

the principle of affirmative action adopted by Courts sometimes in order to avoid discrimination. If we may say so what the High Court has done in this case is a clear and naked usurpation of legislative power.”

1997 (6) SCC 312 = 1997 (4) ALD (SCSN) 55

It is well settled the Courts cannot direct legislation as observed by a three Judge Bench decision of the Supreme Court in *Institute of chartered accountants of India v Price water House and another*, 1997 (6) SCC 312 = 1997 (4) ALD (SCSN) 55, Judges

should not proclaim that they are playing the role of law maker merely for an exhibition of judicial velour. They have to remember that there is a line though thin which separates adjudication from legislature. They should not be crossed.

It is therefore respectfully submitted the decision under study far from being per incuriam appears to be incorrect statement in law and amounts to impermissible legislation and requires reconsideration either for confirmation or otherwise of its reversal which, however appears to be impliedly overruled by the three Bench Decision of the Supreme Court AIR 1964 SC 215.

ORDERS ON INTERLOCUTORY APPLICATIONS — THEIR IMPACT ON THE SUITS

By

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The Supreme Court of India held in *Satyadhyan v. Smt. Deorajie Dabi*, AIR 1960 SC 941, that, ‘Interlocutory orders which have the force of a decree must be distinguished from other interlocutory orders which are a step towards the decision of the dispute between parties by way of a decree or a final order. *Moheshur Singh’s* case, *Forbe’s* case and *Sheonath’s* case dealt with interlocutory judgments which did not terminate the proceedings and led up to a decree or final order. *Ram Kirpal Shakul’s* case, *Bani Ram’s* case and *Hook’s* case deal with judgments, which though called interlocutory, had, in effect, terminated the proceedings....”

Following the said judgment of the Apex Court, A.P., High Court held at para 26, page 421 of 1994 (2) ALT 411 as follows:

“26. From the judgment of the Supreme Court referred to above, it is clear that in order to determine whether a particular order was an interlocutory order or not, we have to see whether the order terminates the proceedings. If the order terminates the proceedings, then it becomes a final order; otherwise, it remains to be an interlocutory order. If it is an interlocutory order, the correctness of the same can be challenged in appeal filed against the final order.... Therefore, the order was a final order as it had the consequences of putting an end to the controversy and as such Section 105 CPC is not applicable....”.

2. Section 104 of CPC speaks of orders from which an appeal lies. Order 43 Rule 1 narrates certain orders passed under various

provisions of CPC against which appeals lies to the 1st appellate Court. Section 105 says that orders which would not come within Section 104 are not subject to any appeal but such orders can be set forth as a ground of objection in the memorandum of appeal, if a regular appeal is preferred against the decree passed in the main proceedings. Thus, orders on interlocutory applications have to be understood as being contained in two separate compartments, to wit, (1) Orders on interlocutory applications which have the effect of finally terminating the proceedings; and (2) orders on interlocutory applications which have no effect on the original proceedings. In the case of former, Section 105 CPC has no application and Section 105 CPC has application in the case of latter orders only.

3. In a case where order 9 Rule 13 CPC Petition is filed along with a delay condonation petition under Section 5 of Limitation Act, 1963 and where the limitation petition was dismissed and in view of the order passed on the limitation petition, the Court dismissed the un-numbered Order 9 Rule 13 CPC Petition, it was held by AP High Court in a decision reported in 2004 (2) ALD 817, that 'The Orders or decrees, which are passed consequent upon the earlier orders, would remain in force so long as the former orders are in force and are not reversed or superseded and once the former order is aside, the consequential order or decree will not survive and will fall through'.

4. In view of the above case law, I bring forth for consideration the provisions contained in Order 7 Rule 11 CPC, which is extracted hereunder:

*Order 7 Rule 11 : Rejection of plaint :—*The plaint shall be rejected in the following cases :—

- (a) where it does not disclose a cause of action;

- (b) where the relief claimed is under valued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with provisions of Rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended, unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Section 2(2) of CPC is as follows:

Section 2(2) :— In this Act, unless there is anything repugnant in the subject or context,—

- (1)
- (2) "decree" means.... it shall be deemed to include the rejection of a plaint and the determination of any question within Section 144.....

5. A plaint can be rejected by the Court itself at the time of registering the suit or during pendency of the suit *suo motto* or on an application by the defendant at any time under Order 7 Rule 11 CPC, when the Court itself rejects the plaint, the Court will have to necessarily mention in detail the grounds on which it rejected the plaint on the plaint itself. The entire order of the Court will be contained on the plaint only. But, on the other hand, if the Court allows a petition filed by the defendant under Order 7 Rule 11 CPC, the Court passes the necessary order on the said petition in full. After passing the order of rejection on the said interlocutory petition in all particulars, the Court would simply write on the suit-bundle generally as follows : “Suit is rejected, in view of the orders passed in I.A. filed under Order 7 Rule 11 CPC (*vide* separate orders). So, the order in I.A. is the main order and the order passed by the Court on the plaint, rejecting the plaint is only a subordinate or dependent or consequential order, which will remain in force till such time as the earlier order, that is, the order passed in the I.A., filed under Order 7 Rule 11 CPC., is not reversed or superseded.

6. Let us consider a concrete example. Suppose a Government employee files a suit in a civil Court in respect of his service matter, seeking for a declaration that the dismissal order served upon him by the appointing authority, is void and seeks for a consequential relief of permanent injunction even without serving any statutory notice under Section 80 CPC., the Court, more often than not, will reject the plaint; as the suit clearly appears from the statement in the plaint to do barred by a law, the law being Administrative Tribunal Act. Then, the Court will have to necessarily pass the order of rejection in detail on the plaint itself. The order becomes a part of the plaint.

Suppose in the same example, by inadvertence, the Court registers the suit and

issues summons to the defendant and the defendant files an interlocutory application under Order 7 Rule 11(d) requesting the Court to reject the plaint as it is hit under provisions of Administrative Tribunal, Act. After hearing both sides, the Court must allow the said interlocutory application and immediately on the plaint, it would pass usually an order as follows: “Suit is rejected in view of the orders passes in I.A., filed under Order 7 Rule 11(d) CPC”. So, the rejection of the plaint can be in either way, one by way of the order of the Court passing on the plaint itself *suo motto* and the other passing of such order of rejection on a petition filed by the defendant under Order 7 Rule 11 CPC., being allowed.

7. It is said in Section 2(2) that a ‘decree’ includes rejection of plaint but it does not say that a ‘decree includes a plaint rejected under Order 7 Rule 11 CPC’. There is vast difference between these two fields of exercise of power by the Court. When the Court *suo motto*, rejects the plaint, it is not exercising the right to reject under Order 7 Rule 11 CPC, necessarily, but it exercise its right under Section 9 CPC., and any statutory bar for the suit to be taken cognizance of by any special Act; but, when it exercises its power of rejecting the plaint after defendant puts up appearance, it would be on a petition filed by the defendant, in which case such order of rejecting the plaint is only a consequential order for the orders passed in the earlier interlocutory application filed by the defendant under Order 7 Rule 11 CPC., and which order of rejection stands good so long as the earlier order in the IA., filed under Order 7 Rule 11 is not superseded. But, it is not so in the case of order of rejection passed by the Court *suo motto* on the plaint itself. So, when it is said order of rejection comes within the meaning of the definition “decree” under Section 2(2) CPC., it means when the order of rejection is passed by the Court *suo motto* only, as the said order will be completely written on the

plaint itself. So that grounds of appeal can be taken with respect to the said order of the Court found on the plaint; but, if it is interpreted that an order rejection by the Court on a petition filed by the defendant under Order 7 Rule 11 CPC., also comes with the definition “decree” as contemplated under Section 2(2), then there can be no appeal grounds at all as there could be no reference to the findings of the Court passed on I.A., while allowing the I.A., under Order 7 Rule 11 CPCs., as the judgment of the Court contains nothing but one sentence, to wit, the plaint is rejected in view of the orders passed in I.A., filed under Order 7 Rule 11 CPC., under Section 96 CPC., such orders passed in I.As., which have no direct impact on the plaint, resulting in rejecting the plaint or dismissing the suit, can only be urged as grounds of appeal. The order passed on a petition under Order 7 Rule 11 is not such an order, coming within the purview of Section 105 CPC., and so the grounds on which the said application was allowed by Court cannot be pleaded as grounds of appeal in the appeal filed under Section 96 CPC. The same result can be arrived at from another point of view also. The order passed on I.A., under Order 7 Rule 11 CPC., is not an appealable order under Order 43 CPC. So a revision to High Court only lies. Without filing a revision and getting the said order being made absolute, the said order operates as *res judicata* and the appeal itself is not maintainable.

8. It is my endeavour to focus upon Section 2(2), Sections 96, 104 and 105 CPC.

9. In Section 2(2), it is said that a decree ‘shall be deemed to include the rejection of a plaint’ and the determination of any question within Section 144... From a conspicuous reading of this sub-section, it speaks of ‘rejection of a plaint but it does not further say’ rejection of plaint under Order 7 Rule 11 or as contemplated under Order 7. Likewise, it is said that decree shall

be deemed to include the determination of any question within Section 144.... but does not say any question relating to restitution of property as contemplated under Section 144....

10. The plaint can be rejected as discussed above by the Court itself *suo motu* without such a request is made by the defendant. In such a case, the Court would make the order of rejection at length on the plaint itself, so that if any appeal is preferred, grounds of appeal can well be made with reference to the order of rejection made by the Court on the plaint itself, as a certified copy of the plaint contains the order of rejection also passed by the Court in detail. So we have to interpret the definition of decree in this context only, as the Court did not reject the plaint under Order 7 Rule 11 CPC., but under Section 9 or 151 CPC., or under a particular statute depending on the facts of the particular case.

But, if the defendant files an application under Order 7 Rule 11 CPC., requesting the Court to reject the plaint on the grounds made therein, the Court, if satisfied in respect of the grounds taken by the defendant for rejection, will pass the order, allowing the said interlocutory application by way of a full-fledged order thereon. Thereafter, the Court would make a mechanical order in one sentence on the plaint to the effect that the plaint is rejected as the I.A. is allowed. So one would get the reasons for rejection, only on the interlocutory application but not in the suit bundle; but, as the definition does not contain the title of the section or order in CPC., it cannot be interpreted that the order passed on a petition under Order 7 Rule 11 CPC., is also appealable.

Section 96(1) starts with “save where otherwise expressly provided in the body of this code or by any other law for the time being in force, an appeal shall lie...”

So, it is redundant to say, that if there are any restrictions imposed under any other section or order or Rule of CPC., an appeal under Section 96 against any decree is not contemplated. Let us examine Section 105... It is under the Title "Appeals from other Order.

Section 104 narrates various orders in CPC., which are appellable under Order XLIII CPC.

Section 105 speaks of other orders, that is, orders not coming within the purview of Section 104 and it further says that, where a decree is appealed from, any error, or defect or irregularity in any order affecting the decision of the case, may be set-forth as a ground of objection in the memorandum of appeal.

An order under Order 7 Rule 11 is not like an order under Order 26 Rule 9, or under Orders 6, 17 or an order under Order 11 Rules 1, 11, 12 and 14, which have no direct impact on the suit itself, resulting in its termination. So, as discussed earlier, orders on interlocutory applications, which have direct impact on the suit itself, are to be distinguished from Orders which have no such effect on the fate of the suit. They can be made as some grounds in the appeal. So, orders on interlocutory applications, can be analyzed into three categories:

- (1) Orders, which are appealable under Section 104 CPC.
- (2) Orders, which are not appealable but which can be referred as some of the grounds of objections in a regular appeal under Section 96 CPC., preferred against the decree; under Section 105 CPC.
- (3) Orders, which do not come within the scope of either of the two above but have direct impact on the fate of the suit, resulting in termination of the suit.

11. Section 96 CPC, is subject to Section 105 in the sense that, the order passed on interlocutory application of the third category stated above, to wit; an order under Order 7 Rule 11 cannot be referred to as a ground of appeal in the main appeal preferred against a decree passed in the suit, as it is not an order coming within the purview of an order contemplated under Section 105(1) CPC, and so the said order in I.A., operates as *res judicate* and, as such cannot be pleaded as one of the grounds in appeal preferred against the decree in the suit. So, according to my interpretation, the word "decree" as defined in Section 2(2), which takes in its fold an order of rejection of the plaint, only means an order of rejection made by the Court *suo motu* on the plaint itself and does not include an order passed by the Court on a petition filed by the defendant under Order 7 Rule 11 CPC.

12. I am of the firm view that an order under Order 7 Rule 11 CPC., does not come within the meaning of the definition 'decree' as contemplated under Section 2(2) CPC, as there is no reference in the definition "decree" to an order of rejection of the plaint under Order 7 Rule 11 CPC, but simply referred to 'order of rejection' and as such a regular revision petition is to be filed in the High Court against the order passed by the Court under Order 7 Rule 11 CPC, so that if the CRP., is allowed, the rejection order on the plaint would automatically get vanished, as the order on the plaint is only a consequential order to the main order passed on the interlocutory application filed by the defendant under Order 7 Rule 11 CPC, which, if set aside by High Court in revision, becomes *non est* in the eye of law, having no effect and, as such, the rejection order of the plaint automatically extinguishes statutorily and the suit would revive back to the same position, as if no such application under Order 7 Rule 11 CPC, was filed.

13. In a recent decision of A.P., High Court reported in 2008 (4) ALD 391 at page 396, para 19, it was held as follows:

“19. Section 115 CPC., is another provision, which has been invoked by the petitioners. A remedy under this provision is available if only no appeal lies against the concerned order. Once a regular appeal under Section 96 CPC., is provided against order rejecting the plaint, the question of invoking Section 115 CPC., does not arise. Therefore, viewed from any angle, the revisions and miscellaneous appeals filed by the petitioners against the orders rejecting the plaint are not maintainable.”

In view of my elaborate discussion on the subject I am of the honest view that an order passed by a Court, allowing an application under Order 7 Rule 11 filed by the defendant, requesting the Court to reject the plaint on the grounds mentioned therein, is different from the order passed by the Court *suo motu*, rejecting the plaint may be on the same grounds, as the former order does not fall under the definition of the word “decree” as defined in Section 2(2) of CPC., as it simply refers to “rejecting of plaint” only but not to “rejecting of plaint under Order 7 Rule 11 C.P.Code”, and Section 96 also being subject to provisions contained in Section 105(1) CPC., does not enable the appellant (plaintiff) to refer to any of the causes raised in the rejection order of the Court in a petition filed by the defendant under Order 7 Rule 11 CPC as one of the grounds in appeal, as the order passed on the application filed under Order 7 Rule 11 CPC., is not of any of the characters of the orders mentioned in Section 105(1) CPC., but something else to wit, which has the impact upon the suit itself, resulting in the rejection of the plaint, and, as such, an order passed by the Court under Order 7 Rule 11 CPC., on an application filed by the defendant can be a subject-matter for revision only by the High Court under its power under Section 115 CPC., and no appeal is contemplated as provided under Section 96 CPC., and as such the above decision of A.P., High Court reported in 2008 (4) ALD 391, requires reconsideration, in my humble opinion.

14. We may once again drive deep into the later part of the definition ‘decree’ under Section 2(2) CPC, “2(2). ‘decree’ means..... It shall be deemed to include the rejection of a plaint and the determination of any question within.....Section 144. It may be noted that there is a reference to the number of the Section, to wit, 144 only but it did not further say as follows: “determination of any question relating to causing of restitution of properly as contemplated under Section 144 CPC.” There are any number of decision of Apex Court as well as A.P. and other High Courts that the Courts can well exercise their inherent powers under Section 151 CPC, for ordering restoration of property to the person entitled for such restoration on equitable grounds in circumstances where Section 144 CPC, does not exactly apply. If one needs any authoritative pronouncement, a decision of A.P. High Court reported in 1995 (1) ALT 115, may be seen, where it was held by A.P. High Court that, where, after, temporary prohibitory injunction, which was initially granted but dissolved after hearing both sides and before the plaintiff obtains a temporary injunction from the appellate Court, the defendant himself forcibly occupies the property in question in the interregnum period, the Court ordered for restitution, by way of evicting the defendant from the plaint schedule under Section 151 CPC, as Section 144 does not strictly apply. Evidently, it is not an order passed under Section 144. Then, can it be said that the said order for restitution passed under Section 151 CPC, is an appealable order under Section 96 of CPC, coming within the purview of Section 2(2) of CPC and hence a regular 1st appeal shall lie to the First Appellate Court, even though it is an order passed under Section 151 CPC, and not under Section 144 CPC. Definitely not, even though the relief granted under Section 144 of CPC., and on a petition filed under Section 151 CPC, in the above stated circumstances, is the same, to wit, ‘restitution’

still an appeal will not lie against the order passed by the Court on an application under Section 151, alleging that the said order is in effect an order for “restitution”. A revision only is to be filed against the order passed by the Court on such petition filed under Section 151 CPC, to the High Court under Section 115 CPC. It is settled principle in interpretation of law, that, while interpreting a law, the Court should not ignore any thing

that is contained in it and likewise, should not add something more into it. So while interpreting the words “rejection of a plaint” in Section 2(2) it should not mean to include rejection of the plaint under Order 7 Rule 11 CPC, also “but it should be understood to mean “rejection of a plaint otherwise than under Order 7 Rule 11 or rejection of a plaint by the Court itself suo motu or rejection of plaint simplicitor”.

WHY DID MOUNTBATTEN CHOOSE 15TH AUGUST, 1947?

By

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After the freedom struggle for Independence, the British Parliament swiftly implemented the decision to partition India. A bill (which became the Indian Independence Act, 1947) was introduced in the House of Commons on 4th July 1947 and was passed on 15th July. The next day, it was passed by the House of Lords. There were no amendments. It received the Royal Assent on 18th July. That Act created the two independent Dominions of India and Pakistan. When the plan for partition was being evolved in India and was to be discussed in London, Azad had an interview with Mountbatten on 14th May 1947, which Azad had recorded in his autobiography. He records that he pleaded with Mountbatten not to bury the Cabinet Mission Plan and to defer the solution of the political problem for a year or two. Thus the partition has become inevitable and was accepted by the Congress and Muslim League, was there any justification for the haste and hurry with which the date of transfer of power was brought forward from June 1948 first to October 1947 and then to 15th August 1947. A recent book reports Mountbatten as having told its authors.

“The date I chose came out of the blue, I chose it in reply to a question. I was determined to show I was master of the whole event. When they asked: had we set a date, I knew it had to be soon. I hadn’t worked it out exactly then—I thought it had it be about August or September and I then went to the 15th of August why? Because it was the second anniversary of Japan’s surrender”

That 15th August 1947 was the second anniversary of the surrender of Japan may have had a personal and historic association for Mountbatten, as he had been the Supreme Commander for South-East Asian in the War against Japan.

Mountbatten obtained a statement from the leaders of the Congress and the Muslim League appealing for a peaceful transfer of power, and expressing the determination of the Government of the two Dominions to secure such peaceful transfer, as also their determination to accept the Boundary Commission Award. It was Gandhi’s finest hour. His courage, his healing touch and tireless efforts succeeded.