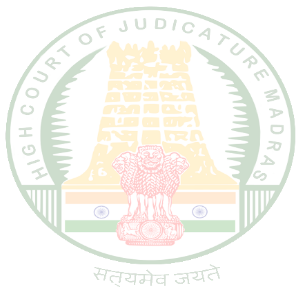
without the pleadings in the earlier suit being made a part of the record, the trial court decided the issue as a matter of deduction. Consequently, the District Judge held that the bar under Order 2 Rule 2 could not have been entertained without the plaint in the earlier suit being made a part of the record. However, the first appellate court also held that if the point did arise for consideration, it would have decided it in favour of the plaintiff and treated the cause of action for a suit for mesne profit as distinct from a cause of action for the relief of possession of a property from a trespasser. However, on the first point that there was no material on the record to justify the plea of a bar under Order 2 Rule 2, the District Judge did not rest his decision on his view of the law as regards the construction of Order 2 Rule 2(3). Accordingly, he set aside the dismissal of the suit and remanded it to the trial court for a decision on merits. The High Court dismissed the second appeal as a consequence of which proceedings came up before this Court.

22. *In that context, the Constitution Bench held :*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(Gurbux Singh case [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810] , AIR p. 1812, para 6)

"6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by

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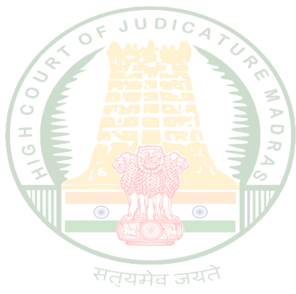
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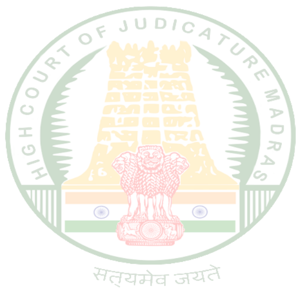
no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits."

23. *On the facts of the case, the Constitution Bench in Gurbux Singh [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810] noted that it was common ground that the pleadings in the earlier suit had not been filed by the appellant in the subsequent suit as evidence in support of the plea under Order 2 Rule 2. This Court observed that in the absence of the pleadings, the decision of the trial Judge was merely as a matter of opinion. This Court agreed with the view which had been taken by the District Judge who had noticed the deficiency in the case of the appellant : without the plaint in the previous suit being on the record, a plea of the bar under Order 2 Rule 2 was not*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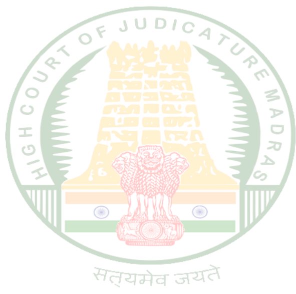
maintainable. As a matter of fact, the High Court also noted that neither the plaint nor the written statement in the earlier suit had been filed and the only document which was available was the judgment in appeal. It was in this background that the Court observed that in the absence of the pleadings in the earlier suit, it was not possible to enter a finding on the identity of the cause of action.

***24.** The situation as it obtained in the case before the Constitution Bench in Gurbux Singh [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810] is distinct from the events as they transpired in the present case. The first appellate court, in the judgment which it delivered upon remand took note of the fact that the defendant had by its application at Ext. 117 prayed for summoning the original record of the earlier suit for injunction for proving the plaint. The plaintiff opposed that plea with the assertion that a certified copy of the document could be placed on record instead of summoning the original record. The Civil Judge, Senior Division, accordingly rejected the application*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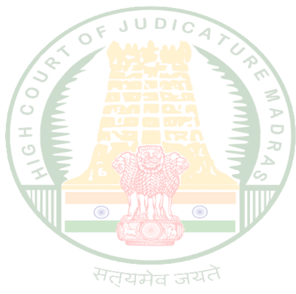
on the ground that since the certified copy was filed on the record, it was unnecessary to call for the original record. The defendant had moved another application at Ext. 118 in the nature of a notice to admit the certified copy of the plaint in the earlier suit. This came to be allowed by the trial court. The first appellate court noted that there was no objection from the plaintiff whereupon the certified copy of the plaint was marked as Ext. 137. In this background, the first appellate court was clearly justified in coming to the conclusion that this is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in the earlier suit. The finding that there was no prejudice to the plaintiff cannot be faulted. The parties were all along aware of the pleadings, the nature of the objection to the maintainability of the subsequent suit on the ground of the bar under Order 2 Rule 2 and the fact that the plaint in the earlier suit was brought on the record. Indeed, it was at the behest of the plaintiff that a certified copy of the plaint in the earlier suit was allowed to be brought on the record and marked as Ext. 137. In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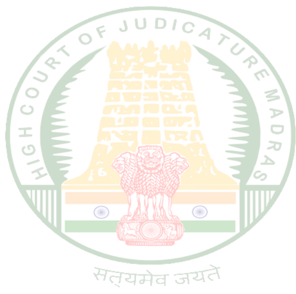
the circumstances, we are of the view that the bar under Order 2 Rule 2 is attracted. The plaintiff was entitled to sue for specific performance when the earlier suit for injunction was instituted but omitted to do so. There was an identity of the cause of action in the earlier suit and the subsequent suit. The earlier suit was founded on the plea of the plaintiff that it was in pursuance of the agreement to sell dated 26-10-1995 that he had been placed in possession of the property. Yet, without seeking the leave of the Court, the plaintiff omitted to sue for specific performance and rested content with the prayer for permanent injunction. In these circumstances, we agree with the finding which has been arrived at by all the three courts that the subsequent suit filed is barred under Order 2 Rule 2 does not warrant any interference in this appeal. The appeal would accordingly have to stand dismissed and we order accordingly."

e) *Pramod Kumar v. Zalak Singh* reported in 2019 (4) CTC 606 : (2019) 6 SCC 621. The relevant portions are extracted hereunder: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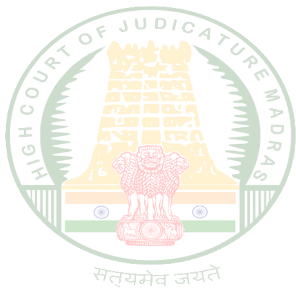
*"**28.** Order 2 Rule 2(1) provides that a plaintiff is to include the whole of the claim, which he is entitled to make, in respect of the cause of action. However, it is open to him to relinquish any portion of the claim. Order 2 Rule 2 provides for the consequences of relinquishment of a part of a claim and also the consequences of omitting a part of the claim. It declares that if a plaintiff omits to sue or relinquishes intentionally any portion of his claim, he shall be barred from suing on that portion so omitted or relinquished. Order 2 Rule 2(3), however, deals with the effect of omission to sue for all or any of the reliefs in respect of the same cause of action. The consequences of such omission will be to preclude plaintiff from suing for any relief which is so omitted. The only exception is when he obtains leave of the court.*

***29.** In a recent judgment of this Court, the distinction between Order 2 Rule 2(1) and Order 2 Rule 2(3) has been succinctly brought out in Virgo Industries (Engineers) (P) Ltd. v. Venturetech Solutions (P) Ltd. [Virgo Industries (Engineers) (P) Ltd. v. Venturetech Solutions (P) Ltd.,*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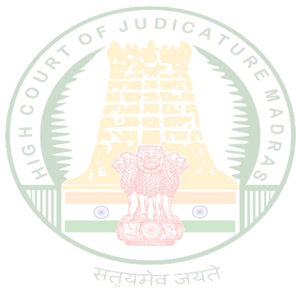
(2013) 1 SCC 625 : (2013) 1 SCC (Civ) 679] This Court, inter alia, has held as follows : (SCC pp. 630-31, paras 9-10)

"9. Order 2 Rule 1 CPC requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 CPC contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order 2 Rule 2 CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. … Such leave of the court is contemplated by Order 2 Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. It is, therefore, clear from a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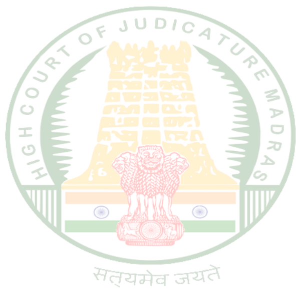
conjoint reading of the provisions of Order 2 Rules 2(2) and (3) CPC that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit.

10. The object behind the enactment of Order 2 Rules 2(2) and (3) CPC is not far to seek. The rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons."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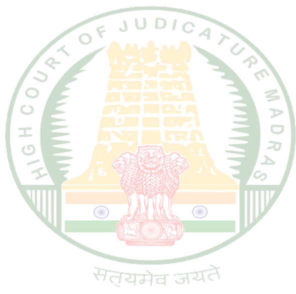
30. *Thus, in respect of omission to include a part of the claim or relinquishing a part of the claim flowing from a cause of action, the result is that the plaintiff is totally barred from instituting a suit later in respect of the claim so omitted or relinquished. However, if different reliefs could be sought for in one suit arising out of a cause of action, if leave is obtained from the court, then a second suit, for a different relief than one claimed in the earlier suit, can be prayed for. There are three expressions which are found in Order 2 Rule 2. Firstly, there is reference to the word "cause of action", secondly the word "claim is alluded to" and finally reference is made to "relief".*

31. *The defence, which is set up by the defendants, would be irrelevant to determine what cause of action means. The reliefs, which are sought by the plaintiffs, will not be determinative of what constitutes cause of action. Cause of action, as explained by the Privy Council in Mohd. Khalil Khan case [Mohd. Khalil Khan v. Mahbub Ali Mian, 1948 SCC OnLine PC 44 : (1947-48) 75 IA 121 : AIR 1949 PC 78] , means the media through which the plaintiff seeks to*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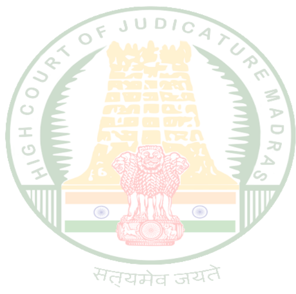
persuade the court to grant him relief. It could, therefore, be said to be the factual and legal basis or premise upon which the court is invited by the plaintiff to decide the case in his favour. It is also clear that the cause of action, in both the suits, must be identical. In order that it be identical, what matters, is the substance of the matter."

f) *Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd.* reported in (2013) 1 SCC 625. The relevant portions are extracted hereunder:

*"**14.** The averments made by the plaintiff in CSs Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when CSs Nos. 831 and 833 of 2005 were instituted, namely, 28-8-2005 and 9-9-2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27-7-2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance along with the relief of permanent injunction that formed the subject-matter of the above two*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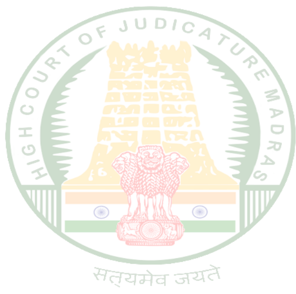
suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in CS Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.

17. *The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in R. Vimalchand v. Ramalingam [(2002) 3 MLJ 177] holding that the provisions of Order 2 Rule 2 CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order 2 Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the*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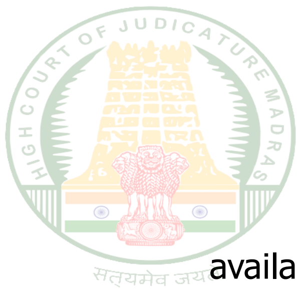
provisions of Order 2 Rule 2 CPC as already discussed by us, namely, that Order 2 Rule 2 CPC seeks to avoid multiplicity of litigations on the same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully subserved by holding that the provisions of Order 2 Rule 2 CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order 2 Rule 2 CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram [ILR (1894) 16 All 165] and by the Bombay High Court in Krishnaji Ramchandra v. Raghunath Shankar [AIR 1954 Bom 125] ."

32. The ratio that could be deduced from the above judgments are that the plaintiff cannot split up the claim so as to omit one part of the claim and sue for the other if the cause of action is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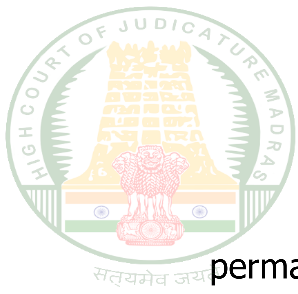
available for all the claims. The Court in order to determine whether a suit is barred by Order II Rule 2 of CPC must examine the cause of action pleaded by the plaintiff in the relevant suits. If the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order II Rule 2, unless a leave is obtained in the earlier suit where a lesser relief was sought for. This bar under Order II Rule 2 will even apply in a case where the second suit is filed during the pendency of the first suit and it is not necessary that the first suit should have been disposed of when the second suit is filed.

33. When the above proposition of law is applied to the facts of the present case, the only conclusion that could be arrived at by this Court is that the subsequent suit filed in O.S. No. 25 of 2004 is barred by Order II Rule 2 of CPC. This is in view of the fact that the plaintiff could have claimed the relief of specific performance even when the earlier suit was filed in O.S. No. 69 of 2003 since the cause of action was available. The plaintiff failed to seek for the larger relief and also omitted to take the leave of the Court when the earlier suit was filed in O.S. No. 69 of 2003 seeking for the lesser relief of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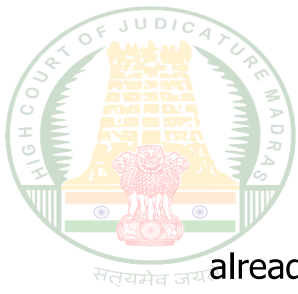
permanent injunction. The findings rendered otherwise by the Lower Appellate Court is unsustainable and is liable to be interfered by this Court. The first substantial question of law is answered accordingly.

34. The Lower Appellate Court while dealing with the merits of the case, appreciated the oral and documentary evidence available on record and came to a clear conclusion that Ex.A3 receipt is a fabricated document which was created by the plaintiff only to escape from limitation. This finding is supported by cogent reasons and this Court does not find any perversity in those findings. This Court cannot once again re-appreciate the evidence while exercising its jurisdiction under Section 100 of CPC. Therefore, the findings rendered by the Lower Appellate Court on the merits of the case against the plaintiff does not warrant any interference. The third substantial question of law is answered accordingly.

35. In the present case, the agreement is dated 14.12.1998 and the time fixed under the agreement was 12 months. If that is taken into consideration, the plaintiff ought to have paid the balance sale consideration on or before 14.12.1999. This Court has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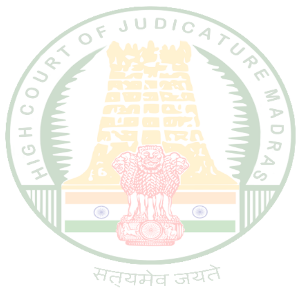
already upheld the finding of the Lower Appellate Court to the effect that Ex.A3 receipt is a concocted document. Hence, if Ex.A3 is eschewed, the suit ought to be filed within 3 years from the expiry of the time fixed under the agreement. The suit for specific performance was filed only on 25.2.2004 which is much beyond the period of limitation. At this juncture, it will be relevant to take note of the Judgment of the Division Bench of this Court in [***K. Murali Vs. M. Mohamed Shaffir]*** reported in **2020 (1) CTC 38** where Article 54 of the Limitation Act was interpreted by this Court. The relevant portions in the Judgment are extracted hereunder:

"18. On the principle governing the application of Article 54 Part I or Part II, as the case may be, it has been held in ***Ramzan****(supra), as under and paragraph (6) thereof is fruitfully reproduced hereunder:-*

"The question is whether a date was fixed for the performance of the agreement and in our view the answer is in the affirmative. It is true that a particular date from the calander was not mentioned in the document and the date was not ascertainable originally, but as soon as the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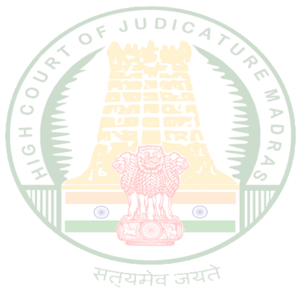
plaintiff redeemed the mortgage, it became an ascertained date. If the plaintiff had, immediately after the redemption, filed the suit, could it be thrown out on the ground that she was not entitled to the specific performance asked for? We do not think so. She would have been within her rights to assert that she had performed her part of the contract and was entitled to insist that her brother should complete his part. The agreement is a typical illustration of a contingent contract within the meaning of S. 31 of the Indian Contract Act, 1872 and became enforceable as soon as the event of redemption (by the plaintiff herself) happened. We agree with the view of the Madras High Court in R. MuniswamiGoundar v. B. M. ShamannaGoundar, AIR 1950 Mad 820 expressed in slightly different circumstances. The doctrine of id certumest quod certumreddipotest is clearly applicable to the case before us which in the language of Herbert Broom (in his book dealing with legal maxims) is that certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it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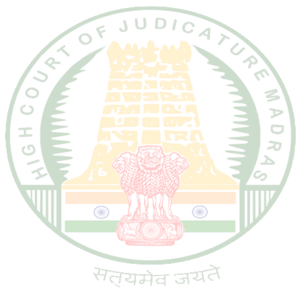
certain, that is sufficient. A similar question had arisen in Duncombe v. The Brighton Club and Norfolk Hotel Company (1875) 10 QB 371, relied upon in the Madras case. Under an agreement, the plaintiff had supplied some furniture to the defendant for which payment was made but after some delay. He claimed interest. The rule at Common Law did not allow interest in such a case, and the plaintiff in support of his claim relied upon a statutory provision which could come to his aid only if the price was payable at a certain time. Blackburn, J. observed that he did not have the slightest hesitation in saying that the agreement contemplated a particular day. which when the goods were delivered would be ascertained, and then the money would be payable at a certain time; but rejected the plaintiffs demand on the ground that the price did not become payable by the written instrument at a certain time. The other learned Judges did not agree with him, and held that the statute did not require that the document should specify the time of payment by mentioning the day of payment. If it specified the event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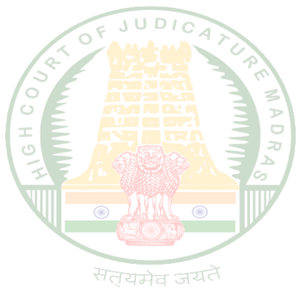
upon which the payment was to be made, and if the time of event was capable of being ascertained, the requirements of the section were satisfied. The same is the position in the case before us. The requirement of Article 113 is not that the actual day should necessarily be ascertained upon the face of the deed, but that the basis of the calculation which was to make it certain should be found therein. We, accordingly, hold that under the agreement the date for the defendant to execute the sale deed was fixed, although not by mentioning a certain date but by a reference to the happening of a certain event, namely, the redemption of the mortgage; and, immediately after the redemption by the plaintiff, the defendant became liable to execute the sale deed which the plaintiff was entitled to enforce. The period of limitation thus started running on that date. The case is, therefore, covered by the first part of Article 54 (third column) and not the second part."

19. We have perused the plaint filed. There is a marked difference between the cause of action for filing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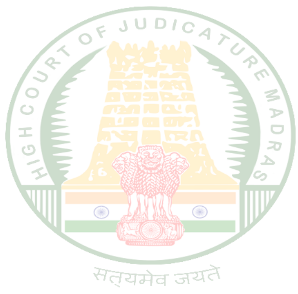
the suit and the starting point of the period of limitation. Therefore, the cause of action for filing may not be the starting point of limitation. Even in paragraph 13 which speaks about the cause of action, nowhere it has been stated that there was an oral extension, particularly because of the non- compliance of the terms of the agreement by the first defendant."

36. It is clear from the above judgment that the first part of Article 54 will apply to the facts of the present case. The limitation begins to run from the date the parties have stipulated for performance of the contract. The finding rendered by the Lower Appellate Court on this issue is perfectly in accordance with law and does not warrant any interference. The second substantial question of law is answered accordingly.

37. The upshot of the above discussion leads to the only conclusion that there are no merits in these Second Appeals and consequently both the Second Appeals are liable to be dismissed. All the substantial questions of law are answered against the appellant.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38. In the result, both the Second Appeals are dismissed with costs.

28.04.2022

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To

1.The Principal District Judge, Thiruvallur.

2.The Subordinate Judge, Thiruvallur.

3.The Section Officer
V.R.Section
High Court.
Madras.

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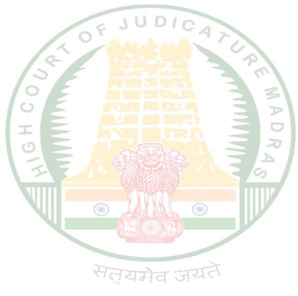
N.ANAND VENKATESH,J.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Common Judgment in

Second Appeal Nos.568 and 569 of 2012

28.04.2022