2019 INSC 886

CORRECTED

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 17486 OF 2017

STATE OF ANDHRA PRADESH & ORS. .....APPELLANT(S)

VERSUS

B. RANGA REDDY (D) BY LRs & ORS. .....RESPONDENT(S)

W I T H

CIVIL APPEAL NO. 17487 OF 2017

A N D

CONTEMPT PETITION (CIVIL) NO. 204 OF 2014

J U D G M E N T

HEMANT GUPTA, J.

1) The challenge in the present appeals is to an order passed by the High Court of judicature of Andhra Pradesh at Hyderabad on October 01, 2012 whereby an appeal filed by the appellants was found to be hit by the principle of *res judicata* and was dismissed.

2) The brief facts leading to the present appeals are that three separate suits were filed against the defendants including the State: first, Original Suit No. 274 of 1983 in respect of 6.08 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village; second suit bears Original Suit No. 276 of 1983 in respect of 3 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village; and third suit bears Original Suit No. 141 of 1984 which has

been filed in respect of land measuring 19.23 guntas in respect of land falling in Survey Nos. 49 and 50 in Rasoolpura Village. The stand of the State in all the suits is that the land in all the three suits falls in Survey No. 43 of Village Bholakpur, which is a Government Shikkam Talab measuring 145 acres 35 guntas, popularly known as Hussain Sagar Talab. All three suits were tried together. The evidence was recorded in Original Suit No. 274 of 1983. The issues and the findings recorded by the learned trial court on issues of title are as under:

"ORIGINAL SUIT NO. 274 OF 1983 – FIRST SUIT

Issues

1) Whether the suit property is part of Sy. No. 9/13 of Khairatabad Village as claimed by the plaintiff or whether it is a part of Sy. Nos. 49 and 50 of Rasoolpura Village as claimed by the defendants 1 to 4 or whether it is the part of Sy. No. 43 of Bholakpur Village as claimed by the Government?

Finding
Para 40. The plaintiff miserably failed to establish that the suit property forms part of Sy. No. 9/13 of Khairatabad Village. But the defendants 1 to 4 clearly established that it forms part of Sy. Nos. 49 and 50 of Rasoolpura. However, the Government also failed to established that the suit land forms part of Sy. No. 43 of Bholakpur Village.

2) Whether the plaintiff is entitled for declaration of his title to the suit property and whether he is entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

Finding
Para 41. The plaintiff miserably failed to establish his title and possession in the suit property and as such, he is not entitled for the relief of declaration or permanent injunction or possession.

3) To what relief?

Finding
Para 44. In the result, the suit is dismissed with costs.

ORIGINAL SUIT NO. 276 OF 1983 – SECOND SUIT

Issues

1) Whether the suit property is part of Sy. No. 9/13 of Khairatabad Village as claimed by the plaintiff or whether it is a part of Sy. No. 49 and 50 of Rasoolpura village as claimed by the defendants 1 and 2 or whether it is the part of Sy. No. 43 of Bholakpur Village as claimed by the Government?

   Finding
   Para 45. Issue No. 1 in Original Suit No. 274 of 1983 and this issue are practically one and the same and as such the finding on issue No. 1 in Original Suit No. 274 of 1983 holds good for this issue also.

2) Whether the plaintiff is entitled for declaration of his title to the suit property and Whether he is entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

   Finding
   Para 46. The plaintiff in this suit also failed to establish his title and possession in the suit property and as such, he is not entitled for the reliefs of declaration or permanent injunction or alternative relief of possession.

3) To what relief?

   Finding
   Para 49. In the result, the suit is dismissed with costs.

ORIGINAL SUIT NO. 141 OF 1984 – THIRD SUIT

Issues

1) Whether the suit property is part of Sy. Nos. 49 and 50 of Rasoolpura Village as claimed by the plaintiffs or Whether it is part of Sy. No. 9/13 of Khairatabad Village as claimed by the defendants 1 and 2 or Whether it is part of Sy. No. 4J of Bholakpur Village as claimed by the Government?

   Finding
   Para 50. The finding on Issue No. 1 in Original Suit No. 274 of 1983 holds good for this issue also.

2) Whether the plaintiff are entitled for declaration of

their title to the suit property and Whether they are entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

Finding
Para 52. The plaintiffs could establish their title in the suit property and as such they are entitled for the reliefs of declaration and possession. Though they were in possession of the property originally, the Special Executive Magistrate took possession of the property after the initiation of Section 145 Cr.P.C. proceedings. So the Government is bound to surrender possession to the plaintiffs in this Suit.

3) To what relief?

Finding
Para 56. In the result, the suit is decreed with costs, as prayed for. The Government is erected to deliver possession of the suit property to the plaintiffs within 2 months. However, this finding shall not come in the way of the Urban Land Ceiling authorities to initiate proceedings to take possession of the excess land, if any, from the plaintiffs (in Original Suit No. 141 of 1984). Similarly, the Government is also at liberty to acquire any portion of the suit land for public purposes by following the necessary procedure and by paying the adequate compensation to the plaintiffs."

3) The State filed appeal arising out of judgment and decree in Original Suit No. 141 of 1984 (Third Suit). In the said appeal, an objection was raised that the findings recorded on Issue No. 1 in Original Suit Nos. 274 of 1983 and 276 of 1983 have to be treated as decree and would operate as *res judicata*. The High Court while hearing such objections in appeal framed the following two points for consideration:

> "1) Whether the findings of the lower Court on issue No. 1 in O.S. Nos. 274 and 276 of 1983 have to be treated as decree and whether they operate as res judicata against the Government, since the Government have not filed any appeals challenging the said findings?

> 2) Whether the Government of Andhra Pradesh was not required to file appeals on the ground that no enforceable decree was passed against it?"

4) The High Court held that decision on issues or any matter in controversy shall be deemed to be decree in view of reading of Order XIV Rule 1 of the Code of Civil Procedure, 1908[1]. The High Court noticed the fact that in the third suit, there was a specific direction to deliver possession of the suit property to the plaintiff within two months but there is no specific direction against the Government in the first and the second suit but the fact remains that specific finding is given in those cases that Government failed to establish that the suit land forms part of Survey No.43 of Bholakpur Village. Thus, there is clear declaration of right and title of the parties. The High Court held as under:

> "In the present case, there is clear finding against the Government. When there is a clear finding that the suit land does not form part of Survey No. 43 of Bholakpur Village as claimed by the Government, it was obligatory on the part of the Government to file cross-objections. What Government can do is it can support the findings of the lower court. The findings of the lower court are that the suit land forms part of Survey No. 49 and 50 of Rasoolpura Village. Obviously, the Government cannot support such finding, because its case is that the suit land forms part of Survey No. 43 of Bholakpur Village.
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> In the appeals filed by the plaintiffs, the main question that falls for consideration is whether the suit properties form part of Survey No. 9/13 of Khairatabad village or it forms part of Survey Nos. 49 and 50 of Rasoolpura village. The question whether the suit land forms part of Survey No. 43 of Bholakpur village as claimed by the Government does not fall for consideration in the appeals in CCCA 1 of 1999 or CCCA No. 9 of 1999 i.e., appeals filed by the plaintiffs in O.S. Nos.274 and 276 of 1983. Therefore, without

1 for short, 'Code'

filing cross-objections the Government cannot challenge the findings of the trial court."

5) Mr. Vaidyanathan, learned senior counsel for the State relied upon judgments of this Court in ***Narhari & Ors.*** v. ***Shankar & Ors.***[2], ***Ganga Bai*** v. ***Vijay Kumar & Ors.***[3], ***Banarsi & Ors.*** v. ***Ram Phal***[4], ***Hardevinder Singh*** v. ***Paramjit Singh & Ors.***[5], ***Sri Gangai Vinayagar Temple & Anr.*** v. ***Meenakshi Ammal & Ors.***[6], ***Chitivalasa Jute Mills*** v. ***Jaypee Rewa Cement***[7], ***Ramesh Chandra*** v. ***Shiv Charan Dass***[8] and ***S. Nazeer Ahmed*** v. ***State Bank of Mysore & Ors.***[9] to contend that the defendants in the first and the second suit had no right to file an appeal against the decree of dismissal of suits passed in such suits. The appeal would not lie against the findings recorded when the decree is only of dismissal of the suits. It is argued that the effect of amendment in Order XLI Rule 22 of the Code vide Central Act No. 104 of 1976 is only to enable an aggrieved person to file cross objections but that does not take away the right of an aggrieved person to support the decree of dismissal of the suit in appeal on the grounds other than what weighed with the learned trial court in dismissing the suit. It is contended that appeal lies against the decree passed and not the judgment giving the reasons to pass a decree. It is further contended that the State has a right to agitate

2 AIR 1953 SC 419
3 (1974) 2 SCC 393
4 (2003) 9 SCC 606
5 (2013) 9 SCC 261
6 (2015) 3 SCC 624
7 (2004) 3 SCC 85
8 AIR 1991 SC 264
9 (2007) 11 SCC 75

the findings on Issue No. 1 in terms of the provisions of Order XLI Rule 33 of the Code as well, therefore, the findings recorded on Issue No. 1 are not final so as to operate *res judicata* against the decree in the third suit which is the subject matter of challenge by the State. It is contended that the State has filed cross objections before hearing of the appeal though after the order of the High Court, thus, the findings recorded on Issue No. 1 have not attained finality which can operate as *res judicata*. It is contended that the judgments referred to by the learned counsel for the respondents are in the cases where the decree had attained finality. But none of the judgments referred to by the learned counsel for the respondents pertains to a finding recorded in a civil suit which was dismissed and is subject matter of challenge in appeal by the plaintiff himself.

6) On the other hand, Mr. Dushyant Dave, learned senior counsel for the respondents argued that there is a categorical finding recorded by the trial court that land does not fall in part of Survey No. 43 of Bholakpur Village, as per the stand of the Appellants in all three suits, therefore, it was mandatory for the defendants to impugn such findings by way of an appeal in the first and second suit as well. Since the State has not filed any appeal against the findings recorded in the first and the second suit, the findings recorded therein will operate as *res judicata* and the appeal arising out of the third suit is barred by *res judicata*. Learned counsel for the respondents relied upon the judgments of this Court in ***Badri***

Narayan Singh v. ***Kamdeo Prasad Singh & Anr.***[10], ***Sheodan Singh*** v. ***Daryao Kunwar (Smt.)***[11], ***Lonankutty*** v. ***Thomman & Anr.***[12], ***Premier Tyres Limited*** v. ***Kerala State Road Transport Corporation***[13], ***Harbans Singh & Ors.*** v. ***Sant Hari Singh & Ors.***[14], ***Ashok Nagar Welfare Association & Anr.*** v. ***R. K. Sharma & Ors.***[15], ***Nirmala Bala Ghose*** v. ***Balai Chand Ghose***[16], ***Bhanu Kumar Jain*** v. ***Archana Kumar and Another***[17].

7) Mr. Dave submits that the judgments referred to by the learned counsel for the appellants are not applicable to the facts of the present case. He argued that *res judicata* applies not only to the decree but it bars the Court to try any suit or issue in which the matter has been directly and substantially in issue in former suit. It is, thus, contended that principle of *res judicata* are not only against the final judgment and decree but also in respect of any finding recorded in the suit.

8) Mr. Jai Savla, learned senior counsel, relied upon another judgment of this Court in ***Govindammal (D) by LRs & Ors.*** v. ***Vaidyanathan & Ors.***[18] to contend that plea of *res judicata* is applicable even in respect of co-defendants.

9) Respondent No. 8 in the written submissions relies upon ***Sri Gangai Vinayagar Temple*** to contend that the filing of a Single

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10 1962 (3) SCR 759
11 1966 (3) SCR 300
12 (1976) 3 SCC 528
13 1993 Supp. (2) SCC 146
14 (2009) 2 SCC 526
15 (2002) 1 SCC 749
16 1965 (3) SCR 550
17 (2005) 1 SCC 787
18 (2018) 14 SCALE 198

Appeal would lead to entire dispute becoming *sub judice* only if suits are consolidated. Since, three suits in question were not consolidated, therefore, non-filing of the appeal by the appellants in first and second suit will operate as *res judicata.*

10) Learned counsel for the appellants has produced a photocopy of the decree in the Original Suit No. 274 of 1983 which is to the effect “that the suit be and the same is hereby dismissed”.

11) To appreciate arguments of the learned counsel for the parties, certain statutory provisions from the Code need to be extracted before the judgments referred to by the learned counsel for the parties are considered.

> “**2(9)** "judgment" means the statement given by the Judge on the grounds of a decree or order;
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> **2(2)** "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include –
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> (a) any adjudication from which an appeal lies as an appeal from an order, or
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> (b) any order of dismissal for default.
>
> **96**. Appeal from original decree
>
> (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.
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> *** ***

Order XLI Rule 22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [19][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; and may also take any cross-objection] to the decree which he could have taken by way of appeal:

Provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[19][Explanation.- A respondent aggrieved by a finding of the Court in the judgement on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

Order XLI Rule 33. Power of Court of Appeal

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

19 Inserted by Central Act No. 104 of 1976

> **Section 11** - *Res judicata*
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> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
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> Explanation I - The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto."

12) The High Court referred to various judgments in respect of applicability of the principle of *res judicata*, therefore, non-filing of the appeal by the State in the other two suits operates as *res judicata*. The High Court referred to a judgment of this Court in ***Sheodan Singh*** wherein, this Court held that once a decree passed in the suit attains finality, it cannot be disturbed indirectly by adjudicating the very same questions in another appeal. We find that the findings recorded by the High Court are patently erroneous for the reasons recorded hereinafter. Therefore, non-filing of the appeal by the State in the other two suits operates as res judicata in the third suit.

13) The learned trial court had clubbed all the three suits and that common evidence was recorded, when it recorded the following fact:

> "All the above three suits have been clubbed and a joint trial has been held. O.S.No.274/83 has been taken as the leading suit and the evidence recorded in that suit has been taken as the evidence for the remaining two suits also. The parties to all the three suits can be divided into three groups……"

14) Learned counsel for the respondents has tried to draw distinction between an order of consolidation of suits and the order where a common judgment is rendered in different suits. In ***Sri Gangai Vinayagar Temple***, the Court referred to judgment in ***Chitivalasa Jute Mills***. However, we find that distinction drawn by learned counsel for the respondents is not tenable in law. ***Chitivalasa Jute Mills*** is a case where one suit was filed at Reva in Madhya Pradesh and another in Vishakhapatnam. The Court noticed that claim in one suit is a defense in another suit, therefore, the order was passed for transfer of a subsequent suit filed at Reva to Vishakhapatnam.

15) In the present case, evidence have been recorded only in one suit as all the three suits have been clubbed together. In view of the said fact, we find that merely the word consolidation has not been used by the learned trial court, therefore, it will not be a case of consolidation of suits but of separate trials.

16) In ***Banarsi,*** the provisions of Order XLI Rule 22 of the Code as it existed before and after the amendment in 1976 as well as Order XLI Rule 33 of the Code have been considered. The said judgment arises out of a fact where a suit for specific performance of an agreement was filed by the respondent in appeal before this Court. The appellants also filed a suit seeking cancellation of the agreement, the basis of the suit for specific performance. The learned trial court ordered the appellants to deposit a sum of Rs.2,40,000/- but the decree for specific performance was not

granted. Two appeals were taken up for hearing preferred by the appellants by the learned Additional District Judge. Both the appeals were dismissed but without any cross objections or an appeal, the Court decreed the suit for specific performance filed by the plaintiffs. The second appeal before the High Court was dismissed. It was held that the First Appellate Court committed no error of law exercising the powers under Order XLI Rule 33 of the Code to pass a decree for specific performance.

17) 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:

> "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* [AIR 1967 SC 1470 : (1967) 3 SCR 153] , *Jatan Kumar Golcha* v. *Golcha Properties (P) Ltd.* [(1970) 3 SCC 573] and *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.*
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> 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 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."

18) This Court while considering the amendments made in the Code in the year 1976, held that even under the amended provisions of Order XLI 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 XLI 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 decree is in his favour. The Court held as under:

> "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 decree is in his favour; however, if he proposes to *attack* any 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:
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> > (*i*) The impugned decree is *partly* in favour of the appellant and *partly* in favour of the respondent.
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> > (*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 *finding* in the judgment which goes against the respondent.
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> 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 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."

19) 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 which was not granted by the trial court.

20) 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 XLI Rule 33 of the Code. The Court held as under:

> "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 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."

21) Such view of the Court has been followed in a judgment in ***Hardevinder Singh***. 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 defendant Nos. 1 to 4 was validly executed. The First Appellate Court dismissed the suit for the reason that there is a settlement between the parties. The defendant No. 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 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 No. 5, brother of the plaintiff benefited from the decree granted by the trial court but the plaintiff has settled the dispute with defendant Nos. 1 to 4, the rights of defendant No. 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:

> "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 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* [(2003) 9 SCC 606 : AIR 2003 SC 1989] , 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 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."
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> *(emphasis Supplied)*

22) The judgment in ***Sri Gangai Vinayagar Temple*** is relied upon by both the parties. Learned counsel for the appellants relies upon para 25 of the order whereas, counsel for the respondents relies upon para 27 of the order. Both the paragraphs read as under:

> "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 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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> xxx xxx xxx
>
> 27. Procedural norms, technicalities and processal 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 vs. Jaypee Rewa Cement (2004) 3 SCC 85. In the instance of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially

> adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that 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. 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 all."

23) 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 Gangai Vinayagar Temple*** 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 January 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/.

24) 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 operate as *res judicata*. But in the present case, an appeal in the first and second suit is pending in which the appellant has right to support decree in terms of Order XLI Rules 22 and 33 of the Code.

25) Learned counsel for the respondents strongly relies upon a Constitution Bench judgment of this Court in ***Badri Narayan Singh*** 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 appellant had also committed corrupt practices. On the other hand, 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 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 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 of the High Court in Appeal No. 7 of 1958. The Court distinguished the earlier judgment in ***Narhari***. It held that though Appeal Nos. 7 and 8 of 1958 arose out of one proceeding but subject matter of each appeal was different, therefore, the final judgment would operate as *res judicata*. The relevant findings read as under:

> "14. It is true that both the 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 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 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)*

26) 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,*** the decision in an appeal became final, holding the appellant to be not duly elected candidate. The 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.

27) The ***Narhari*** arises out of a suit for possession of 1/3 share of land

from the 2 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 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:

> "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 ap- pealed against with a different number or a copy of it was attached to a different appeal. The two decrees in sub- stance 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……"

28) ***Ganga Bai*** is the judgment arising out of the proceeding prior to amendment of Order XLI Rule 22 of the Code. The High Court held that the first appeal filed by defendant Nos. 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:

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

29) In ***Ramesh Chandra***, 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:

> "3. 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……"

30) In another judgment reported as ***S. Nazeer Ahmed***, it has been held that the appellant without filing a memorandum of cross-objections in terms of Order XLI 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:

> "7. The High Court, 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."

31) Mr. Dave vehemently argued that *res judicata* in terms of Section 11 of the Code is not about a decree but to a finding in the former suit. It is argued that the first suit and second suit are the former suits in which the findings were written against the State, therefore, such findings will operate *res judicata.* The said argument proceeds on the basis that the Court would mean the High Court and, therefore, finding in the first and second suit would

bar the subsequent proceedings arising out of the third suit in appeal. We find that such an argument is not tenable. As mentioned above, that the decree of dismissal of the first and second suit has not attained finality which are under challenge by the plaintiffs and the defendants-State are entitled to dispute findings on Issue No. 1 even without filing cross objections or in terms of Order XLI Rule 33 of the Code that the decree of dismissal of suit on the grounds other than what weighed with the learned trial court. All the issues are open for consideration before the First Appellate Court.

32) Section 11 and Explanation I of the Code would be applicable in subsequent proceedings between the same parties or between the parties under whom they or any of them claimed under the same title. But the findings in the first and second suit will not operate as *res judicata* as such findings are subject matter of challenge in the appeals filed by the plaintiffs in their respective suits. All the three suits have been decided together and the three appeals pending against such judgment and decrees. Therefore, it cannot be said that the first and the second suit are the former suits as the decree passed therein has not attained finality. The findings recorded therein will not, therefore, operate as *res judicata* as the State is not obliged to challenge findings on Issue No.1 in the first and second suit even after the amendment of Order XLI Rule 22 of the Code.

33) This Court in ***Lonankutty*** has examined the applicability of the

principles of Section 11 in a matter wherein two suits were filed. Civil Suit No. 666 of 1954 was filed by the appellant for an injunction from taking water from Survey No. 673 and discharge the water back through Survey No. 673 and for a mandatory injunction directing them to demolish the bund and close the sluice gates. The respondents filed Civil Suit No. 5 of 1957 for an injunction restraining the appellant from trespassing on the bund constructed by them and for preventing the appellant from interfering with their right to take water from Survey No. 673 and to discharge the water back through that land. The second was subsequent suit. The suit of the appellant was decreed. However, the suit of the respondents was dismissed but decreed to the extent of the right claimed regarding the agriculture use. The result of decrees passed in two suits was that the respondents could take water from the land of the appellant and discharge for agricultural purposes only and not for fishing. Both filed two appeals arising out of two suits. However, all the appeals were dismissed. No appeal came to be filed arising out of second suit filed by the respondents. It is in these circumstances it was held that the suit filed by the respondents, though after the suits of the plaintiff, would be deemed to be former suits as the decree in the said suit has attained finality. The Court held as under:

> "19. Respondents did not file any further appeal against the decree passed by the District Court in the appeals arising out of their suit. They filed a second appeal in the High Court, only as against the decree passed by the District Court in AS No. 66 of 1958 which arose out of the decree passed by the trial court in the

> appellant's suit. Thus, the decision of the District Court rendered in the appeal arising out of the respondents' suit became final and conclusive. That decision, not having been appealed against, could not be reopened in the second appeal arising .out of the appellant's suit...
>
> xx xx xx
>
> 21. In its remanding judgment dated July 8, 1964, by which the plea of res judicata was repelled, the High Court relied principally on the decision of this Court in *Narhari* v. *Shankar* [AIR 1953 SC 419 : 1950 SCR 754;] . That decision is in our opinion distinguishable because in that case only one suit was filed giving rise to 2 appeals. A filed a suit against B and C which was decreed. B and C preferred separate appeals which were allowed by a common judgment, but the appellate court drew 2 separate decrees. A preferred an appeal against one of the decrees only and after the period of limitation was over, he preferred an appeal against the other decree on insufficient court fee. The High Court held that A should have filed 2 separate appeals and since one of the appeals was time barred, the appeal filed within time was barred by res judicata. This Court held that "there is no question of the application of the principle of res judicata", because "when there is only one suit, the question of res judicata does not arise at all". This was put on the ground that "where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up". In our case, there were 2 suits and since the appellate decree in one of the suits had become final, the issues decided therein could not be reopened in the second appeal filed against the decree passed in an appeal arising out of another suit. This precisely is the ground on which *Narhari case* was distinguished by this Court in *Sheodan Singh* v. *Smt Daryao Kunwar* [AIR 1966 SC 1332: (1966) 3 SCR 300]. It was held therein that where the trial court has decided 2 suits having common issues on the merits and there are two appeals therefrom the decision in one appeal will operate as res judicata in the other appeal."

34) The reliance of Mr. Dave on the judgment in ***Ashok Nagar Welfare Association*** is not relevant for the present case as question examined was the scope of interference in the Special

Leave Petition. That was a case whether an *ex parte* decree granted in two suits by the trial court was set aside in appeal. The Special Leave Petition was directed against such order. This Court has rightly not interfered with the setting aside the ex *parte* judgment. ***Bhanu Kumar Jain*** is also a case delineating the remedies available to a defendant in the event of an *ex parte* decree granted. The said judgment is not applicable to the facts of the present case.

35) Another judgment referred to by Mr. Dave is ***Nirmala Bala Ghose.*** In the said case, the decree against deity had attained finality in two suits. It was held that it is not open to another defendant to challenge the decree insofar as it is against deities. The Court has held as under:

> "23. In this appeal, the two deities are also impleaded as party respondents. But the deities have not taken part in the proceeding before this Court, as they did not in the High Court. The decree against the two deities has become final, no appeal having been preferred to the High Court by the deities. It is not open to Nirmala to challenge the decree insofar as it is against the deities, because she does not represent the deities. The rights conferred by the deed Ext. 11 upon Nirmala are not affected by the decree of the trial court. She is not seeking in this appeal to claim a mere exalted right under the deed for herself, which may require re-examination even incidentally of the correctness of the decision of the trial court and the High Court insofar as it relates to the title of the deities. It was urged, however, that apart from the claim which Nirmala has made for herself, the Court has power and is indeed bound under Order 41 Rule 33 Code of Civil Procedure to pass a decree, if on a consideration of the relevant provisions of the deed, this Court comes to the conclusion that the deed

operates as an absolute dedication in favour of the two deities. Order 41 Rule 313, insofar as it is material, provides:

> "The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:"

The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.”

36) 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 defendants-State could not file an appeal against a decree which was of a dismissal of a suit simpliciter. The findings

on Issue No. 1 against the State could be challenged by way of cross-objections in terms of amended provisions of Order XLI Rule 22 of the Code but such filing of cross-objections is not necessary to dispute the findings recorded on Issue No. 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 XLI 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.

37) As per facts on record, Original Suit Nos. 274 of 1983 and 276 of 1983 have been dismissed. The plaintiffs are in appeal in both the suits before the First Appellate Court. Therefore, such decree including the finding on Issue No. 1 has not attained finality as the Appellate Court is seized of the entire controversy including the findings of fact on Issue No. 1. The defendants have a right to dispute such findings by filing cross-objections under Order XLI Rule 22 of the Code as amended in the year 1976 or even in the exercise of the powers conferred on the Appellate Court under Order XLI Rule 33 of the Code.

38) The decree is of dismissal of the suit, whereas, the reasons for passing such decree is judgment as defined in Section 2(9) of the Code. In terms of Section 11 read with Explanation I, the issue in a former suit will operate as *res judicata* only if such issue is raised in a subsequent suit. Since, the issue of title has not attained finality,

therefore, it is not a former suit to which there can be any application of Section 11.

39) In view of the above, we allow the present appeals, set aside the order passed by the High Court in the first appeal filed by the State, as the findings on Issue Nos. 1 and 2 in the first and second suit do not operate as *res judicata*. The pending applications, if any, shall stand disposed of.

40) In view of the orders in the appeals, Contempt Petition (Civil) No. 204 of 2014 is disposed of.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

NEW DELHI;
AUGUST 09, 2019.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 17486 OF 2017

STATE OF ANDHRA PRADESH & ORS. .....APPELLANT(S)

VERSUS

B. RANGA REDDY (D) BY LRs & ORS. .....RESPONDENT(S)

W I T H

CIVIL APPEAL NO. 17487 OF 2017

A N D

CONTEMPT PETITION (CIVIL) NO. 204 OF 2014

J U D G M E N T

HEMANT GUPTA, J.

41) The challenge in the present appeals is to an order passed by the High Court of judicature of Andhra Pradesh at Hyderabad on October 01, 2012 whereby an appeal filed by the appellants was found to be hit by the principle of *res judicata* and was dismissed.

42) The brief facts leading to the present appeals are that three separate suits were filed against the defendants including the State: first, Original Suit No. 274 of 1983 in respect of 6.08 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village; second suit bears Original Suit No. 276 of 1983 in respect of 3 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village; and third suit bears Original Suit No. 141 of 1984 which has been filed in respect of land measuring 19.23 guntas in respect of

land falling in Survey Nos. 49 and 50 in Rasoolpura Village. The stand of the State in all the suits is that the land in all the three suits falls in Survey No. 43 of Village Bholakpur, which is a Government Shikkam Talab measuring 145 acres 35 guntas, popularly known as Hussain Sagar Talab. All three suits were tried together. The evidence was recorded in Original Suit No. 274 of 1983. The issues and the findings recorded by the learned trial court on issues of title are as under:

"ORIGINAL SUIT NO. 274 OF 1983 – FIRST SUIT

Issues

4) Whether the suit property is part of Sy. No. 9/13 of Khairatabad Village as claimed by the plaintiff or whether it is a part of Sy. Nos. 49 and 50 of Rasoolpura Village as claimed by the defendants 1 to 4 or whether it is the part of Sy. No. 43 of Bholakpur Village as claimed by the Government?

Finding
Para 40. The plaintiff miserably failed to establish that the suit property forms part of Sy. No. 9/13 of Khairatabad Village. But the defendants 1 to 4 clearly established that it forms part of Sy. Nos. 49 and 50 of Rasoolpura. However, the Government also failed to established that the suit land forms part of Sy. No. 43 of Bholakpur Village.

5) Whether the plaintiff is entitled for declaration of his title to the suit property and whether he is entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

Finding
Para 41. The plaintiff miserably failed to establish his title and possession in the suit property and as such, he is not entitled for the relief of declaration or permanent injunction or possession.

6) To what relief?

Finding
Para 44. In the result, the suit is dismissed with costs.

ORIGINAL SUIT NO. 276 OF 1983 – SECOND SUIT

Issues

4) Whether the suit property is part of Sy. No. 9/13 of Khairatabad Village as claimed by the plaintiff or whether it is a part of Sy. No. 49 and 50 of Rasoolpura village as claimed by the defendants 1 and 2 or whether it is the part of Sy. No. 43 of Bholakpur Village as claimed by the Government?

   Finding
   Para 45. Issue No. 1 in Original Suit No. 274 of 1983 and this issue are practically one and the same and as such the finding on issue No. 1 in Original Suit No. 274 of 1983 holds good for this issue also.

5) Whether the plaintiff is entitled for declaration of his title to the suit property and Whether he is entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

   Finding
   Para 46. The plaintiff in this suit also failed to establish his title and possession in the suit property and as such, he is not entitled for the reliefs of declaration or permanent injunction or alternative relief of possession.

6) To what relief?

   Finding
   Para 49. In the result, the suit is dismissed with costs.

ORIGINAL SUIT NO. 141 OF 1984 – THIRD SUIT

Issues

4) Whether the suit property is part of Sy. Nos. 49 and 50 of Rasoolpura Village as claimed by the plaintiffs or Whether it is part of Sy. No. 9/13 of Khairatabad Village as claimed by the defendants 1 and 2 or Whether it is part of Sy. No. 4J of Bholakpur Village as claimed by the Government?

   Finding
   Para 50. The finding on Issue No. 1 in Original Suit No. 274 of 1983 holds good for this issue also.

5) Whether the plaintiff are entitled for declaration of their title to the suit property and Whether they are entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

Finding
Para 52. The plaintiffs could establish their title in the suit property and as such they are entitled for the reliefs of declaration and possession. Though they were in possession of the property originally, the Special Executive Magistrate took possession of the property after the initiation of Section 145 Cr.P.C. proceedings. So the Government is bound to surrender possession to the plaintiffs in this Suit.

6) To what relief?

Finding
Para 56. In the result, the suit is decreed with costs, as prayed for. The Government is erected to deliver possession of the suit property to the plaintiffs within 2 months. However, this finding shall not come in the way of the Urban Land Ceiling authorities to initiate proceedings to take possession of the excess land, if any, from the plaintiffs (in Original Suit No. 141 of 1984). Similarly, the Government is also at liberty to acquire any portion of the suit land for public purposes by following the necessary procedure and by paying the adequate compensation to the plaintiffs."

43) The State filed appeal arising out of judgment and decree in Original Suit No. 141 of 1984 (Third Suit). In the said appeal, an objection was raised that the findings recorded on Issue No. 1 in Original Suit Nos. 274 of 1983 and 276 of 1983 have to be treated as decree and would operate as *res judicata*. The High Court while hearing such objections in appeal framed the following two points for consideration:

> "1) Whether the findings of the lower Court on issue No. 1 in O.S. Nos. 274 and 276 of 1983 have to be treated as decree and whether they operate as res judicata against the Government, since the Government have not filed any appeals challenging the said findings?
>
> 2) Whether the Government of Andhra Pradesh was not required to file appeals on the ground that no enforceable decree was passed against it?"

44) The High Court held that decision on issues or any matter in controversy shall be deemed to be decree in view of reading of Order XIV Rule 1 of the Code of Civil Procedure, 1908[20]. The High Court noticed the fact that in the third suit, there was a specific direction to deliver possession of the suit property to the plaintiff within two months but there is no specific direction against the Government in the first and the second suit but the fact remains that specific finding is given in those cases that Government failed to establish that the suit land forms part of Survey No.43 of Bholakpur Village. Thus, there is clear declaration of right and title of the parties. The High Court held as under:

> "In the present case, there is clear finding against the Government. When there is a clear finding that the suit land does not form part of Survey No. 43 of Bholakpur Village as claimed by the Government, it was obligatory on the part of the Government to file cross-objections. What Government can do is it can support the findings of the lower court. The findings of the lower court are that the suit land forms part of Survey No. 49 and 50 of Rasoolpura Village. Obviously, the Government cannot support such finding, because its case is that the suit land forms part of Survey No. 43 of Bholakpur Village.
>
> In the appeals filed by the plaintiffs, the main question that falls for consideration is whether the suit properties form part of Survey No. 9/13 of Khairatabad village or it forms part of Survey Nos. 49 and 50 of Rasoolpura village. The question whether the suit land forms part of Survey No. 43 of Bholakpur village as claimed by the Government does not fall for consideration in the appeals in CCCA 1 of 1999 or CCCA No. 9 of 1999 i.e., appeals filed by the plaintiffs in O.S. Nos.274 and 276 of 1983. Therefore, without filing cross-objections the Government cannot challenge the findings of the trial court."

45) Mr. Vaidyanathan, learned senior counsel for the State relied upon

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20 for short, 'Code'

judgments of this Court in ***Narhari & Ors.*** v. ***Shankar & Ors.***[21], ***Ganga Bai*** v. ***Vijay Kumar & Ors.***[22], ***Banarsi & Ors.*** v. ***Ram Phal***[23], ***Hardevinder Singh*** v. ***Paramjit Singh & Ors.***[24], ***Sri Gangai Vinayagar Temple & Anr.*** v. ***Meenakshi Ammal & Ors.***[25], ***Chitivalasa Jute Mills*** v. ***Jaypee Rewa Cement***[26], ***Ramesh Chandra*** v. ***Shiv Charan Dass***[27] and ***S. Nazeer Ahmed*** v. ***State Bank of Mysore & Ors.***[28] to contend that the defendants in the first and the second suit had no right to file an appeal against the decree of dismissal of suits passed in such suits. The appeal would not lie against the findings recorded when the decree is only of dismissal of the suits. It is argued that the effect of amendment in Order XLI Rule 22 of the Code vide Central Act No. 104 of 1976 is only to enable an aggrieved person to file cross objections but that does not take away the right of an aggrieved person to support the decree of dismissal of the suit in appeal on the grounds other than what weighed with the learned trial court in dismissing the suit. It is contended that appeal lies against the decree passed and not the judgment giving the reasons to pass a decree. It is further contended that the State has a right to agitate the findings on Issue No. 1 in terms of the provisions of Order XLI Rule 33 of the Code as well, therefore, the findings recorded on

21 AIR 1953 SC 419
22 (1974) 2 SCC 393
23 (2003) 9 SCC 606
24 (2013) 9 SCC 261
25 (2015) 3 SCC 624
26 (2004) 3 SCC 85
27 AIR 1991 SC 264
28 (2007) 11 SCC 75

Issue No. 1 are not final so as to operate *res judicata* against the decree in the third suit which is the subject matter of challenge by the State. It is contended that the State has filed cross objections before hearing of the appeal though after the order of the High Court, thus, the findings recorded on Issue No. 1 have not attained finality which can operate as *res judicata*. It is contended that the judgments referred to by the learned counsel for the respondents are in the cases where the decree had attained finality. But none of the judgments referred to by the learned counsel for the respondents pertains to a finding recorded in a civil suit which was dismissed and is subject matter of challenge in appeal by the plaintiff himself.

46) On the other hand, Mr. Dushyant Dave, learned senior counsel for the respondents argued that there is a categorical finding recorded by the trial court that land does not fall in part of Survey No. 43 of Bholakpur Village, as per the stand of the Appellants in all three suits, therefore, it was mandatory for the defendants to impugn such findings by way of an appeal in the first and second suit as well. Since the State has not filed any appeal against the findings recorded in the first and the second suit, the findings recorded therein will operate as *res judicata* and the appeal arising out of the third suit is barred by *res judicata*. Learned counsel for the respondents relied upon the judgments of this Court in ***Badri Narayan Singh*** v. ***Kamdeo Prasad Singh & Anr.***[29], ***Sheodan***

29 1962 (3) SCR 759

Singh v. ***Daryao Kunwar (Smt.)***[30], ***Lonankutty*** v. ***Thomman & Anr.***[31], ***Premier Tyres Limited*** v. ***Kerala State Road Transport Corporation***[32], ***Harbans Singh & Ors.*** v. ***Sant Hari Singh & Ors.***[33], ***Ashok Nagar Welfare Association & Anr.*** v. ***R. K. Sharma & Ors.***[34], ***Nirmala Bala Ghose*** v. ***Balai Chand Ghose***[35], ***Bhanu Kumar Jain*** v. ***Archana Kumar and Another***[36].

47) Mr. Dave submits that the judgments referred to by the learned counsel for the appellants are not applicable to the facts of the present case. He argued that *res judicata* applies not only to the decree but it bars the Court to try any suit or issue in which the matter has been directly and substantially in issue in former suit. It is, thus, contended that principle of *res judicata* are not only against the final judgment and decree but also in respect of any finding recorded in the suit.

48) Mr. Jai Savla, learned senior counsel, relied upon another judgment of this Court in ***Govindammal (D) by LRs & Ors.*** v. ***Vaidyanathan & Ors.***[37] to contend that plea of *res judicata* is applicable even in respect of co-defendants.

49) Respondent No. 8 in the written submissions relies upon ***Sri Gangai Vinayagar Temple*** to contend that the filing of a Single Appeal would lead to entire dispute becoming *sub judice* only if suits are consolidated. Since, three suits in question were not

30 1966 (3) SCR 300
31 (1976) 3 SCC 528
32 1993 Supp. (2) SCC 146
33 (2009) 2 SCC 526
34 (2002) 1 SCC 749
35 1965 (3) SCR 550
36 (2005) 1 SCC 787
37 (2018) 14 SCALE 198

consolidated, therefore, non-filing of the appeal by the appellants in first and second suit will operate as *res judicata.*

50) Learned counsel for the appellants has produced a photocopy of the decree in the Original Suit No. 274 of 1983 which is to the effect “that the suit be and the same is hereby dismissed”.

51) To appreciate arguments of the learned counsel for the parties, certain statutory provisions from the Code need to be extracted before the judgments referred to by the learned counsel for the parties are considered.

> “**2(9)** "judgment" means the statement given by the Judge on the grounds of a decree or order;
>
> **2(2)** "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include –
>
> (c) any adjudication from which an appeal lies as an appeal from an order, or
>
> (d) any order of dismissal for default.
>
> **96**. Appeal from original decree
>
> (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.
>
> *** ***
>
> **Order XLI Rule 22.** Upon hearing, respondent may object to decree as if he had preferred a separate appeal

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [38][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; and may also take any cross-objection] to the decree which he could have taken by way of appeal:

Provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[19][Explanation.- A respondent aggrieved by a finding of the Court in the judgement on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

Order XLI Rule 33. Power of Court of Appeal

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

Section 11 - *Res judicata*

38 Inserted by Central Act No. 104 of 1976

> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> Explanation I - The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto."

52) The High Court referred to various judgments in respect of applicability of the principle of *res judicata*, therefore, non-filing of the appeal by the State in the other two suits operates as *res judicata*. The High Court referred to a judgment of this Court in ***Sheodan Singh*** wherein, this Court held that once a decree passed in the suit attains finality, it cannot be disturbed indirectly by adjudicating the very same questions in another appeal. We find that the findings recorded by the High Court are patently erroneous for the reasons recorded hereinafter. Therefore, non-filing of the appeal by the State in the other two suits operates as res judicata in the third suit.

53) The learned trial court had clubbed all the three suits and that common evidence was recorded, when it recorded the following fact:

> "All the above three suits have been clubbed and a joint trial has been held. O.S.No.274/83 has been taken as the leading suit and the evidence recorded in that suit has been taken as the evidence for the remaining two suits also. The parties to all the three suits can be divided into three groups……"

54) Learned counsel for the respondents has tried to draw distinction

between an order of consolidation of suits and the order where a common judgment is rendered in different suits. In ***Sri Gangai Vinayagar Temple***, the Court referred to judgment in ***Chitivalasa Jute Mills***. However, we find that distinction drawn by learned counsel for the respondents is not tenable in law. ***Chitivalasa Jute Mills*** is a case where one suit was filed at Reva in Madhya Pradesh and another in Vishakhapatnam. The Court noticed that claim in one suit is a defense in another suit, therefore, the order was passed for transfer of a subsequent suit filed at Reva to Vishakhapatnam.

55) In the present case, evidence have been recorded only in one suit as all the three suits have been clubbed together. In view of the said fact, we find that merely the word consolidation has not been used by the learned trial court, therefore, it will not be a case of consolidation of suits but of separate trials.

56) In ***Banarsi,*** the provisions of Order XLI Rule 22 of the Code as it existed before and after the amendment in 1976 as well as Order XLI Rule 33 of the Code have been considered. The said judgment arises out of a fact where a suit for specific performance of an agreement was filed by the respondent in appeal before this Court. The appellants also filed a suit seeking cancellation of the agreement, the basis of the suit for specific performance. The learned trial court ordered the appellants to deposit a sum of Rs.2,40,000/- but the decree for specific performance was not granted. Two appeals were taken up for hearing preferred by the

appellants by the learned Additional District Judge. Both the appeals were dismissed but without any cross objections or an appeal, the Court decreed the suit for specific performance filed by the plaintiffs. The second appeal before the High Court was dismissed. It was held that the First Appellate Court committed no error of law exercising the powers under Order XLI Rule 33 of the Code to pass a decree for specific performance.

57) 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:

> "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* [AIR 1967 SC 1470 : (1967) 3 SCR 153] , *Jatan Kumar Golcha* v. *Golcha Properties (P) Ltd.* [(1970) 3 SCC 573] and *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 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."

58) This Court while considering the amendments made in the Code in the year 1976, held that even under the amended provisions of Order XLI 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 XLI 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 decree is in his favour. The Court held as under:

> "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 decree is in his favour; however, if he proposes to *attack* any 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 *finding* in 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 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."

59) 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 which was not granted by the trial court.

60) 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 XLI Rule 33 of the Code. The Court held as under:

> "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 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.”

61) Such view of the Court has been followed in a judgment in ***Hardevinder Singh***. 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 defendant Nos. 1 to 4 was validly executed. The First Appellate Court dismissed the suit for the reason that there is a settlement between the parties. The defendant No. 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 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 No. 5, brother of the plaintiff benefited from the decree granted by the trial court but the plaintiff has settled the dispute with defendant Nos. 1 to 4, the rights of defendant No. 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:

> "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 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* [(2003) 9 SCC 606 : AIR 2003 SC 1989] , 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 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)*

62) The judgment in ***Sri Gangai Vinayagar Temple*** is relied upon by

both the parties. Learned counsel for the appellants relies upon para 25 of the order whereas, counsel for the respondents relies upon para 27 of the order. Both the paragraphs read as under:

> "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 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.
>
> xxx xxx xxx
>
> 27. Procedural norms, technicalities and processal 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 vs. Jaypee Rewa Cement (2004) 3 SCC 85. In the instance of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that 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. 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 all."

63) 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 Gangai Vinayagar Temple*** 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 January 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/.

64) 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 operate as *res judicata*. But in the present case, an appeal in the first and second suit is pending in which the appellant has right to support decree in terms of Order XLI Rules 22 and 33 of the Code.

65) Learned counsel for the respondents strongly relies upon a Constitution Bench judgment of this Court in ***Badri Narayan Singh*** 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 appellant had also committed corrupt practices. On the other hand, 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 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 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 of the High Court in Appeal No. 7 of 1958. The Court distinguished the earlier judgment in ***Narhari***. It held that though Appeal Nos. 7 and 8 of 1958 arose out of one proceeding but subject matter of each appeal was different, therefore, the final judgment would operate as *res judicata*. The relevant findings read as under:

> "14. It is true that both the 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 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 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)*

66) 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,*** the decision in an appeal became final, holding the appellant to be not duly elected candidate. The 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.

67) The ***Narhari*** arises out of a suit for possession of 1/3 share of land from the 2 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 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:

> "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 ap- pealed against with a different number or a copy of it was attached to a different appeal. The two decrees in sub- stance 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……"

68) ***Ganga Bai*** is the judgment arising out of the proceeding prior to amendment of Order XLI Rule 22 of the Code. The High Court held that the first appeal filed by defendant Nos. 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:

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

69) In ***Ramesh Chandra***, 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:

> "3. 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……"

70) In another judgment reported as ***S. Nazeer Ahmed***, it has been held that the appellant without filing a memorandum of cross-objections in terms of Order XLI 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:

> "7. The High Court, 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."

71) Mr. Dave vehemently argued that *res judicata* in terms of Section 11 of the Code is not about a decree but to a finding in the former suit. It is argued that the first suit and second suit are the former suits in which the findings were written against the State, therefore, such findings will operate *res judicata.* The said argument proceeds on the basis that the Court would mean the High Court and, therefore, finding in the first and second suit would bar the subsequent proceedings arising out of the third suit in

appeal. We find that such an argument is not tenable. As mentioned above, that the decree of dismissal of the first and second suit has not attained finality which are under challenge by the plaintiffs and the defendants-State are entitled to dispute findings on Issue No. 1 even without filing cross objections or in terms of Order XLI Rule 33 of the Code that the decree of dismissal of suit on the grounds other than what weighed with the learned trial court. All the issues are open for consideration before the First Appellate Court.

72) Section 11 and Explanation I of the Code would be applicable in subsequent proceedings between the same parties or between the parties under whom they or any of them claimed under the same title. But the findings in the first and second suit will not operate as *res judicata* as such findings are subject matter of challenge in the appeals filed by the plaintiffs in their respective suits. All the three suits have been decided together and the three appeals pending against such judgment and decrees. Therefore, it cannot be said that the first and the second suit are the former suits as the decree passed therein has not attained finality. The findings recorded therein will not, therefore, operate as *res judicata* as the State is not obliged to challenge findings on Issue No.1 in the first and second suit even after the amendment of Order XLI Rule 22 of the Code.

73) This Court in ***Lonankutty*** has examined the applicability of the principles of Section 11 in a matter wherein two suits were filed.

Civil Suit No. 666 of 1954 was filed by the appellant for an injunction from taking water from Survey No. 673 and discharge the water back through Survey No. 673 and for a mandatory injunction directing them to demolish the bund and close the sluice gates. The respondents filed Civil Suit No. 5 of 1957 for an injunction restraining the appellant from trespassing on the bund constructed by them and for preventing the appellant from interfering with their right to take water from Survey No. 673 and to discharge the water back through that land. The second was subsequent suit. The suit of the appellant was decreed. However, the suit of the respondents was dismissed but decreed to the extent of the right claimed regarding the agriculture use. The result of decrees passed in two suits was that the respondents could take water from the land of the appellant and discharge for agricultural purposes only and not for fishing. Both filed two appeals arising out of two suits. However, all the appeals were dismissed. No appeal came to be filed arising out of second suit filed by the respondents. It is in these circumstances it was held that the suit filed by the respondents, though after the suits of the plaintiff, would be deemed to be former suits as the decree in the said suit has attained finality. The Court held as under:

> "19. Respondents did not file any further appeal against the decree passed by the District Court in the appeals arising out of their suit. They filed a second appeal in the High Court, only as against the decree passed by the District Court in AS No. 66 of 1958 which arose out of the decree passed by the trial court in the appellant's suit. Thus, the decision of the District Court rendered in the appeal arising out of the respondents'

> suit became final and conclusive. That decision, not having been appealed against, could not be reopened in the second appeal arising .out of the appellant's suit...
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> xx xx xx
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> 21. In its remanding judgment dated July 8, 1964, by which the plea of res judicata was repelled, the High Court relied principally on the decision of this Court in *Narhari* v. *Shankar* [AIR 1953 SC 419 : 1950 SCR 754;] . That decision is in our opinion distinguishable because in that case only one suit was filed giving rise to 2 appeals. A filed a suit against B and C which was decreed. B and C preferred separate appeals which were allowed by a common judgment, but the appellate court drew 2 separate decrees. A preferred an appeal against one of the decrees only and after the period of limitation was over, he preferred an appeal against the other decree on insufficient court fee. The High Court held that A should have filed 2 separate appeals and since one of the appeals was time barred, the appeal filed within time was barred by res judicata. This Court held that "there is no question of the application of the principle of res judicata", because "when there is only one suit, the question of res judicata does not arise at all". This was put on the ground that "where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up". In our case, there were 2 suits and since the appellate decree in one of the suits had become final, the issues decided therein could not be reopened in the second appeal filed against the decree passed in an appeal arising out of another suit. This precisely is the ground on which *Narhari case* was distinguished by this Court in *Sheodan Singh* v. *Smt Daryao Kunwar* [AIR 1966 SC 1332: (1966) 3 SCR 300]. It was held therein that where the trial court has decided 2 suits having common issues on the merits and there are two appeals therefrom the decision in one appeal will operate as res judicata in the other appeal."

74) The reliance of Mr. Dave on the judgment in ***Ashok Nagar Welfare Association*** is not relevant for the present case as question examined was the scope of interference in the Special Leave Petition. That was a case whether an *ex parte* decree

granted in two suits by the trial court was set aside in appeal. The Special Leave Petition was directed against such order. This Court has rightly not interfered with the setting aside the ex *parte* judgment. ***Bhanu Kumar Jain*** is also a case delineating the remedies available to a defendant in the event of an *ex parte* decree granted. The said judgment is not applicable to the facts of the present case.

75) Another judgment referred to by Mr. Dave is ***Nirmala Bala Ghose.*** In the said case, the decree against deity had attained finality in two suits. It was held that it is not open to another defendant to challenge the decree insofar as it is against deities. The Court has held as under:

> "23. In this appeal, the two deities are also impleaded as party respondents. But the deities have not taken part in the proceeding before this Court, as they did not in the High Court. The decree against the two deities has become final, no appeal having been preferred to the High Court by the deities. It is not open to Nirmala to challenge the decree insofar as it is against the deities, because she does not represent the deities. The rights conferred by the deed Ext. 11 upon Nirmala are not affected by the decree of the trial court. She is not seeking in this appeal to claim a mere exalted right under the deed for herself, which may require re-examination even incidentally of the correctness of the decision of the trial court and the High Court insofar as it relates to the title of the deities. It was urged, however, that apart from the claim which Nirmala has made for herself, the Court has power and is indeed bound under Order 41 Rule 33 Code of Civil Procedure to pass a decree, if on a consideration of the relevant provisions of the deed, this Court comes to the conclusion that the deed operates as an absolute dedication in favour of the

two deities. Order 41 Rule 313, insofar as it is material, provides:

> "The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:"

The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from."

76) 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 defendants-State could not file an appeal against a decree which was of a dismissal of a suit simpliciter. The findings on Issue No. 1 against the State could be challenged by way of

cross-objections in terms of amended provisions of Order XLI Rule 22 of the Code but such filing of cross-objections is not necessary to dispute the findings recorded on Issue No. 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 XLI 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.

77) As per facts on record, Original Suit Nos. 274 of 1983 and 276 of 1983 have been dismissed. The plaintiffs are in appeal in both the suits before the First Appellate Court. Therefore, such decree including the finding on Issue No. 1 has not attained finality as the Appellate Court is ceased of the entire controversy including the findings of fact on Issue No. 1. The defendants have a right to dispute such findings by filing cross-objections under Order XLI Rule 22 of the Code as amended in the year 1976 or even in the exercise of the powers conferred on the Appellate Court under Order XLI Rule 33 of the Code.

78) The decree is of dismissal of the suit, whereas, the reasons for passing such decree is judgment as defined in Section 2(9) of the Code. In terms of Section 11 read with Explanation I, the issue in a former suit will operate as *res judicata* only if such issue is raised in a subsequent suit. Since, the issue of title has not attained finality, therefore, it is not a former suit to which there can be any

application of Section 11.

79) In view of the above, we allow the present appeals, set aside the order passed by the High Court in the first appeal filed by the State, as the findings on Issue Nos. 1 and 2 in the first and second suit do not operate as *res judicata*. The pending applications, if any, shall stand disposed of.

80) In view of the orders in the appeals, Contempt Petition (Civil) No. 204 of 2014 is disposed of.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

NEW DELHI;
AUGUST 09, 2019.