mesne profits

CIVIL PROCEDURE CODE (1908), O.8, R.6 (PAGE NO. 167)
-O.8, R.6 - Equitable set off - when allowed - Patnidar granted mesne profits against Zamindar- Amount for rent revenue and cess due to Zamindar after delivery of possession - Zamindar cannot claim equitable set-off - A plea in the nature of equitable set -off is not available when the cross - demands do not arise out the same transaction.

- A plea in the nature of equitable set -off is not available when cross - demands do not arise out the same transaction. Thus where A, a Patnidar, is allowed mesne profits against B, his Zamindar, for the period during which B was in wrongful possession of A's lands, B cannot claim equitable set-off against A for the amounts due to him in respect of rent, revenue and cess for the period subsequent to the delivery of possession to A as the claims neither relate to the same period nor do they arise out of the same cause of action. The transaction which led to A's demand resulted from B's wrongful act as a trespasser, while the transaction giving rise to B's demand arises out of the relationship of landlord and tenant and the obligation resulting therefrom. A wrongdoer who has wrongfully withheld moneys belonging to another cannot invoke any principles of equity in his favour and seek to deduct therefrom the amount, that during this period have fallen due to him. Bhupendra Narain Singh V. Bahadur Singh.AIR 1952 SC 201: 1952 SCJ 269: 1952 SCR 782:1953 SCA 143.

ORDER 10 RULE 1 (Page No. 181, O.9, R.13- N.12)
O. 9,R.1- Examination of witness - Comparison of signature- Suit for recovery of amount from two defend - Pla by plaintiff that defendant No1 authorised defendant No.2 to sell the property on his behalf - Denial of his signature on such writing by him vakalatnama - Dismissal of suit by trail court on protracted trial - Illegal. R.F.A. No. 460 of 1996. D/-3-3-1998 (Kant). Reversed.

Where in a suit for recovery of amount alleged to be paid by plaintiff to the two defendants as a sale consideration of property, the plaintiff claimed that there was a document signed by defendant No.1 in favour of defendant No. 2 authorising him to sell the property on his behalf and the defendant No.1 denied his signatures on the document and also on written statement and Vakalatnama, the trail Court could have decreed the suit at the stage of examination of witnesses instead of going into protracted trail and then dismissing the suit on the ground of absence of private of contract between defendant No. 1 and plaintiff. Trail Court should have immediately probed into the matter. It should have recorded statement of the counsel for the 1st defendant to find out if vakalatnama in his favour and written statement were not signed by the 1st defendant whom he represented. It was apparent that the 1st defendant was trying to get out of the situation when confronted with his signatures on the Vakalatnama and the written statement and his having earlier denied his signatures on the document in order to defeat the claim of the plaintiff. Falsehood of the claim of the 1st defendant was writ large on the face of it. Trail Court could have also compared the signatures of the 1st defendant as provided in S.73 of the Evidence Act. Satyanarayana K.S. v. Narayana Rao V.R. **AIR 1999 SC 2544:1999 AIR SCW 2711: 1999(4) Scale 286:1999(6) Supreme 277:1999(5) JT 127.**

O. 19, R.1- Affidavits - Verification of - Necessity - Affidavits not properly verified cannot be admitted in evidence.

The reasons for verification of affidavits are to enable the Court to find out which facts can be said to prove on the affidavits evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from person or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. A.K.K.Nambair V. Union Bank Of India .**AIR 1970 SC 652: 1970 Lab IC 566: (1969) 3 SCC 864: (1969) 2 SCWR 961.**

Mesnt Profit (Page: - 201)

-O.20, R.12 (1)(C) - "Three years from the date of the decree"- Meaning of - Period to be counted from date of decree finally passed.

The words "Whichever event first occurs " in sub clause (iii) of clause (c) imply that the maximum period for which future mense profits can be awarded, is three years from the date of the decree for possession and mense profits, finally passed. Where the plaintiff's appeal was allowed by the Supreme Court, the period of three years mentioned in sub-clause (iii) of Cl.(c) of Rule 12(1) is to be computed from the date of the decrees of the Supreme Court, and it will expire on the date on which possession was delivered or relinquished by the defendant in favour of the decree-holder pursuant to that decree. In other words, the decree mentioned in sub-cl. (iii) of the aforesaid clause (c), would be the aforesaid clause (c), would be the appellate decree of the Supreme Court. Luky Kochuvareed v. P. Mariappa Gounder.**AIR 1979 SC 1214: (1979) 3 SCC 150: (1979) 3 SCR 58: (1979) 3 Mah LR 229.**

PAGE No.:- O.20 R.18 (Page No.209)

-O.20 R.18 (2) - Partition - Final decree -what constitutes- Drawing up of final decree and then to engross it on stamped papers of required value - Both acts together constitute "final decree".

F.A. No. 229 of 1976 and L.P.A. No. 15 of 1977, D/-7-3-1977 and 7-4-1977(Bom), Reversed. AIR 1983 Pat 105, Overruled.

Limitation does not begin to run from the date when direction is given to pass final decree. Mere giving of direction to supply stamped paper for passing a final decree. Until the final decree determining the rights of the parties by the metes and bounds is drawn up and engrossed on stamped paper (s) supplied by the parties, there is no executable decree. In this behalf, it is necessary to note that S.2 (a) of the Bombay Stamp Act, 1958, as amended by the local Act, provides that a decree of per Article 46 in Schedule 1.Section 34 thereof lays down that "no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law of consent of parties authority to receive evidence. Or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped". Therefore, executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20,Rule 18(2). After final decree is passed and a direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper(s),it becomes executable or becomes an instrument duly stamped. Thus, condition precedent is to draw up a final decree and then to engross it on stamped paper(s) of required value. These two acts together constitute final decree, crystallizing the rights of the parties in terms of the preliminary decree. Till then, there is no executable decree as envisaged in Order 20 Rule 18(2), attracting residuary Article 182 of the old Limitation Act. AIR 1983 Pat 105,**Overruled;** AIR 1960 Andh Pra 54, **Approved**. Shankar Balwant Lokhande V. Chandrakant Shankar Lokhande AIR **1995 SC 1211: 1995 AIR SCW 1971: (1995) 3 SCC 413: (1995) 3 JT (SC) 186.**

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-O.21, R.35 - Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, S.12 (3)- Eviction suit on ground of arrears of rent - Consent decree - Term in decree that if all arrears are paid on or before particulars date landlord will not recover possession by execution - Term is not penal- Is executable- Tenancy right whether continutable by consent decree. AIR 1985 Bombay 297, Reversed.

Eviction suit for possession of the demised premises was filed by the landlord mainly on the ground of arrears of rent under S.12 (3) of the Act. The suit was settled between the parties. A compromise decree was passed. By Cls. (1) and (2) of the compromise terms, the tenant was required to deliver vacant possession of the demised premises together with arrears of rent etc. by a particular future date. It was further provided that if the tenant fails to deliver possession and defaults in paying the arrears due from him by the stipulated date the landlord will be entitled to recover both possession and arrears of rents, mesne profits, electricity and water charges, cost of the suit, etc. by the stipulated date the landlords agrees not to execute the decree for possession.
Held, Cl. (3) of the consent terms could not be said to be penal in character. By the first two clauses of the consent terms a decree for possession of the demised premises as well as arrears of rent etc. passed and the tenant is given a grace period up to the stipulated date of comply with the same falling which the landlord is given the right to put the decree to execution and obtain possession of the premises and recover the arrears of rent etc. through Court. By Cl. (3) of the consent terms, however, the tenant is granted a concession that if he pays the entire rent etc. due from him by the stipulated date the landlord will not put the decree to execution for recovery of possession. This stipulation is clearly to secures his dues i.e. arrears of rent, etc. Depending on the situation in which a landlord is placed, he may grant the concession and agrees that if the entire arrears is cleared by a stipulated date he will not insist on possession that will not render the clause penal in nature.

As regards the question whether parties to the consent decree intended to create or continue relationship of landlord and tenant held, that if the condition precedent for availing of the benefit or concession under cl.(3) of the consent terms is satisfied, the relationship of landlord and tenant continues but if the tenant fails to comply with the condition precedent for availing of the benefit or concession the forfeiture operates and the tenant become liable for eviction under the decree. Prithvichand v.S.Y.Shinde. **AIR 1993 SC 1929: 1993 AIR SCW 2223: (1993) 3 SCC 271: (1993) 2 Rent LR 1.**

(PAGE: - 229)
ORDER 21, RULE 54.
-O.21.Rr.54(1A) and 66(2)-Execution proceedings- Service of notice of, on judgement-debtor of proposed sale of his property- Mandatory-omission to serve notice-Sale is nullity.

Service of notice of the proposed sale of his property on the judgement-debtor is a Fundamental part of the procedure touching upon the jurisdiction of the Execution Court to take further steps to sell his immovable property. Therefore, notice under O.21, R.66 (2), unless proves o is applied (if not already issued under O.21, R.22) and service is mandatory. It is made manifest by O.21, R.54 (1A) brought on statute by 1976 Amendment Act with peremptory language. The omission thereof renders the further action and sale in pursuance thereof void unless the judgement-debtors appears without notice and thereby waives the service of notice.
The jurisdiction to sell the property would arise in a Court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property can not be sold without his being told that it is being so sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality. The absence of notice causes irremediable injury to the judgment-debtor. Equally publication of the proclamation of the sale under R.67 and specifying the date and the place of sale of the property under R.66 (2) are intended that the prospective bidders would know the value so as to make up their mind to offer the prices to attend at sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the judgement-debtor disables him to offer his estimate of the value who is better known of its value and to publicise on his part canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disable him to know fraud committed in the publication and conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under O.21 divests right, title and interest of the judgement-debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgement -debtor or the decree-holder. A sale made, therefore, without notice to the judgement -debtor is nullity since it divests the judgement -debtor of his right, title and interest in his property without an opportunity. Desh Bandhu Gupta v N.L.Anand .**1993 AIR SCW 3458:1994(1) SCC 131:1993(5) JT 313.**

PAGE No. 236.
ORDER 21, RULE 85
-O.21, R.85 - See Ibid, O.21, R.90 **AIR 1999 SC 96: 1998 AIR SCW 3447.**
-O.21, R.85 - Court Sale- Non-compliance with R.85-Sale is Void-See Ibid.O.21 R.84. **AIR 1997 SC 1812: 1997 AIR SCW 1162**

-O.21,Rr.85,90-Execution Sale-Purchaser, decree-holder- Failure to deposit full amount of sale price within time stipulated by R.85-Sale becomes nullity- Plea by purchaser decree holder that short deposit was due to mistake of court in indicating amount to be set off- Cannot avert the consequence of sale becoming nullity.
The requirement of R.85 of O.21 that full amount of purchase money must be paid by the purchaser at execution sale within 15 days from the date of the sale, is mandatory. Its non-compliance renders the sale proceedings a complete nullity requiring the executing Court to proceed under Rule 86 and property has to be resold unless the judgement-debtor satisfies the decree by making the payment before the resale. Failure to deposit purchases money as per R.85 is not a mere material irregularity in the sale so as to attract R.90 of O.21.The consequence of the execution sale becoming nullity on failure to deposit full sale price as per R.85 can not be averted on plea that the short fall in the deposit was occasioned by a mistake of the Court in the calculation of the amount, of which the purchaser decree-holder was entitled to claim set off under R.72. The assertion on behalf of the purchaser the decree-holder that the shortage in deposit was occasioned by a mistake of executing Court in indicating the figure of the decretal amount due in the sale proclamation also has no sound basis. The provisions in O.21 relating to sale of property beginning with R.64 clearly indicate the responsibility of the decree-holder in this behalf and his role in the drawing up the sale proclamation. The specification of the amount for the recovery of which the sale was ordered, statement made and verified by the decree-holder is not open to the decree-holder to claim that he was misled by any mistake of the Court in the specification of that amount. The blame, if any, for the mistake lies squarely on the decree-holder. A mistake for which the decree-holder himself is responsible cannot furnish a ground to the decree-holder to avert the adverse consequences on him of his failure comply with the mandatory requirement of Rule 85.

The duty to pay the full amount of purchases money within the prescribed period of 15 days from the date of sale of the property is cast on the purchaser by virtue of R.85 of O.21 and, therefore, the entire responsibility to make full compliance of the mandatory provision is his. The provision giving benefit to the decree-holder purchaser merely relieves him of the requirement of depositing that amount of which he is entitled to claim set off, but it does not relieve him of the duty to deposit the full amount taking advantage of the set off. Any mistake made while claiming the set off which results in failure do deposit the full amount of purchase money within 15 Days of the date of sale render the decree-holder purchaser liable to the same adverse consequences which would ensue to any other purchaser due to noncompliance of R.85. No distinction is made between a decree-holder purchaser entitled to claim set off under R.72 and any other purchases for the purpose of strict compliance with the requirement under R.85.Palram Son of Bhasa Ram V.Ilam Singh. **AIR 1996 SC 2781: 1996 AIR SCW 3539: 1996 All LJ 1811:1996(7) JT 423: 1996 (2) UJ (SC) 591.**

AUTION PURCHASER. (Page No. 242)
-O.21, R.90, O.21, R.85
-Execution sale-Setting aside of- Application for by Co-Owner of suit property-Ground, auction purchaser failed to pay purchases money within 15 days-Sale set aside by Executing Court-Revision against by auction purchaser-High Court while dismissing revision directed Co-owner to pay loss suffered by auction purchaser on grounds that sale was being set aside after 15 years- Such a direction is illegal. Usmansab Hatelsahab v.R.L.Meharwade. **AIR 1999 SC 96: 1998 AIR SCW 3447: (1998) (3) SCC 271:1998(4) JT 303:1998(9) Supreme23.**
-O.21, R.90-Execution sale- Objection by decree-holder that property was sold in violation of reserved price and prescribed procedure was not followed- Four out of Five auction-purchaser stating that sale was vitiated- Rent stated by auction-purchasers to have accrued from premises also showing that property was valuable and prices fetched at auction sale was inadequate -Objections raised to sale are therefore tenable- Lone auction-purchaser who had contested the objection agreeing to pay higher prices- Supreme Court finally decided the matter to do complete and substantial justice between the parties. L. P. A. No.876 of 1986, D/-14.09.1987(P & H)**. Reversed.** State Bank Of India v. Ajit Jain.1994 **AIR SCW 5152: 1995 SUPP (1) SCC 683: 1995(1) JT 60: 1995 (1) UJ (SC) 147.**

-O.21, R.90-Application to set aside execution sale and appeal thereafter-Decree-holder impleaded but joint purchaser not made party - Application and appeal are not rendered not maintainable dur to omission.
Where in application to set aside execution sale and appeal thereafter the decree-holder who was a joint purchaser was made party but the other purchaser was not impleaded in application and appeal, It could not be said that application and appeal were not maintainable. In the proceedings under S.47 or O.21, R.90, the decree-holder is the affected necessary party. Though the auction-purchaser need to be impleaded as a party, It is not necessary to impale all the joint purchasers. Desh Bandhu Gupta v.N.L. Anand.1993 **AIR SCW 3458: 1994 (1) SCC 131: 1993 (5) JT 313**.

Grounds on which a sale can be set aside. Page No.-247
O-21.Rr.92, 94,95 S.65- Auction sale - Confirmed in name of highest bidder- Sale certificate however issued in name of a society-Sale does not become void thereby-Judgement- debtor cannot file suit for possession on basis of title- society, the holder of sale certificate cannot be held to be trespasser.

The house in question was sold in the execution of a final decree for the sale and the bid was knocked down in the name of the person who was the highest bidder. The entire sale money was deposited and the sale was confirmed under O. XXI, R.92, and C.P.C. in his name. The sale certificate was however issued in the name of an educational society as the society claimed to be the real purchaser in the auction sale. Steps for executing the decree and for obtaining actual possession was also taken by the Educational Society. The judgment-debtor was a party to the execution proceedings. Suit for possession and declaration was filed by the judgment-debtor. Till the filing of the suit for declaration and possession no objection was raised as regards the sale certificate being wrongly issued in favour of Educational Society.

Held, that even if it is presumed that the sale certificate was wrongly issued in the name of the educational society the sale in favour of the highest bidder was not void and the judgment-debtors could not take the stand that they were the true owners of the disputed house as the sale itself was void and therefore were not required to file a suit for setting aside the sale.
So far as the sale in favour of the highest bidder is concerned, there is no illegality and the sale was rightly confirmed in his favour under O.XXI.R.92 C.P.C. Once an order was made under O.XXI, R.92 confirming the sale, the title of the auction-purchaser related back to the date of sale as provided under S.65, C.P.C. The title in the property thereafter vests in the auction-purchaser and not in the judgement-debtor. The issue of sale certificate under O.XXI.R.94 C.P.C. in favour of the auction-purchaser though mandatory but the granting of certificate is a ministerial act and not judicial. No right or title remained with the judgement-debtor after confirmation of sale in favour of the highest bidder. It was therefore not a case of a void sale, which could be ignored by a true owner, and it did not affect his title. The Judgement-debtor and his legal representatives were not entitled to take the stand that they were true owners as the sale itself was void and they were not required to file a suit for getting the sale set aside.

Held further, that even if it may be considered for a moment that sale certificate could not have been issued in favour of the educational society still in the facts of this case it could not have been issued in favour of the educational society still in the facts of this case it could not be held that the society was a trespasser and judgement-debtor was the true owner at the time of filling of the suit. The sale of the property is question was perfectly valid and as soon as the sale was confirmed in favour of highest bidder under O.XXI, R.92, C.P.C., Judgement-debtor had no right or title in the property. The admitted position which is borne out from the records is that the highest bidder never claimed any right in the property nor took proceeding for obtaining possession by executing the decree. On the other hand, he took a clear stand that he had bid in the auction on behalf of society and the sale certificate was rightly issued in favour of the society. That apart, after

the issue of sale certificates in favour of society it alone was entitled to obtain possession under O. XXI, R.95, and C.P.C. The view that the educational society was a trespasser and the judgement-debtor could have filed a suit for possession was therefore erroneous. Sagar v. Pandit sadashiv rao Harshe.**AIR 1991 SC 1825: 1991 AIR SCW 1955: 1991(3) JT 75: 1991 (3) SCC 588:1991(2) SCR 906.**

-O.21, R.94 - Page No. 251

Conflict between boundaries and Khata No. And Plot No.- Khata No. And boundaries held prevailed.

The final decree for sale and the sale certificate gave Khata Number and the boundaries of the property sold. The Khata number and the boundaries however all referred to Plot No. 1060.

Held, that it was a case of misdescription and the identity of the property sold was well established, namely Plot No 1060. The mistake in the plot number must be treated as a misdescription, which did not affect the Identity of the property sold. Sheodhgan Singh v. Mt.Sanchara Kuer.**AIR 1963 SC 1879: (1961) 2 SCJ 540: (1962) 2 SCR 753:1962 SCD 102.**

-O.21, R.97 - Page No. 253

-Decree for immovable property -Execution-Third party in possession claiming independent right as tenant - Can object and get his claim adjudicated when sought to be dispossessed by decree holder- He need not wait until he is dispossessed.

AIR 1980 Madh Pra 146 (FB), Over ruled.

C.R.No.406 of 1983,D/-20-2-1985(Madh Pra) Reversed.

A third party in possession of a property claiming independent right as a tenant not party to a decree for possession of immovable property under execution, could resist such decree by seeking adjudication of his objections under O.21, R.97.

The expression "any person" under subclause (1) of R.97 is used deliberately for widening the scope of power so that the Executing Court could adjudicate the claim made in any such application under O.21 R.97. Thus by the use of the words 'any person', it includes all persons resisting the delivery of possession claiming right in the property even those not bound by the decree, includes tenants or other persons claiming right on their own including a stranger. Under the Law as it stood prior to 1976 amendment as well as

After the amendment the right of a tenant or any person claiming right on his own of the property in case he resists, his objection under O.21, R.97 has to be decided by the Executing Court itself. R.100 of the old law and R.99 of the new law covers cases where persons other than judgement-debtor is dispossessed of immovable property by the decree-holder, of course, such cases are also covered to be decided by the Executing Court. But this will not defeat the right of such person to get his objection decided under R.97 which is a stage prior to his possession or a case where he is in possession. In other words, when such person is in possession the adjudication is to be under R.97 and in case dispossessed, adjudication is to be under R.100 (old law) and R.99 under the new law. Thus a person holding possession of an immovable property on his own right can object in the execution proceeding under O.21, R.97.One has not to wait for his dispossession to enable him to participate in the execution proceeding. This shows that such person can object and get adjudication when he is sought to be dispossessed by the decree holder. Shreenath v. Rajesh. **AIR 1998 SC 1927: 1998 AIR SCW 1619:1998(3) JT 244: 1998(4) Supreme 155:1998(4) Scale 725:1998(4) SCC 543.**

Minor is a legal representative. Page No. 264

-O.22, R.3- Minor - Coparcener-Suit on behalf of -Court can decree partition only if it is in the interest of minor -Death of minor pending suit - There is no abatement and legal representative can continue suit- See Hindu Law- Joint Family. **AIR 1963 SC 1601.**

-O.22, R.4 Page No. 268

-O.22, R.4 and O.1, R10-Impleading of legal representatives not brought on record within time-Effect.

Per Desai. J.: - It is true that when a specific provision is made as provided in O.22, R.4 a resort to the general provision like O.1, R.10 may not be appropriate. But the laws of procedure are devised for advancing justice and not imposing the same. Code of procedure is designed to facilitate justice and further its ends; not a penal enactment for punishment and penalities; not a thing designed to trip people up.

A preliminary decree was passed after partition in suit filed by appellant against respondents 1 and 2.During appeal respondetives were not brought on record for more than 3 years. Afterwards an application was filled by appellant under O.22, R.4 and other application was filed by legal heirs of respondent 1 under O.1, R.10. These applications were rejected by High Court and it was held that the appeal abated as a whole.
Held that the order of High Court disclosed a hyper technical approached which if carried to end may result in miscarriage of justice.F.A.No.67 of 1972,D/-27.01.1982,**Reversed.**
The provision fixing a particular time for making an application for bringing legal representatives on the record with the consequence of the suit or appeal abating if no application is made within time, have been enacted for expeditious disposal of cases in the interest of proper administration of justice.

However in the peculiar facts and circumstances of the case, bearing in mind that the appeal is from a preliminary decree in a partition suit in which the heirs and legal representative of the deceased respondent had also made an application, through misconceived, For being substituted and brought on record, and also for the reason that hearing of the appeal cannot cause any irreparable prejudice to the parties the order of High Court is set aside. Bhagwan Swaroop v. Mool Chand. **AIR 1983SC 355: (1983) 2 SCC 132: (1983) 2 SCWR 1: 1983 UJ (SC) 23.**

12. Suit for ejectment of trespassers. Page No. 271.

-O.22, R.4- Suit for ejectment of tenant after termination of tenancy -Bonafide requirement of landlord - Death of statutory tenant during second appeal by landlords- His heirs and legal representatives, brought on record are not tenants- Pleas open to them -Right of statutory tenant to continue in possession under provisions of Act being personal to them cannot be claimed by them -See Houses and Rents - Rajasthan Premises (Control of Rent and Eviction) Act (1950). S.3 (vii). **AIR 1972 SC 2526.**

-O.22, R.1- Page No. 284

-Withdrawal of Suit-Grant of permission-considerations- Application for the permission- Considerations- Application for permission to sell trust property - Withdrawal sought in revisional proceedings on remand-Advantage obtained by applicant from order of remand -Withdrawal should not be permitted.

A petition for permission to sell trust property was filed by the trustees under Trust Act. The permission was refused by the District Judge. Revision against it was also dismissed. However in review of the revisional order permission to sell by public auction was grant ed. The Deputy Commissioner. HR & CE thereupon sought implement and stay. No order any stay was passed. The Deputy Commissioner therefore filed SLP for setting aside the judgement in review. The Supreme Court in view of agreement of all parties allowed the appeal and set aside the order in review. The Supreme Court directed the High Court to implead the auction purchaser, the Commissioner, H.R. & C.E. and the Executive Officer of the temple in the main revision netition which was reopened for fresh disposal. It was also directed that the said C.R.P. be disposed of "on merits and according to law." It was further stated by Supreme Court that it would be open to all the parties to take up such contentions before the High Court as permissible in law including any contentions which the auction purchaser and the trustees might raise stating that the property in question was not part of trust property but that there was only a charge on the properties of the trust. In view of the remand the notice, which had been issued to, trustees by the Commissioner for allegedly violating the provisions of the Endowment Act, 1959 was also directed to be dropped. The trustees thereupon filed a memo in High Court seeking permission under O.23 R.1 of C.P.C. to withdraw the revision as well as the petition for permission to sell. The High Court allowed the withdrawal.

Held, grant of permission to withdraw the revision and the original petition for permission by High Court was not proper. The High Court ought to have taken into consideration the fact that on the ground that the parties would agree for adjudication as to the nature of the property, the trustees prayed in the civil Appeal that the proceedings initiated by the Commissioner against them under the Endowment Act, 1959 should be directed to be dropped. The Supreme Court thought that in view of the agreement by the trustees to have adjudication on merits, the Commissioner could and should drop the proceeding and directed accordingly. Having obtained such an advantage from the order of remand, the trustees could not have precluded the High Court from adjudicating the matter on merits by with drawing the CRP and the OP. The Executive Officer, Arthanareswarar Temple v.R.Sathyamoorthy. **AIR 1999 SC 958: 1999 AIR SCW 575: 1999(3) SCC 115: 1999(1) Scale 358: 1999(1) Supreme 406: 1999(1) JT 343.**

ORDER 26 RULE 10. (PAGE No 300.)

-O.26, R.10- Encroachment - Report of Local Commissioner showing that dependant had encroached upon area belonging to plaintiff -Claim of dependant that there was old existing building on disputed site which he had allegedly purchased negative by said report-on basis of said report High Court concluded that view taken by appellate Court was not vitiated by any illegality since that finding was substantiated by said report- this being factual position, Supreme Court declined to go into matter- See Constitution of India, Art 136. **1997(1) Supreme 549.**

-O.26, R.10-Commissioner-Report-Inference therefrom. **AIR 1988 SC 2126.**

ORDER 26, RULE 10-B. (PAGE No 300.)

-O.26, R.10-B -Appointment of Special Officer-By the division Bench of High Court for demarcating plots in question with assistance of surveyor with consent of parties-Report submitted by special officer on basis of survey -Disposal of appeal however by division Bench with direction to previous special officer who was appointed earlier by single Judge, to hand over possession of plot to one of parties-Illegal being made without consideration of relevant material viz.report of special officer appointed by Division Bench itself.A.No.340 of 1988 ,D/-25-9-1995 (Cal), Reversed.

Where in view of order appointing a special officer by the Division Bench of the High Court to demarcate the plots in question by taking assistance of a surveyor, the Surveyor was appointed by the consent of parties and on the basis of the consent of parties and on the basis of the survey done the Special Officer submitted his report objection to which also stood dismissed, the order of the division Bench disposing of the appeal with direction to the Special Officer appointed earlier by single Judge of High Court, to hand over possession of plots to one of parties, was not legal on the ground of non-considerate on of relevant material. The aforesaid report of the Special Officer as well as the survey done by the Surveyor constituted an important items of evidence which could not have been ignored by the division Bench while disposing of the appeal. Further any direction Could be given by Division Bench only to the Special Officer appointed by it and not to Special Officer appointed earlier by single Judge. Tushar Kanti Bose V. Savitri Devi. **AIR 1996 SC 2752: 1996 AIR SCW 3449: 1996(7) JT 480:1996(10) SCC96.**

ORDER 34; RULE 1 (PAGE NO. 311)

-O.34, R.1- Suit for possession by redemption of Mortgagee-Original mortgage not heard for 7 Years- His heirs filling suit- Suit decreed-Defendant claiming for 1st time in appeal that compromise decree for specific performance of sale is passed against original mortgagor-Decree obtained by defendant by fraud and misrepresentation-Plaintiff can not be non-suited on that accounts.

The plaintiffs filed a suit for possession of land by redemption of mortgage. They claimed that original mortgagor was not heard of for the last 7 years, and he is deemed to be dead under the law. The plaintiff being legal heirs of the mortgage were entitled to redeem the mortgage. The plaintiff added evidence in support of their claim for redemption but the defendant did not adduce any evidence nor examined himself as a witness on his behalf. Accepting the unrebutted evidence of the plaintiffs the trail Court decreed the suit for possession by redemption by holding that original mortgagor has not been heard of for the last about 20 years and, therefore, he would be presumed to be dead and the plaintiffs being his legal heirs had a right to file the suit for redemption.

The first appeal filed by the defendant mortgagee was dismissed. In second appeal he sought amendment of written statement asserting that he along with another Court and thus the right, title and interest of the mortgagor in the suit property has come to an end. The amendment was allowed and the case remanded to trial Court.

Held that the plaintiffs were entitled to decree for possession by redemption of mortgage for following reason: -

1) Though the alleged agreement for the sale of suit land by mortgagor in favour of the defendant and another on the basis of which compromise decree was obtained, is said to have been executed prior to filing of the suit by the plaintiffs but the defendant did not disclose the said fact nor pleaded the same in his written statement filed in the plaintiff's suit for redemption till it was decreed. Though the dependant has obtained the agreement from mortgagor prior to filling of suit by plaintiff's and on that basis had already pocketed

The compromises decree yet he did not disclose the same in the appeal.

2) It is surprising that without any pre-settlement or any intimation or knowledge about the whereabouts of mortgagor, the defendant happens to meet him suddenly and the agreement was written and consideration was passed on to mortgagor which was readily available with the defendant.

3) The evidence on record revealed that the compromise decree was obtained by fraud and misrepresentation.

4) The positive evidence of the witnesses that the original mortgagor is not traceable for more than 7 years could not be brushed aside by relying on inadmissible evidence. Beli Ram v. Salig Ram. **AIR 1996 SC 757: 1996 AIR SCW 68: 1996(7) SCC186: 1995(8) JT 338:1995(4) SCJ 447.**

-O.34,R.1 and O.22,R.4 - suit for redemption-Legal representatives of co-mortgagee not brought on record in appeal- Appeal abates only in respect of that mortgagee when mortgagor is prepared to pay entire mortgage amount to surviving mortgagee.

It is a well recognized principle that even if all the mortgagees are not before the Court in a suit filed by the mortgagor for redemption of the property, but the mortgagor is prepared to pay the entire amount due at the foot of the mortgagees as are before the court and gives up his right under the mortgage as against those mortgagees who are not

before the Court, the Court can pass a decree for redemption directing that the entire mortgage amount should be paid to the mortgagees who are actually before the Court.

Where the party who had purchased mortgagee rights in respect of part of mortgaged property was joined as a defendant along with the co-mortgagee in the suit for redemption and his legal representatives were not brought on record on his death in appeal, the appeal would not abate as a whole but would abate in respect of that dependant-respondent only especially when the defendant in question did not contest the suit at any stage and the mortgagor was prepared to pay the entire mortgagor amount to the surviving defendant-appellant. Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai. **AIR 1982 SC 121: (1982) 1 SCC 223: 1982 UJ (SC) 120: (1982) 2 SCR 166.**

ORDER 34, RULE 1 (PAGE NO. 314)

-O.34, R.2- Suit by mortgagee to enforce mortgage- His liability to render account under S.76 (h), T.P. Act- Two stages of accounting, one up to preliminary decree and second thereafter - Even if first is barred the second remains- See Ibid, O.34, R.4. **AIR 1965 SC 1055.**

-O.34 Rr.2,3 - T.P. Act 91882, Ss.60,98-Anomalous mortgage- final decree for foreclosure passed- court has no jurisdiction to reopen decree and to extend time for redemption on equitable ground.

Assuming that in the case of a decree for payment of money a Court executing the decree has jurisdiction to grant relief against what is in fact a penalty even when the decree has been passed by consent, the examination of Ss.60 and 98, T.P. Act and O.34 Rr.2 and 3, Civil P.C., makes it clear that the Court has no jurisdiction to reopen a final foreclosure decree in order to extend the time for foreclosure on equitable grounds.

A mortgaged his three houses to B on 16th January 1934 for Rs. 32000/-. Possession was delivered to B who was to take the rents in lieu of interest. A agreed to pay the amounts due within five years and in case A failed to do it, mortgagee B was given a right to obtain a decree for foreclosure. On A's failure to pay the amount, B instituted on 16th May 1939 a suit for recovery of Rs. 32000/- or a decree for foreclosure. Parties came to a compromise in 1940 whereby A agreed to pay Rs.20,300 in two equal installments of Rs.10150/- each on 15th February 1941 and 15th February 1942 and a decree was to be passed in these terms with conditions that if A failed to pay this reduced amount, the same decree was to be deemed to be final decree for foreclosure for the full amount claimed in the suit. A preliminary decree for foreclosure was passed in these terms. On A's defaults, B applied on 24th Feb.1942 for execution of the decree by delivery of possession in exercise of its equitable jurisdiction and to give sufficient time for payment of the amount, on the ground that the value of the foreclosed property was twenty-five times greater than the decretal amount of Rs 32000/- and therefore the decree was penal:

Held, that the decree passed in accordance with the agreement must be treated as final decree for foreclosure and in view of the statutory provisions in Ss.60 and 98, T.P. Act and O.34,Rr.2(2) and 3, there was no room for the contention that the Court had power within its equitable jurisdiction and to grant the relief sought by A;

Held, further that **even** if the Court had power to grant the relief sought by A, he was not entitled to the same as there was no evidence of good faith on the part of A by tender or payment into Court of the amount due for 9 years since the passing of the preliminary decree. Autar Singh v.Mohamad Ejar Rasool Khan. **AIR 1950 PC 88: 1950 All LJ 315:54 Cal WN 313 : 52 Bom LR 482.**

ORDER 34, RULE 3 (Page No. 314)

-O.34,R.3- Anomalous Mortgage-Final decree for foreclosure passed- Court has no jurisdiction to reopen decree and to extend time for redemption on equitable ground - See Ibid, O.34, R.2

AIR 1950 PC 88 : 1950 ALL LJ 315.

ORDER 34, RULE 3 (Page No. 315)

-O.34,R.4- Suit for recovery of certain amount inclusive of principal, interest etc. besides interest pendente lite on basis of mortgage - Question whether the goods stated to have been damaged were not delivered-**Held,** decision of High Court was erroneous - **Held,** further that the plaintiff was entitled to a mortgage decree with interest pendent lite and future interest at 6% per annum from the date of decree of the trail Court to the date of realisation. Central Bank Of India Ltd. V. Hari Prasad Jalan. **AIR 1972 SC 1274 : 1972 UJ (SC) 207 : (1973) 2 SCJ 34 : 1971 SCD 1146.**

ORDER 34, RULE 8 (Page No. 319)

-O.34,R.8(1),(3) - Redemption of mortgage- Preliminary decree-Application for final decree by mortgagee with deposit of redemption amount-Dismissal of, for non-prosecution and withdrawal of deposited amount - Perse creates no bar to entertain second application - However in view of filling of independent redemption suit by mortgagor, Court cannot proceed further with second application.

The limitation to file an application under Order 34, Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fix in preliminary decree is extended by an order of the Court. In its absence on expiry of the limitation of the three years from the date fixed in the preliminary decree is expired under Art.137 of the schedule to Limitation Act,1963 (Art.181 of schedule 2 of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begin to run until deposit is made though there is a conditional preliminary decree and default was compliance thereof.

In the instant case one 'K' the eldest male member of the house, created an usufructuary mortgage in favour of one 'L' and mortgagee is one of the successors in interest. Subsequently a second mortgage was created in favour of the appellant with a direction to redeem the first mortgage and to remain in possession for 10 years. On its footing the mortgagee filed a suit for redemption of the mortgage. The Court while granting preliminary decree directed to deposit decretal amount into the court on or before certain date. The mortgagor and the mortgagee filed first appeals and the appeal of the mortgagor was allowed increasing the appellant's liability and the dismissed the appellant's appeal. Subsequently the appellant filed an application to pass final decree depositing only the amount qualified in the preliminary decree. On second appeals High Court set aside the decree of the trial Court. In the meanwhile the mortgagee got dismissed his application of passing final decree and withdrew the amount deposited. While the respondent-mortgagor purchased initially the equity of redemption of the Mortgages from 'L' and later on purchased the hypothica by a registered sale deed. Thus she became mortgagor. The mortgagee subsequently filed application to pass final decree depositing a disputed sum. The respondent- mortgagor also filed an independent suit for redemption of the mortgages or alternatively for foreclosure of appellant's redemption suit.

Held, the proceeding in the preliminary decree does not get terminated by dismissal of first application for passing of final decree on or for non-prosecution. Till date of passing the final decree and execution of till its remedy is barred by limitation under Art.137 of the Schedule to the Limitation Act ,1963 the Court has power jurisdiction to entertain the application to pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. The dismissal of the earlier application or non prosecution, therefore, does not per se bar the right of the plaintiff. But if remedy to enforce preliminary decree for redemption is barred by the limitation, thereafter, the right remains unenforceable. The deposit, therefore, is non est. and the Court cannot proceed to pass final decree as the remedy is lost. Therefore, the mere dismissal of the first application for non-prosecution and withdrawal of the redemption money deposited thereunder per se creates no bar to entertain second application. Equally instead of availing the remedy of depositing the redemption amount

in the pending proceedings under Rule 8(1) of Order 34, the respondent instituted an independent suit for redemption perforce, though it does not operate as to maintain the application to pass final decree. Court cannot proceed further with the application. Otherwise conflicting decisions would arise giving rise to multiplicity of proceed further in the matter. In view of finding that the application to pass final decree is bared by the limitation, the trail Court has no jurisdiction to proceed with the application under Rule 8 (3) of Order 34 and to pass final decree. K.Parameshwaran Pillai(Dead) v. K.Sumathi alias Jesis Jessie Jacquiline. **AIR 1994 SC 191: 1993 AIR SCW 3340: 1993 (4) SCC 431: 1993(6)JT 515.**

-O.34,R.8- Redemption - Application for -Mere fact that application was not found in village by postman is no reason to dismiss application for default in appearance.**(1987)1 SCC 605.**

12. Who can apply for injunction (Page No. 335)

-O.39,Rr.1,2 - Temporary injunction-Building acquired for widening of road-Possession was also taken over by Municipal Corporation- Eviction of tenants in building on expiry of period of lease and licence-Order becoming final-tenants have no right to remain in possession- Cannot seek any injunction for restraining Corporation from evicting them.

In the instant case the State Govt. had acquired the building for purpose of widening of road undertaken by Municipal Corporation to remove traffic congestion. After the award was made by the Collector, Possession was taken. Thereafter, the appellants- tenants entered into leave and licence agreement with the Corporation. On expiry thereof, the Municipal Corporation had initiated proceedings for ejectment of the appellants and the order of ejectment had become final when the special leave petition was dismissed by the Supreme Court. Thereafter, the appellants had no legal right to remain in possession of the shops. In such circumstances the appellants possession being unlawful they cannot seek any injunction against the rightful owner from evicting them as the appellants have
No prima facie right or title and neither balance of convenience nor irreparable injury would be caused to them. Mahadeo Savlaram Shelke v.Puna Municipal Corporation. **1995 AIR SCW 1439 : (1995) 3 SCC 33 : (1995)2 JT 504.**

13. Injunctions will be granted only in suit. (Page No. 335)

-O.39,Rr.1,2 - Suit for interim injunction restraining elected Manager of duly constituted Committee of college from interfering with management and control - Dismissal of, by civil Court on the grounds that District Inspector of Schools is empowered to consider the question as to who is entitled to control the Management-Erroneous- **Held,** any interim relief which the parties may seek have to be decided and adjudicated upon by civil Court. Jaswant Singh V. Dist. Inspector of schools, Meerut. **1981 UPLBEC 126 (SC).**

-O.40,Rr.1, - Receiver appointed to property to which Rent Act applies-Power of Court to issue directions or orders for maintenance and preservation of property - Scope- Order or direction affecting right of tenant protected, controlled or regulated by Rent Act should not be passed-Illegal and unauthorized activity of tenant not consistent with rights flowing from tenancy can however be prevented by Court.

Where a Rent Act is applicable, the inter se rights and obligations of the landlord and tenant are regulated and controlled by such Rent Act. In areas where any special law governing the incidences of tenancy is not applicable, the law relating to lessor and lessee an envisaged by the general law of the land, namely, Transfer Of Property Act, Will regulated and determine inter se rights of landlords and tenant. In dealing with the rights and obligations which a third party may have in respect of a property in which a receiver, like a party to the suit, will have same limitation. The receiver will be bound by the incidences to tenancy flowing from the statute regulating and determining inter se right of landlord and tenant. Therefore, no order for eviction of the tenant can be passed by the court at the instance of its officer, the receiver, without taking recourse to appropriate proceedings for eviction of the tenant under the appropriate statute regulating and governing the inter se rights of landlord and tenant. Apart from an eviction proceeding, any incidence of tenancy which is regulated and controlled by a social statute cannot be altered, varied or interfered with except in accordance with the provisions of such statute. The Court in such cases has no jurisdiction to pass orders and direction affecting the right of the tenant protected, controlled or regulated by the Rent Act on the scores of expediency and passing some order or direction for the maintenance and preservation of the property in custodia legis. Thought a tenant of a property in custodia legis cannot be deprived of statutory protection of the rights of tenant vis-a- vis landlord, a tenant cannot claim protection of any assumed right not flowing from the incidences of tenancy. If a tenant resorts to unauthorized and illegal activity in respect of tenanted premises when such premises when such premises is in custodia legis, for prevention of such illegal and unauthorized activities not consistent with any right flowing from the incidence of his tenancy, it may not be necessary to institute a suit for preventing the tenant from such illegal activities: but the Court, being apprised by the receiver of such illegal activities of a tenant, thereby obstructing the Courts overall supervision and concern for preserving or maintaining the property in custodia legis, will be within its right to pass suitable order or direction against the tenant for prevention of illegal and unauthorised activities after giving the tenant reasonable opportunity to place his defence against allegation of unlawful and illegal activity. What should be the reasonable opportunity, must depend On the facts of each case. The Court, in such a case should ensure broadly that the tenant is not deprived of the reasonable opportunity to which he would have been entitled if an action against him in a Court of law had been brought on such complaint. Such the Court must be presumed to be fully unbiased in deciding the allegation of illegal and

unauthorised activities of a tenant causing prejudice against the lawful owner in the matter of preservation and maintenance of the property pendent lite, the necessity of adjudication of such dispute by another Court by bringing a legal action before, it, as a matter of course, is neither necessary nor expedient. However, if for the purpose of deciding the dispute of authorised and illegal activity affecting maintenance and preservation of the property in custodia legis it becomes necessary to determine any right claimed under a statute or flowing from some action inter partes as may be pleaded and required to be decided, it is only desirable that the Court would refrain from such determination in the summary proceeding initiated before it on the complaint of the receiver or a party to the suit and the Court will direct the receiver to seek adjudication of the dispute before a competent Court by the bringing appropriate legal action. Save as aforesaid, it will not correct to contend that in no case the Court exercising control and supervision of the property in suit by appointing receiver will be incompetent even to pass direction against a third party for the purpose of preservation of the property, once such third party pleads defence in justification of his action. Anthony C. Leo v. Nandlal Bal Krishna. **AIR 1997 SC 173 : 1996 AIR SCW 4338 : 1996 (11) SCC 376 : 1996 (4)Cur CC 237 : 1996(9) JT 672.**

-O.40, Rr.1, (Page No. 345)

- **Direction to Receiver to sell suit property - Receiver accepting offer of party with consent of parties to Suit-However,38 families residing in hutment constructed on the property in question offering to Court to purchase at price higher than that offered to Receiver-Contract between party making first offer and Receiver not a concluded contract -Held, in the interest of social justice, higher offer of hut-dwellers should be accepted.**

(Per majority, A.Varadarajan, J.contra)

A suit was instituted for a declaration that the will executed by 'J' was void. An Official Receiver was appointed over the disputed properties. He was directed by Court to sell the disputed premises either by a public auction or private treaty to the highest offered as some of the parties required immediate funds. The offer for purchase made by 'A' for Rs. 4,00,000/-accompanied by Bank draft for Rs.1, 00,000/ - in favour of Official Receiver was accepted. The appellant 'A' expressed his willingness orally to take the property under sale subject to the pending litigation. But the offer of the appellant did not contain any condition that the offer to purchase was subject to pending litigation. The approval of the parties had been obtained by the Official Receiver. According to the High Court there was no concluded contract. Though the application for sale of the property in question was made because the parties were while the matter stood thus, certain parties claiming to have constructed pucca huts on the disputed land made an application to the Court praying that their right to be in possession should be determined and offered Rs.1 Lakh more. The High Court held that the disputed lands should be sold to hut dwellers. According to the High Court there was no concluded contract between 'A' and the receiver.

Held, there was no bar to the receiver in accepting a higher offer because the appellant's offer because the appellant's offer had not yet been translated into action or become operative as the purchaser had not yet fulfilled the two conditions, viz.(I)not making the payment of the balance amount of Rs.3 Lakhs, and (2) not indicating that they would buy the properties subject to the pending litigation. The concept of social justice and in administering justice- Social or legal, jurisprudence has shifted away from fine spun technicalities and abstract rules to recognition of human beings as human beings.

-O.41,R.22 and O.41,R.33(Page No. 365)

- Power of Court of appeal under- Scope - Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of surplus Land) Act (12 of 1962), Ss10, 30-Order of Collector allowing certain units to landholders-No appeal filed by state- In appeal filed by landholder, Commissioner, held, had no power to interfere with finding in favour of landholder.

Where the Collector on the basis of the material placed before him allowed certain units to the various landholders who feeling aggrieved went up in appeal before the commissioner of the Division but the State of Bihar submitted to the order and did not go up in appeal nor did it file cross objection, the commissioner as well as the High Court, Held, Committed a manifest error in reversing the finding regarding allotment of units to the various appellants (landholders)in the absence of any appeal by the State of Bihar when the same had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross objection within the period of limitation. On the strength of the first part of sub-cl.(1) of R.22 of O.41 the State of Bihar could only support the decree not only on the grounds decided against it. Choudhary Sahu (Dead) by LRs. V. State of Bihar. **AIR 1982 SC 98 : (1982) 1 SCC 232 : 1982 UJ(SC) 86 : (1982) 2 SCJ 325.**

-O.41, R.22- L. R's. before Court- Action would not abate even if there is no strict compliance with requirements of Rr.3 and 4 of O.22- The principle applies to procedure to be followed in cross objections- That is why cross-objection can be preferred in respect of such points on which that party could have preferred an appeal -See Ibid, O.22, R.3 **AIR 1979 SC 1393.**

-O.47,Rr.1 and 4 (Page No. 390)

Award in land acquisition reference - Review by State - Compensation reduced to some extent-Appeal by state -cross appeal by claimant against maintainability of review application - No appeal by state against original order on reference - High Court holding review not maintainable - Effect-Proper order to be passed.

The effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree superseding the original one.

On a reference under the Land acquisition Act the district Judge on 18-8-1961 allowed the compensation for land at the rate of Rs 200/- per Katha. But on an application for review by the state the District Judge by a fresh judgement dated 26-9-1961 reduced the compensation from Rs.200/- to Rs.75/- per Kantha. Thereafter the state filed an appeal in the High Court. The memorandum of appeal stated that the appeal was being preferred against the decree dated 18-8-1961/26-9-1961 but it was clear from the grounds taken in the memorandum of appeal and the Court-fee paid that the appeal was only against the Decree dated 26.09.1961. The claimant filed a cross-appeal challenging the maintainability of the review petition as also the order passed thereon. The high court found that the District Judge went wrong in entertaining the review and vacating the judgement dated 18.08.1961 but, nevertheless, it considered the appeal on merits and dismissed the appeal and cross appeal thereby maintaining the compensation awarded at the rate of Rs.75/- per Kantha.

Held, when the High Court came to the conclusion that the district Judge went wrong in allowing the review, it should have allowed the cross- appeal and dismissed the appeal, which was and dismissed the appeal, which was and could only be against the decree passed on 26-6-1961 after the review.

State did not file any appeal from the decree dated 18-6-1961. On the other hand, it sought for a review of that decree and succeeded in getting the decree vacated. When it filed the appeal before the High Court, it could not have filed an appeal against the decree dated 18-8-1961 as at that time that decree and already been superseded by the decree dated 26-9-1961 passed after review. So the appeal filed by the State before the High Court could only be an appeal against the decree passed after review. Sushil Kumar Sen V. State of Bihar. **AIR 1975 SC 1185: (1975)1 SCC 774 : (1975) 2** SCWR 111: (**1975) 3 SCR 942.**

-CLUB (Page No. 410)

-Cannot be assessed to wealth tax-word 'individual' in charging S.3-Cannot be stretched to include association of persons like club.

153 ITR 172 (Mad), Overruled.

Charging section under Wealth Tax Act (S.3) does not speak of a body of individuals or an association of persons or a firm. If the legislative intent was to tax the wealth of body of individuals or an association of persons or a firm, the Legislature would have said so in so many words as was done in the Indian Income Tax Act, 1992 or Income Tax Act, 1961. When wealth tax Tax Act, 1957 was passed, the Legislature decided to specify only 'Individual, Hindu Undivided Family and Company' as units of assessment. It will not be right to presume that the Legislature was unaware of the wording of the charging provisions of Indian Income Tax Act, 1922, when the Wealth Tax Act was enacted. The Legislature must be presumed to have known the large number of cases that were heard and decided on the scope of the charging section under the Income Tax Act and meaning ascribed to "Association of Persons" therein. The legislature, however, decided to exclude "firms, association of persons and body of individuals" from the ambit of the charges of Wealth Tax. What has been specifically left out by the legislature cannot be brought back within the ambit of charging section by implication or by ascribing an extended meaning to the word "Individual" so as to include what ever has been left out. Wealth Tax Act has been drafted on the same lines as the Indian Income Tax Act-1922. There is similarity of wording between the various provisions of Wealth Tax Act and corresponding provisions of Indian Income Tax Act 1922. But in the case of the charging of S.3 of the Indian Income Tax Act , S.3 of the Wealth Tax Act does not mention a firm or an association of persons or a body of individuals as taxable units of assessment

The position has been placed beyond doubt by insertion of S.21-AA in the Wealth Tax Act itself. This amendment was effected by the Finance Act,1981 with effect from 1-4-1981. It provides for assessment of association of persons cannot be taxed at all under S.3 of the Act. That is why an amendment was necessary to be made by the Finance Act,1981.whereby S.21- AA was inserted to bring to tax net Wealth of an association

Of persons where individual shares of the members of the association were unknown or indeterminate. It is thus clear that the legislature deliberately excluded a firm or an association of persons from the charges of Wealth Tax and the word "individual" in the charging section can not be stretched to include entities which had been deliberately let out of the charge. An unincorporated club being an association of persons could not be brought to tax as an individual under the Wealth Tax Act.

123 ITR 395 ; 136 ITR 697 : 191 ITR 370, **Approved.**

129 ITR 307, **Expln.** Commissioner of Wealth Tax, Gujrat III v. Ellisa Bridge Gymkhana. **AIR 1998 SC 120: 1997 AIR SCW 4074 : 1997 Tax LR 1072 : 1998 (1) SCC 384 : 1997 (9) Supreme 204 : 1997 (8) JT 585.**

-Expulsion of members-Source of power. **AIR 1963 SC 1144**

MUNCIPAL TAX

Retable value of property -Ascertainment. **AIR 1968 SC425.**

-Sports club-Grant of lease by Government at concessional rate- Validity **AIR 1998 SC 2320 : 1998 AIR SCW 2232.**

Clubbing of Income

- Expression "individual" occurring in S.64 (1)(I)-Covers both male and female of species. Commissioner of Income Tax ,Ludhiana V. Om Prakash. **AIR 1999 SC 2534 : 1999 AIR SCW 2699: 1999 TAX LR 807 : 1999 (4) Scale 275:1999(6)Supreme 246 : 1999(6) SCC 349 : 1999 (5) JT 104.**

-Expression "individual" under S.64 - Does not include Karta of HUF-Karta of HUF, partner in firm-Minor children of karta admitted to benefits of partnership-Income of Karta's minor children cannot be included in computation of his total income.

1984 tax LR 289 (All) (FB), 1977 Tax LR 34 (All),(1984)147 ITR 732 (Mad),(1990) 183 ITR 382(MP), Overruled.

Word "individual" in S.64(1) does not take in Karta of the Hindu Undivided Family within its import. Income in the hands of Karta of the HUF as partner of a partnership firm cannot be treated as income of individuals and, if that be so, the income arising to the spouse of minor child of the Karta of HUF cannot be included in his income as such under S.64(1)(I) and (ii) of the1961 Act.

When a Karta of HUF is a partner in partnership firm, he has dual capacity ; qua the partnership, he functions in his personal capacity and qua third parties , in his representative capacity. Under the Income Tax Act, when he is assessed in respect of the income derived by him from the partnership firm as a partner, it is in his representative capacity as Karta of the HUF and not as an individual as such. That is because his capacity vis-à-vis spouse/minor children who are members of the HUF is that of Karta and not as an individual though vis-à-vis other partners of the partnership firm he functions in his personal capacity. This being the position, the income of Karta's Spouse / Minor child cannot be included in computation of his total income, for, that is the income of HUF and not his individual income. Section 64 will be attracted only when an assessee's own income is being assessed and not that of an HUF. If Karta is brought within the ambit of 'individual is S.64 (1), the share income of the spouse of the Karta and his minor children will, in effect, be included in the income of the HUF which is not what is contemplated by S.64(1) (I) and (ii)and which is impermissible. Yet another aspect which militates against bringing in Karta within the meaning of term 'individual' in S. 64(1) is that it speaks of total income of any individual and total income of the HUF need not be total income of Karta as an individual. The object of S.64(1) of the 1961 Act, like the object of S.16(3) of the 1922 Act, is to check the tax evasion resorted to by individuals forming partnership as a cloak to perpetrate fraud on taxation. But cases of genuine partnership where any individual take the spouse and minor children as partners will also be within the clutches of S.64(1). It is true that if Karta is held not to fall within the meaning of the term 'individual' in S.64(1), the tax evasions sought to be averted would continue in the case of the HUF where a Karta takes the spouse or minor children to the benefits of the partnership or as members in the partnership firm. But it cannot be

lost sight of that 'individual' and HUF are two different tax entities and Parliament has chose to confine the application of S.64(1) for purposes of tax evasion in regard to individuals without being Kartas of the H UF in the fold of section either by defining individual or otherwise. On the ground that Karta of HUF will draw an unfair advantage of this interpretation , Court cannot enlarge the meaning of the term 'individual' by the process of the term' individual' by the process of interpretation so as to rope in Karta within the meaning of the term "individual' by implication, the HUF within the clutches of S. 64(1) of the 1961Act. Commissioner of Income tax, Ludhiana v. Om Prakash. **AIR 1999 SC 2534 : 1999 AIR SCW 2699 : 1999 Tax LR 807 : 1999(4) Scale 275 : 1999 (5)JT 104 : 1999 (6) SCC 349 : 1999(6) supreme 246.**

- **Income of Spouse admitted to partnership or of minor children admitted to benefits of firm- Cannot be included in individual income of husband/ father who is partner in capacity of Karta of H.U.F.- Cannot also be included in income HUF.**

Where a person is a partner in a partnership firm not in his individual capacity but as the Karta of the HUF, neither the income accruing to his wife on account of her being a partner in the same partnership firm nor the income accruing to his minor children on account of their being admitted to the benefits of such partnership firm, can be included in the total income of such person neither in his individual assessment nor in the assessment of the H.U.F.

The opening words of S.64(1) are " incomputing the total income of any individual." Then it proceeds to say that in the total income of such individual shall be included the income of his spouse arising from the membership firm in which such individual is the partner. It proceeds further and says that the income arising to the minor children of such individual who are admitted to the benefits of partnership where in such individual is a partner shall also be included in the total income of such individual is a partner shall also be included in the total income of such individual. Now an individual can be partner in a partnership firm in his individual capacity or in the capacity of the karta of a HUF or, for that matter, in any other capacity, e.g., as a trustee. So far as other partners in the partnership firm are concerned, they are not really concerned in what capacity a particular person is a partner, i.e. Whether as an individual, as a karta, as a trustee or otherwise. To them, he is an individual, a person. This aspect however becomes relevant as between the partner and those whom he represents in the partnership firm. To wit, where a person is a father as the karta of a HUF, the capacity in which he is a partner in the partnership firm is relevant as between him and the other members of the HUF for, the income the Karta receives as a partner is not his individual income, it is the income of the HUF and receives it on the HUF. It is for this reason that the income of the wife and minor children arising from their membership/admission to the benefits of partnership firm is held not Includible in the income of the HUF since the total income of HUF is not the total income of the individual(husband or father as the case may be). For section 64(1) to get attracted, it is necessary that the Husband/Father should be a partner in a partnership firm as an individual, i.e., in his individual capacity. It is not attracted where he is a partner as the Karta of H.U.F. to which such wife and /or minor children belong. It may not be quite to say that vis-à-vis the members of the HUF, the Karta is still an individual and, therefore, such income of wife and minor children should be included in the income of the Karta derived as karta. Nor is such income of the wife and/ or minor children should be included in the individual assessment of the Karta. In clauses (I) and (ii) the expression "such individual" occurs twice. Firstly, the "Individual" must be a partner in a firm and the wife and/ or minor children of such individual must also deriving income from such partnership firm. For the purpose of clauses (I) and (ii), it is not his capacity vis-à-vis other partners of the firm that is relevant but his capacity vis-à-vis his wife and/ or minor children. Commissioner of Income tax, Ludhiana v. Om Prakash. **AIR 1996 SC 593 : 1995 AIR SCW 4529: 1996 TAX LR 171 :1995 SUPP (4) SCC 737:1995(8) JT 245.**

Page 415.

-S. 2(d)- Bihar Land Reforms Act (30 of 1950), S.10(1)-"Person interested" within S.2(d)- Holder of head lease for mining in Bihar-Lease subsisting before vesting in state of area comprised in lease under Land Reforms Act- Holder is "Person interested" within S.2(d). 1971 BLJR 335,Reversed.

Where the head lease for mining of an area in Bihar subsisting before the vesting of the area in the State under the Land Reforms Act the position as it stood prior to the Change in the law by the introduction of S.10(A) in the land Reforms Act that the head-Lessee with the State Government becoming the lessor in place of the erstwhile grantor of the lease would be apply. As such, the head lessee would be "person interested" within the meaning of S.2(d). In such a case, it cannot be said that S.10(1)(a) of the Land Reforms Act envisaged a lessee being in actual possession and that where the head-lessee had parted with possession in favour of Sub-Lessee the idea of the lessee being held to be entitled to "retain possession" becomes in apposite and that therefore, S.10(1)can not be so strictly construed as to be equivalent to actual possession. A lessee, in law is in possession through a sub-lessee though the possession of sub-lessee is "immediate" and that of the lessee "mediate". In the view that the head lessee is a "person interested" the question that the head lessee should be held as "person interested", the same for being holding company of sub-Lessee or the further question that the expenses incurred by the head-Lessee for obtaining the lease could be claimed even assuming that sub-lessee could alone be "person interested" becomes academic. The second point assumes materiality only of head lessee is not entitled to compensation and as a consequence, the further question arises whether the expenses incurred by it under S.13(1)(I) can constitute a head of claim in the hands of the sub-lessee. Karanpura Development Company v. Union of India. **AIR 1988 SC 1478: (1998) 2 UJ(SC)236.**

Page 419.

-Ss.13,14- Scope-Acquisition of land- Validity of Act cannot be challenged on ground of inadequacy of compensation-Constitution of India Art. 31(2)

Prospecting on a piece of land for coal is merely a stage preceding the actual acquisition of that land. If, therefore, those provisions of the law which deal with the question of acquisition are rendered unconstitutional the whole act will be rendered unconstitutional. There is no doubt that the entire Act cannot be sustained by resorting only to Art.31- A(1)(e) or to Art.31 (2)(A) of the Constitution because these provisions of Ss.13 and 14 that the Act specifies the principles on which and the manner in which the compensation should be determined and given. This is all that is required of a law relating to acquisition of property by Art.31(2) of Constitution. Burrakur Coal Co.Ltd V Union of India. **AIR 1961 SC 954: (1962) 2 SCJ 216 : (1962) 1 SCR 44: (1961) 2 SCA 523.**

SECTION 14

-S.14- Act also deals with acquisition of land-Ss.13 and 14 Specify principles and manner of compensation- Validity of Act cannot be challenged on the ground of

inadequacy of compensation -Constitution of India,Art.31(2)- See Ibid, S. 13. **AIR 1961 SC 954.**

-SS.2(h),3(3) and 26-Nationalisation-Properties of mine vesting in Central Government on nationalisation- Structures adjacent to mine used as office and quarters of staff of mine-They would vest in Central Government.
Appeal from O. D. No. 722 of 1979, D/-20-11-1992 (Patna), Reversed.

Where a colliery vested in the Central Govt. by virtue of S.3 of the Act and certain structures near the mine were unutilized as office premises of the colliery and staff quarters of the officers of the colliery, the structures would also vest in the central Govt. by virtue of extended definition of mine in S. 2(h).

Page No. 420

-S.2 (h)(iv)- Term 'mine'- Scope of Land adjacent to a mine and used for purchases thereof for carrying on mining operations in respect of part of seam lying immediately below surface -Land also used for purposes of adjacent mine- It is "mine" within S.2(h)(iv).

The land was being used for carrying on the mining operations and it was adjacent to a mine and was used for the purposes of the mine for carrying on the mining operations in respect of the part of the seam lying immediately below the surface. Secondly, the land was also being used for the purposes of the said adjacent mine, namely, stacking of the coal and effecting local sale thereof.
Held, land constituted mine within meaning of Ss.2(h)(iv) and 2(h)(vi). Apparently, there cannot be any working mine without the surface being included in that concept. If the surface does not form part of the concept of mine, It is not possible to have any excavation. Section 2(h)(iv)includes open cast working within the definition of "mine". Kali Prasad Agarwalla (Dead by LRs) v. M/s Bharat Cooking Coal Ltd. **AIR 1989SC1530 :1989 BBCJ (SC)112.**

Page No. 439

COMMERCIAL DOCUMENTS EVIDENCE ACT (30 OF 1939)

SECTION 3.

-S.3 (b), Sch. Pt. II, Item 21- Copy of balance sheet from Registrar's office-Admissibility.

Under s.3(b) read with the schedule part II, Item No. 21, Court can presume that the balance sheet, copy of which is obtained from the office of Registrar of Companies, has been duly made and that the statements contained therein are accurate. Such a copy is therefore admissible in evidence without any further proof.

The presumption under S.3(b), however is not compulsory as in the case of S.3(a) of the Act; it is discretionary with the Court. Kashinath Sankarappa Wani v. New Akot Cotton Ginning and Pressing Co. **AIR 1958 SC 437; 1958 SCJ 748: 1958 SCR 1331: 1959 SCA 211.**

SCHEDULE, PART II,ITEM 21

- Sch., Pt. II, Item 21- Copy of balance sheet from registrar's office-Admissibility-See Ibid, S.3(b). **AIR 1958 SC 437.**

COMMERICAL ESTABLISHMENT

Lawyer's office - Not a commercial establishment. **AIR 1984 SC 1700: 1984.**
Lab IC 1587.

SECTION 20

(Page No. 453)

-S.20 - One Article of Association prescribing maximum and minimum number of Directors- Another article authorizing company at General Meeting to increases or reduce number subject to provisions of S.83-A (1) and to alter their qualification and order of rotation – Held, on consideration of Articles of Association, that provisions were textually inconsistent and must be read subject to cross reference reconciling them- Ordinary resolution of company at general Meeting increasing number of Directors beyond prescribed maximum held valid. 50 Cal WN 310, Reversed.

One of the Articles of Association, Art.109 of a company prescribed maximum and a minimum number of Directors without any qualifying words. Another Article (Art.126) authorised the company in a General Meeting, from time to time to increase or reduce the number of Directors subject to the provisions of S.83-A(1) and to alter their qualification and change the order of rotation of the increased or reduced number. The question was whether the power of the company by ordinary resolution to "increase or reduce" the number of Directors conferred by Art.126 was only exercisable within the limits set by the maximum and the minimum prescribed by Art. 109 and whether a special resolution altering Art 109 and whether a special resolution altering Art.109 and whether a special resolution altering Art.109 was required to increase the number of Directors beyond the prescribed maximum;

Held, that after consideration of the relevant Articles, Arts. 126 and 109 were two textually inconsistent provisions. The company had power to increase the number of Directors beyond the maximum prescribed by Art.109, by an ordinary resolution and consequently a special resolution altering Art. 109 for the purpose was not required. Ram Kissendas Dhanuka V. Satya Charan. **AIR 1950 PC 81:77 Ind App 128:52 Bom LR 501: ILR (1951)1 Cal 305.**

Page No. 454.

-S.34 and Table A, Regn.18- Transfer of shares- Relationship between Transferor and transferee - Obligation of transferor.

On the transfer of shares the transferee becomes the sole beneficial owner of those shares sold by the transferor, the legal title to which is vested in him. Thus, the relation of trustee and cestue que trust is thereby established between them. The transferor holds the shares for the benefit of the transferee to extent necessary to satisfy the demands of S.94, Trusts Act, 1882. As the transferee holds the whole beneficial interest and transferor has none. The transferor must comply with all reasonable directions that the transferee may give. In this situation if he becomes a trustee of dividends he is also a trustee of the right to vote.45 Bom LR 46, **Rel. On**. Mathalone R. V. Bombay Life Assurance Co. Ltd. **AIR 1953 SC 385 : 1953 SCJ 548: 1954 SCR 117.**

Page No. 465.

SECTION 193

-Ss. 193 and 230(3) – Bank in occupation of property as tenant – Property not remaining with liquidators for purpose of liquidation – Property of rent accruing due since date of winding up.

Where the property of which the bank was in occupation as a tenant has not been challenged the property not having remained with the liquidators for the purpose of the liquidation, unless the court passes an order holding that the debt incurred was a part of the cost and expenses of liquidation, the rent accruing due since the date of winding up cannot be claimed in priority over other ordinary debts. Official Liquidators. U.P. Union Bank, Ltd. v. Rameshwar Nath Agarwal. **AIR 1960 SC 332:1960 SCJ 334 : (1960) 2 SCR 189: (1960) 1 An WR (SC) 93.**

Page No. 497.

Ss.169,87 - U.P. Land revenue Act(3 of 1901), S.149- Right of shareholder to requisition extraordinary general meeting of company - Shares held by shareholder attached under S.149 of U.P. Act - Effect- Title of shareholder to share not lost-He can requisition extraordinary general meeting.

The attachment of certain shares of a company held by a shareholder for purpose of sale in a shareholder for purpose of sale in a proceeding under S. 149 of the UP Land Revenue Act does not have the effect of depriving the holder of the shares of his title to the shares, and the shareholder is not depriving the holder of the shares of his title to the shares, and the shareholder is not deprived of his right to vote at the meeting or to issue the notice under S. 169 of the Act.

An attachment under S.149 of the Land Revenue Act is made according to the law in force for the time being for the attachment and sale of movable property under the decree of a Civil Court. Section 60 of the Code of Civil Procedure,1908 states that the properties that are liable to attachment for purpose of sale. Section 64 of the Code of Civil Procedure,1908 states that where an attachment of a property is made, any private transfer or delivery of the property attached or any interest therein and any payment to the judgement- debtor of any debt, divided other monies contrary to such attachment,

Shall be void as against all claims enforceable under the attachment. Until the property is actually sold, the judgement-debtor retains title in the property attached. Under Rule 76 of O.21 of the Code of Civil Procedure,1908, the shares in a Corporation which are attached may be sold in public auction under R. 77 thereof. On such sale either under R.76 or R. 77, the purchaser acquires title. Until such sale is affected , all other rights of the judgement-debtor remain unaffected even if the shares may have been seized by the officers of the Court under R.43 of O.21 of the Code of Civil Procedure,1908 for the purpose of effecting the attachment, or through a receiver or though an order in terms of Rule 46 of O. 21 of the code of Civil Procedure may have been served on the judgement - debtor or on the company concerned. Balkrishna Gupta V. Swadeshi Polytex Ltd. **AIR 1985 SC 520: 1985 Tax LR 2066: (1985)2 SCC 167 : (1985) 2 SCR 854.**

Page No. 515

S.394-Amalgamation of Company - Valuation of shares-Approved by more than 95% of shareholders - Cannot be interfered with the Court.

Per R.M.Sahai, J. when in case of amalgamation of Company admittedly more than 95 % of the shareholders who are the best Judge of their interest and are better conversant with the market trend agreed to the valuation determined it could not be interfered by Courts as, certainly, It is not a part of the Judicial process to examine entreneurial activities to ferret out flaws. The Court is least equipped for such oversights. Nor, indeed, is it a function of the Judges in our constitutional scheme. It cannot be said that the internal management, business activity or institutional operation of public bodies can be subjected to inspection by the Court. To do so, is incompetent and improper and, therefore, out of bounds. Nevertheless, the broad parameters of fairness in administration, bona fides in action and the fundamental rules of reasonable management of public business, if breached, it will become justiciable. Hindustan Lever Employees Union V Hindustan Lever Ltd. **AIR 1995 SC 470: 1994 AIR SCW 4701: (1994)4 Com LJ** 267 : 1995 Supp (1) SCC 499.

-S.394- Business income - Trading liability allowed to assessee in previous year- Tax on benefit obtained by assessee in respect of such trading liability in subsequent year - Permissible only if identity of the assessee in the previous year and subsequent year is same- Amalgamation of companies- Amalgamating (Transferor) Company loses its identity - S.4(1) cannot be applied. **AIR 1991 SC 70 : 1990 Tax LR 1003.**

-S.394- Amalgamation of companies - Carry forward and set off of accumulated loss and unabsorbed depreciation allowance of amalgamated company- Refusal of Government to give declaration contemplated by S.72-A of I.T. Act on conclusion that amalgamating company- Financial assistance could not be forthcoming in view of provisions of S.370 of the companies Act- Interference by High Court held valid- See Income Tax Act(1961), S.72- A. **AIR 1984 SC 1182 ; 1983 Tax LR 1286.**

-S.394-Words and Phrases-"Undertaking" -Meaning of-Banking Companies(Acquisition and transfer of Under taking) Act(22 of 1969),S.5- See Words and Phrase- Undertaking - **AIR 1970 SC 564.**

COMPANY ACT.

SECTION 535 (Page No.537)

S-535- Order permitting disclaimer of onerous property -Power of Court-Power exercised in respect of large area of land leased to company in liquidation for 99 years with further 99 years for meagre rent of Rs.1200/- per annum- Not justified. Decision of Calcutta High Court, Reversed.

The power under S. 535 is not to be lightly exercised. Due care and circumspection have to be bestowed. It must be remembered that an order permitting disclaimer, while it frees the company in liquidation of the obligation to comply with covenants, puts the party in whose favour the covenants are to serious disadvantage. The court must, therefore, be fully satisfied that there are onerous covenants, covenants which impose a heavy burden upon the company in liquidation, before giving leave to disclaim them.

Where a large area of land was leased to the company in liquidation for 99 years with the option of renewal for a further 99 years for the meager rent of Rs.1200/- per annum it could not be said to be land burdened with onerous convenants. Therefore, it was held that the High Court was not justified in permitting disclaimer of land and holding in proceedings under S. 535 that the lease of the said land had been validly terminated so that the Official Liquidator became liable to pay mesne profits to the Trust; and that this coupled with arrears of rent, in five figures made the lease onerous. United Bank Of India V. The official Liquidator.**1993 AIR SCW 3586 : 1994 (1) SCC 575 : 1993(6) JT 116 : (1993) 12 Corporate Law Adviser 207(SC).**

SECTION 536

-S.536 (2) - Word 'void' in S. 536 can not be understood as meaning ab initio void- See Negotiable Instruments Act (1881) S.138. **2000 AIR SCW 992 : 200 Crj LJ 1781 : 2000 CLC 712.**

-S.536 (2) - Winding up proceedings- Order staying up of proceeding by appellate Court- Repayment of debts to creditor by company during interregnum period- No evidence to show that payments were made in bona fide manner- Such payments cannot be validated. Chittoor District Co-operative Marketing Soc.Ltd. v. M/s Vegetols Ltd. **1987 (Supp) SCC 167.**

-Ss.536,82 - transfer of shares - Effect of - Right to dividend -Winding up - Transfer of assets by liquidators for cash and shares in another company -Sanction by court - Discretion - See Ibid, S. 82. **AIR 1956 SC 655.**

SECTION 537.

-S. 537 - Applications of banks and Financial Institutions for recovery of debts due to them - Provisions of Recovery of debts due to Banks and Financial Institutions Act, 1993 confer exclusive jurisdiction in the debt recovery Tribunal and recovery officer- Jurisdiction of civil court or company court is ousted- See Banking Laws-Recovery of debts to bank and Financial Institutions Act (1993), S.17. **AIR 2000 SC 1535 : 2000 AIR SCW 1347:2000 CLC 913.**

-S.537- For initiation of various Debt recovery proceedings by the Banks and Financial Institutions under RDB Act, 1993 leave of Company Court is not necessary -See Banking Laws- Recovery of debts due to Banks and Financial Institutions Act (1993),S.19(19). **AIR 2000 SC 1535 : 2000 AIR SCW 1347:2000 CLC 913.**

-S.537- Recovery of Debts due to Banks and Financial Institutions Act overrides the companies Act - See banking laws - Recovery of Debts due to Banks and Financial Institutions Act (1993),S.34. **AIR 2000 SC 1535 : 2000 AIR SCW 1347:2000 CLC 913.**
-S.537- Winding up proceedings in respect of Bank -Applicability of Ss. 171 and 232, Companies Act (1913) -See banking laws- Banking Companies Act (1949),S.45G. **AIR 1965 SC 614.**

SECTION 543 (Page: 538)

-Ss. 543, 634 and 635- Civil P.C. (1908), Ss. 2(11) and 50 - Misfeasance proceedings under S. 543 against Director of Company in liquidation- Death of Director during pendency of proceedings- Proceedings can be continued against his legal representative -His liability, However, would be limited to value of deceased's estate in his hands. (1975)79 cal WN 92, Reversed.

The proceedings initiated against a Director of a company in liquidation under S.543 of the Companies Act can be continued after his death against his legal representatives and the amount declared to be due in such misfeasance proceedings can be realised from the estate of the deceased in the hands of legal representatives. The legal representative, of course, would be not liable for any sum beyond the value of the estate of the deceased in his hands.

The liability arising under the misfeasance proceedings is founded on the principle that a person who has caused loss to the company by an act amounting to breach of trust should make good the loss. Section 543 of the Act does not really create any

new liability. It only provides for a summary remedy for determining the amount payable by such person on proof of the necessary ingredients. The Section authorises the Court to direct such persons chargeable under it to pay a sum of money to the company by way of compensation. This is not a provision intended to punish a man who has been found guilty of misfeasance but for compensating the company in respect of the loss occasioned by the misfeasance.

At the conclusion of the proceedings under Section 543 a declaration of the liability is made. Such declaration partakes of the character of a decree in a suit. When once such declaration is made it can be enforced under section 634 of the Act and where the order made by one Court has to be executed by another Court the procedure prescribed by section 635 of the Act has to be followed. In the course of such execution proceedings the provisions of Sections 50 of the Code Of Civil Procedure has to be applied when the person who is made liable dies before the order is satisfied and the liability of the legal representatives should be determined accordingly. Any other construction of the provisions of Section 543 of the Act would make the entire process of determination of the liability of persons under it meaningless. The official Liquidator v. Parthasarathi Sinha. **AIR 1983 SC 188 : (1983) 1 SCC 538 : 1983 UJ (SC) 71: 1983 Tax LR 2401.**

SECTION 557.

-S. 557- Winding up of company under just and equitable clause- Consideration of wishes of creditors-See Ibid, S. 433 (1).**AIR 1971 SC 2600 : 1971 Tax LR 1771.**

SECTION 582

-S.582(b) - Part X does not affect operation of partnership Act- Partnership, an unregistered company-Suit for dissolution, accounts and declaration- Maintainability - See Ibid, S. 590. **AIR 1977 SC 2021.**

-S.582- Company incorporated outside India, carrying on business in India - Winding up as unregistered company -Foreign creditors can prove their claims -See Companies Act (1913), S. 156.**AIR 1962 SC 500.**

SECTION 583

-S.583- Company incorporated outside India, carrying on business in India - Winding as unregistered company -Foreign creditors can prove their claims -See Companies Act (1913), S. 156.**AIR 1962 SC 500.**

SECTION 584

-S.584 - Company incorporated outside India, carrying on business in India - Winding as unregistered company -Foreign creditors can prove their claims -See Companies Act (1913), S. 156.**AIR 1962 SC 500.**

SECTION 585

-S.585- Company incorporated outside India, carrying on business in India - Winding as unregistered company -Foreign creditors can prove their claims -See Companies Act (1913), S. 156.**AIR 1962 SC 500.**

SECTION 590 (Page: 539)

-S.590& 582(b)-Part X does not affect operation of partnership Act- Partnership an unregistered company- Suit for dissolution, accounts and declaration- Maintainability.

Section 590 leaves unaffected the operation of any enactment (a) which provides for any partnership, association or company being wound up, or (b) which provides for any partnership, association or company being wound up as a company or as an unregistered company under the companies Act, 1913 or any Act repealed by that Act. An enactment means the whole act or a part of it. It is clear that the provisions for winding up of the affairs of a firm which Chapter VI of the Partnership Act Contains besides provisions for the dissolution of partnership are left untouched by S.590. AIR 1955 Mys 149, **Overruled.**

Thus where the partnership was an unregistered company within Section 582(b) and the suit was filed for dissolution of partnership and accounts and the reliefs prayed for included a declaration that the firm stood dissolved from certain date, it was held that it could not be said that the Court had no jurisdiction to entertain the suit in view of part X of the Act. The relief for declaration could not be claimed in a proceeding under Part X of the Companies Act which provided for the winding up of unregistered companies. However, it was not necessary to consider whether the civil Court had jurisdiction to entertain some of the Claims made in the suit because Section 590 of the Companies Act made it clear that Part X of the Act did not affect the operation of the Partnership Act. Vasantrao V.Shyamrao. **AIR 1977 SC 2021: (1977) 4 SCC 9: 1977 UJ (SC) 499: (1977) 2 SCJ 373.**