**Civil Procedure Code**

**1. O. 6 R. 17**

**Mashyak Grihnirman Sahakari Sanstha Maryadit V. Usman Habib Dhuka & Ors. 2013 (I) CLR (SC) – 1212**

**P. SATHASIVAM, M. Y. EQBAL AND ARJAN KUMAR SIKRI, JJ.**

**ISSUE**

**Amendment of plaint – scope of powers of Court.**

Plaintiff. Allegedly members of appellant a Co-operative Housing Society which had entered into a development agreement with respondent Developer, in respect of development of Society's property-Appellants filed a civil suit challenging amalgamation of plots (both owned by appellant-society) praying for directions to Municipal Corporation as regards demolition of fully/partially constructed buildings of appellant-society on the amalgamated plot – Civil Judge rejected the Notice of Motion holding that the plaintiffs were aware of all the facts but they did not raise any objection on dispute – On appeal, no relief was granted by the High Court – Plaintiff took our Chamber Summons for amending the plaint seeking to incorporate the relief of declaration of Conveyance Deed as illegal and malafide – Chamber Summons was dismissed by the Civil Court – Writ petition- High Court permitted the plaintiffs to amend the plaint- Whether the High Court committed an error of law in setting aside the order passed by the Trial Court – Held, Yes.

**Appeal allowed.**

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**2. O. 7 – R. 14**

**M/s Bagai Construction Thr. Its Proprietor Mr. Lalit Bagai V. M/s Gupta Building Material Store. 2013 (I) OLR (SC) – 1070**

**P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.**

**ISSUE**

**Applications for placing on record certain documents and seeking permission to recall P.W. 1 for proving certain documents by leading his additional evidence – Whether the plaintiff has made out a case for allowing the applications ? – Recording of evidence should be continuous and flowed by arguments and decision thereon within a reasonable time – Court should certainly endeavour to follow such a time schedule – Applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered – Held, course taken by plaintiff is not permissible even with the aid of Sec. 151 C.P.C.**

After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for

adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and Judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

Under these circumstances, the impugned order of the High Court dated 23.08.2011 in C.M. No. 707 of 2010 (Civil Revision No. 707 of 2010) is set aside and the order dated
25.02.2010 of the trial Court is restored.

The appeal is allowed with no order as to costs.

Case referred :
1. 2009 (II) OLR (SC) 76 : (2009) 4 SCC 410 :
Vadiraj v. Sharadchandra
2. 2011 (II) OLR (SC) 13 : (2011) 11 SCC 275 :
K.K. Velusamy v. N. Palanisamy.

**Appeal allowed.**

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**3. Sec.10**

**Aspi Jal & Anr. V. Khushroo Rustom Dadyburjor. AIR 2013 SC 1712**
**CHANDRAMAULI KR. PRASAD AND V. GOPALA GOWDA , JJ.**
**ISSUE**

**Stay of suit – Provision is mandatory – Intends to avoid contradictory verdicts – And prevent multiplicity of litigation. "Matter in issue is also directly and substantially in issue in previous suit" – Matter in issue – Means entire subject-matter – Eviction suits – Both filed on ground of non-user – But for different periods – Suits are thus based on different cause of action – Dismissal of earlier may not entitle dismissal of other – S. 10 therefore does not apply.**

In the instant case the parties in all the three suits are on and the same and the Court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. All the suits are for eviction. Two of them are on ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but

for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them to decree for eviction. Therefore, the provisions of S. 10 of the Code is not attracted in the facts and circumstances of the case.

The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding.

The key words in Section 10 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. For application of Sec 10 of the Code, the matter in issue in both the suits have to be directly and subsequently in issue in the previous suit. Matter in issue means the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject-matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue.

In the result, the appeal is allowed and the impugned order of the trial court as affirmed by the High Court is set aside but without any order as to costs.

**Appeal allowed.**

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**4. Sec. 92**

**Sri Sangram Mudali and another v. Dr. Sukant Mohapatra and others. 2013 (I) OLR – 983**

**M.M. Das, J.**

**ISSUE**

**Suit under the section is a suit of a special nature which pre-supposes the existence of a public trust of a religious or charitable character – Such a suit can proceed only on the allegation that there was a breach of such**

**trust or that the direction of the Court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section – In the present case, District Judge concluded that the trust in question is a charitable trust and it is not mandatory for issuance of notice to all the defendants before granting leave to proceed with the suit under Sec. 92 C.P.C. – District Judge held that the suit is maintainable and accordingly leave as required under the section was granted – Held, impugned order is immune from interference of High Court by exercise of its revisional jurisdiction under Sec. 115 C.P.C.**

It is settled position of law now that a suit under Sec. 92 C.P.C. is a suit of a special nature which pre-supposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there was a breach of such trust or that the direction of the Court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section. Further, it is also well settled that if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92. The Hon'ble Supreme Court also laid down that can be brought under the section but only the suits which, besides claiming any of the reliefs, are brought by individuals as representatives of the public for vindication of public rights and deciding whether a suit falls within Sec. 92 the Court must go beyond the reliefs and have regard to the capacity in which the plaintiff are suing and to the purpose for which the suit was brought. The Hon'ble Supreme Court in no uncertain terms has laid down in various cases that is only the allegations in the plaint, which should be looked into in the first instance to see whether the suit falls within the ambit of Sec. 92. If after evidence is taken, it is found that the breach of trust alleged has not been made out and that the prayer for direction of the Court is vague and is not based on any solid foundation in facts or reasons, but is made only with a view to bring the suit under the Section, then a suit purporting to be bought under Sec. 92 must be dismissed. The Hon'ble Court in a series of decisions with regard to issuance of notice on an application for grant of leave under Sec. 92 CPC to all the defendants has reiterated that although as a rule of caution, the Court should normally give notice to the defendants before granting leave under the said Sec. To institute a suit, the Court is not bound to do so. If a suit is instituted on the basis of such leave granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-maintainable. The grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants, because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law. The desirability of such notice being

given to the defendants, however, cannot be regarded as a statutory requirement to be complied with before leave under Sec. 92 can be granted as that would lead to unnecessary delay and in a given case, cause considerable loss to the public trust. Such construction of the provisions of Sec. 92 would render it difficult for the beneficiaries of a public trust to obtain urgent interim orders from the Court even though the circumstances might warrant such relief being granted.

Keeping the above position o f law in view, the learned District Judge appears to have analysed the averments of the plaint in rightly coming to the conclusion that the trust in question is a charitable trust and as per the settled position of law, it is not mandatory for issuance of notice to all the defendants before granting leave to proceed with the suit under Sec. 92 C.P.C. the learned Dist. Judge has also taken note of the reliefs sought for along with the averments in the plaint holding that the suit is maintainable and according leave, as required under Sec. 92 C.P.C. was granted. This Court, therefore, is of the considered view that the impugned order has not been passed by exercise of jurisdiction not vested with the learned District Judge nor the learned District Judge has failed to exercise such jurisdiction vested in him or has acted in exercise of his jurisdiction illegally or with material irregularity. Hence, the impugned order is immune from interference of this Court by exercise of its revisional jurisdiction under Sec. 115 C.P.C.

In view of the above, the Civil Revision does not hold any merit and accordingly, stands dismissed.

Revision dismissed.

Case referred :

1. AIR 1974 SC 2141 : Swami v. Ramji
2. AIR 1991 SC 221 : R.M. Rarayana v. N. Lakshmanan

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**5. O. 8, R. 9**

**Balaram Dixit and others V Tadit Kumar Rout. 2013 (I) OLR – 988.**

**S.K.Mishra, J.**

**ISSUE**

**Application to accept the written statement-cum-counter claim by defendants – Civil Judge (Sr. Division) rejected the petition, inter alia holding that the inordinate delay of eleven months after appearance of defendants for filing of their written statement has not been explained satisfactorily – Writ – Whether the petitioners are entitled to file the written statement/counter claim in the suit beyond the time period prescribed under Order 8, Rule 1, C.P.C. ? – Petition filed by the defendants that there was talk of compromise between the parties, is a good ground for extending time beyond prescribed limit by filing written statement – Petition allowed subject to payment of cost of Rs. 1,000/- - Directions issued.**

The case in hand, it is seen that the main ground on which the opposite party resisted the application of the petitioners is that the defendant has filed time petitions on several occasions indicating that they need adjournment because of the fact that they were collecting certain documents for filing the written statement. However, in the petition to accept
the written statement, they have stated that there was a chance of settlement between the parties at the behest of the Sahi Panchayat. There is an apparent contradiction. Learned Civil Judge (Senior Division) has rejected the application of the defendants-petitioners on such facts. However, the fact remains that the time petitions do not contain verification of the parties. Time petitions are filed by the Advocates without signature of the parties. It is also
well known that petitions for adjournment are most often drafted/prepared by junior associates of the conducting counsel. Sometimes, it is written by the Advocates' clerks. Therefore, the same cannot be taken into consideration to hold that the party himself has instructed the lawyer to file a petition for time on the ground stated therein. On the other hand, the petition filed for acceptance of the written statement is supported by an affidavit sworn by a
party. Thus, the grounds submitted or pleaded in a petition supported by an affidavit of the party have to be accepted as the version of the party or the litigant and merely because a petition for time does not reflect the same ground it cannot be rejected. It will cause injustice to the party.

In that view of the matter, this Court comes to the conclusion that approach adopted by the learned Civil Judge (Senior Division) was erroneous. This Court however held that the petition filed by the defendants that there was talk of compromise between the parties, is a good ground for extending time beyond prescribed limit by filing written statement. Hence, the
writ petition succeeds. The petition filed by the defendants-petitioners to accept the written statement is allowed, subject to payment of cost of Rs.1,000/- (Rupees one thousand) by 6th May, 2013 before the court below. The parties are directed to appear before the Court on 6th May, 2013. The Court of original jurisdiction shall accept the written statement-cum-counter
claim filed by the defendants-petitioners. With the aforesaid observation, the writ petition is allowed.

**Petition allowed.**

Case Referred :

1. (2009) 3 SCC 513 : Mohammad v. Faij
2. 2005 (I) OLR (SC) 718 : (2005) 4 SCC 480 :
Kailash v. Nanhku
3. 2007 (II) OLR 498 : (2007) 6 SCC 420
M/s. R. N. Jadi v. Subhash
4. 2009 (I) OLR 48 : Smt. Sarbati v. Durga

**6. (A) O.1, R. 10**

***Bhagwati Developers Private Ltd. V. Peerless General Finance Investment Company Ltd. and Ors. AIR 2013 SC 1690***

**Dr. B.S. Chauhan & Fakkir Mohamed Ibrahim Kalifulla, JJ**

**ISSUE**

**Company petition-Requirement of petitioner holding 10% shares-can be fulfilled by obtaining consent of other shareholders.**

Where the Company Petition is filed with the consent of the other shareholders, the same must be treated as filed in a representative capacity, and therefore, the making of an application for withdrawal by the original petitioner in the Company Petition, would not render the petition under Sec. 397 or 398 of the Act 1956, non-Existent or non-maintainable. The other persons, i.e., the constructive parties who provide consent to file the petition, are in fact entitled to be transposed as petitioners in the said case. Additionally, in case the petitioner does not wish to proceed with his petition, it is not always incumbent upon the Court to dismiss the petition. The Court may, if it so desires, deal with the petition on merit without dismissing the same. Further, there is no requirement in law for the shareholder himself, to give consent in writing. Such consent may even be given by the power of attorney holder of the shareholder. If the shareholder who had initially given consent to file the Company petition to help meet the requirement of 1/10th share holding, transfers the shares held by him, or ceases to be a shareholder, the same would not affect the maintainability and continuity of the petition.

In view of the above, the case at hand is required to be considered in the light of aforesaid settled propositions of law, which provide that where the Company Petition is filed with the consent of the other shareholders, the same must be treated in a representative capacity, and therefore, the making of an application for withdrawal by the original petitioner in the Company Petition, would not render the petition under Sections 397 or 398 of the Act 1956, non-existent, or non-maintainable. The other persons, i.e., the constructive parties who provide consent to file the petition, are in fact entitled to be transposed as petitioners in the said case. Additionally, in case the petitioner does not wish to proceed with his petition, it is not always incumbent upon the court to dismiss the petition. The court may, if it so desires, deal with the petition on merit without dismissing the same. Further, there is no requirement in law for the shareholder himself, to give consent in writing. Such consent may even be given by the power of attorney holder of the shareholder. If the shareholder who had initially given consent to file the Company Petition to help meet the requirement of 1/10th share holding, transfers the shares held by him, or ceases to be a shareholder, the same would not affect the maintainability and continuity of the petition.

**(B) O.23, R.1 (5)**

Suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the court may pass such an order. If the court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction.

The courts have consistently held, that a suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the court may pass such an order. If the court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction. (Vide: Mt. Ram Dei v. Mt. Bahu Rani, AIR 1922 Pat. 489; Mt. Jaimala Kunwar & Anr. v. Collector of Saharanpur & Ors., AIR 1934 All. 4; and The Asian Assurance Co. Ltd. v. Madholal Sindhu & Ors., AIR 1950 Bom.378.)

Thus, the appeals are allowed, the impugned judgment and order of the High Court dated 24.11.2003 is hereby set aside and the matters are remanded to be decided by the High Court of Calcutta afresh giving strict adherence to judgment of this Court dated 36.4.1996. while deciding the case afresh, the Division Bench shall not take note of the earlier judgments of the High Court dated 16.11.1993 and 18.11.1993.

As the matters are pending since long, in the facts and circumstances of the case, we request the Hon'ble High Court to decide the appeals expeditiously preferably within a period of six month from the date of filing of certified copy of this judgment and order before the High Court. There shall be no order as to costs.

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**7. O. 6 R. 17**

**Anantaswar Deb and others v. Harihar Acharaya 2013 (I) CLR – 1231**

**B.K. Misra, J.**

**ISSUE**

**Amendment of written statement to correct typographical errors and to replace the word "rather" by the word "and" only- No new fact was sought to be introduced by the proposed amendment and no change in the nature and character of the original pleadings sought for – Petition though filed after closure of evidence, held, rightly allowed.**

In the instant case, the defendant by the proposed amendment only wanted to correct the typographical error in Para-8 of the written statement and wanted to replace the word "rather" by the word "and" only. I have gone through the written statement filed by the sole defendant in the Court below by substituting the word "and" in place of "rather". It is seen that no new fact was intended to be introduced by amending the written statement and by the proposed amendment also there is no change in the nature the character of and original pleadings in the original written statement. The learned Court below has passed a very well reasoned order by allowing the prayer of the amendment to the written statement and I do not find any infirmity in the said order calling for interference by this Court. The contention of the learned counsel for the petitioners that the Court below should have refused the amendment in view of the proviso to order 6, Rule 17 of the C.P.C., which was introduced by way of amendment in the year, 2002, is not tenable in the eye of law in view of the settled position that the said proviso to Rule 6, Rule 17 of the C.P.C. is not applicable to the suit which was filed in the year 1999.

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**8. Orissa Superior Judicial Service Rules (1963), Rr. 7,8,9**

***Debabrata Dash & Anr V. Jatindra Prasad Das & Ors. AIR 2013 SC 1700***

**R.M. Lodha, J. Chelameswar, Madan B. Lokur, JJ.**

**ISSUE**

**Orissa Judicial Service (Special Schemes) Rules, (2001), Rr. 4,7 – Inter se seniority – Direct recruits and promotes – Judicial service – Respondents member of Superior Judicial Service (Junior Branch) – Promoted on ad hoc basis to senior branch for posting to Fast Track Court – Promotion cannot be said to be to cadre of senior branch when no substantive vacancy was available in that cadre – Claim of seniority over direct recruits to cadre of senior branch – Not tenable.**

These 72 posts of ad hoc Additional District Judges were created under the 2001 Rules to meet its objectives were not part of cadre strength of Senior

Branch Service in 1963 Rules nor by creation of these posts under the 2001 Rules, the cadre strength of the Senior Branch of service got increased. The respondents promotion as an ad hoc Additional District Judge pursuant to which he joined the post of ad hoc Additional District Judge, is traceable wholly and squarely to the 2001 Rules, Merely because the writ petitioner was adjudged suitable on the touchstone of the 1963 Rules, it cannot be said that he was given appointment to the post of ad hoc Additional district Judge under the 1963 Rules, As there was no vacancy to be filled by promotion in cadre strength of Senior Branch of the Service under the 1963 Rules on that date. When appellants direct recruits were appointed as Additional District Judges, no vacancy to be filled by way of promotion to the Senior Branch of the service was available either in the cadre or in the ex-cadre. When no vacancy was available against which the respondent could have been brought into the cadre then his claim for seniority in the cadre over the appellants would not arise. It is clear form Rules 3(d), 4,5,7,8 and 9 of the 1963 Rules that a person can become a member of the Senior Branch of the Superior Judicial Service only if his appointment has been made to a post in the service. If there is no vacancy to be filled in by promotion in the cadre of Senior Branch service, there is no question of any appointment being made to the service. The membership of service is limited to the persons who are appointed within the cadre strength by direct recruitment and by promotion. As such until the vacancy occurred in the cadre of Superior Judicial Service (Senior Branch) which was to be filled up by promotion, the service rendered by the respondent in the Fast Track Court cannot be deemed to be service rendered in the Superior Judicial Service, Senior Branch, then, he continued to be a member of the parent cadre, i.e. Superior Judicial Service (Junior Branch). This period cannot be counted for holding that respondent was senior to appellants.

The brief facts leading to the controversy are these: The writ petitioner joined the judicial service in the State of Orissa as Munsiff on probation on 15.07.1981 under the Orissa Judicial Service Rules, 1964. He was promoted to the Junior Branch of the Superior Judicial Service on 19.07.1999. on 05.01.2002, the writ petitioner, who was continuing as a member of Superior Judicial Service(Junior Branch), was appointed, on ad hoc basis, as Additional District Judge in the Fast Track Court. Pursuant to the above order of appointment, on 11.04.2002 writ petitioner was posted as an ad hoc Additional District Judge in the Fast Track Court at Bargarh where he joined on 26.04.2002.

On 13.01.2003, the appellants were appointed in the Senior Branch cadre of Orissa Superior Judicial Service by way of direct recruitment under the 1963 Rules. Pursuant to the posting order dated 22.01.2003, they joined as Additional District and Sessions Judge at Cuttack and Behrampur on 03.02.2003 and 07.02.2003 respectively. By an order dated 28.05.2003, the tenure of writ petitioner as ad hoc Additional District Judge (Fast Track Court),

Bargarh was extended for a further period of one year or 31.03.2004 (whichever was earlier). By a notification dated 15.12.2003, the writ petitioner was allowed to officiate in the Senior Branch of the Superior Judicial Service on regular basis on account of a vacancy that arose due to retirement of an officer of the Senior Branch on 31.07.2003. The writ petitioner was posted on 19.01.2004 as Additional District and Sessions Judge, Bargarh pursuant to the notification dated 15.12.2003 to which post the writ petitioner joined on 03.02.2004. Appellant no. 1 was confirmed in the cadre of Senior Branch, Superior Judicial Service with effect from 03.02.2004 while appellant no. 2 was confirmed with effect from 07.02.2004. The appellants were conferred selection grade with effect from 03.02.2008 and 07.02.2008 respectively. The writ petitioner was substantively appointed in the cadre of District Judge with effect from 17.01.2007 and he was granted selection grade with effect from 22.10.2009. On 13.11.2009, the writ petitioner submitted a representation to the High Court on administrative side seeking seniority in the cadre of District Judge with effect from 26.04.2002, i.e., the date of his joining as ad hoc Additional District Judge (Fast Track Court), Bargarh. The claim of seniority by the writ petitioner over and above the appellants was based on the ground that the period of his service as an ad hoc Additional District Judge (Fast Track Court) should be included for the purpose of computing his length of service in the cadre of Senior Branch, Superior Judicial Service under the 1963 Rules. A committee to consider the representation of the writ petitioner was constituted. The committee by majority opined that the writ petitioner's representation was liable to be rejected. On 02.08.2011 the Full Court of the High Court considered the report of the committee. The representation of the writ petitioner was rejected on 08.08.2011. It was this administrative decision of the High Court that was challenged by the writ petitioner before the High Court on the judicial side. The writ petition was contested by the appellants as well as the High Court on the administrative side and the State of Orissa.

It is not in dispute that immediately before writ petitioner's ad hoc promotion to the Senior Branch of Superior Judicial Service for being posted in the Fast Track Court, he was a member of the Junior Branch of the Superior Judicial Service. There is also no dispute before us that there was no cadre post available on 05.01.2002 or 26.04.2002 under the 1963 Rules. The fact of the matter is that 72 posts of ad hoc Additional District Judges (Fast Track Court) were created out of 11th Finance Commission recommendations and these posts were to be filled up under the 2001 Rules.

In the backdrop of the above factual position, we shall now consider the scheme of the 1963 Rules. Rule 4 of the 1963 Rules provides that cadre of Superior Judicial Service shall consist of two branches; (i) Superior Judicial Service, Senior Branch and (ii) Superior Judicial Service, Junior Branch. There are two modes of recruitment to the Superior Judicial Service in respect of Senior Branch. These two modes prescribed in Rule 5, are, (a) by direct

recruitment in accordance with Rule 8 and (b) by promotion of officers from the Junior Branch of the service. Rule 9(1) lays down that whenever a vacancy in the Senior Branch of the service is decided to be filled up by promotion, the government shall fill up the same after due consideration of the recommendation of the High Court in accordance with sub-rule (2). As per sub-rule (2) of Rule 9, the High Court shall recommend for appointment to such vacancy an officer of the Junior Branch of the service, who, in the opinion of the High Court, is the most suitable for the purpose. If the government is unable to accept the recommendation of the High Court, it may call for further recommendations from the High Court to fill up the vacancy. Rule 7 of the 1963 Rules, enables the government to fill up the vacancy in the Senior Branch of the service in consultation with the High Court either by direct recruitment or promotion. As regards the strength of direct recruits in the Senior Branch of the service, a cap is put that their number shall not exceed 25 per cent of the cadre posts mentioned in Rule 4 (2). The direct recruitment to the Senior Branch of the service is required to be made from the Bar. Rule 8 makes the complete provision about the eligibility of the candidates, reservation and the procedure for filling up the vacancies available to direct recruits to the Senior Branch of the service. Rules 7,8 and 9 of the 1963 Rules are quite significant. The position that emerges from these provisions is this : When a vacancy occurs in the Senior Branch of the service, first a decision is taken whether such vacancy is to be filled up by promotion or direct recruitment. Obviously, while taking such decision, the cap on the number of the direct recruits has to be kept in view. If the vacancy is to be filled up by direct recruitment, Rule 8 comes into play. In case, such vacancy is decided to be filled by promotion, the procedure in Rule 9 has to be followed. In other words, for a vacancy in the Senior Branch of service to be filled by promotion, the High Court makes recommendation for appointment to such vacancy an officer of the Junior Branch of the service, who in the opinion of High Court is the most suitable for the purpose. When such recommendation is made by the High Court for filling the vacancy, either the government accepts the recommendation or if, for any reason the government is unable to accept the recommendation, it may call for further recommendations from the High Court. Thus, in the absence of any vacancy in the Senior Branch cadre of Superior Judicial Service to be filled up by promotion, no appointment to the Senior Branch of service by way of promotion can be made. It is as fundamental as this.

As noted earlier, 72 posts of ad hoc Additional District Judges were created under the 2001 Rules to meet its objectives. These posts were not part of cadre strength of Senior Branch Service in the 1963 Rules nor by creation of these posts under the 2001 Rules, the cadre strength of the Senior Branch of service got increased. The writ petitioner's promotion as an ad hoc Additional District Judge vide Notification dated 05.01.2002 pursuant to which he joined the post of ad hoc Additional District Judge, Bargarh on 26.04.2002 is traceable wholly

and squarely to the 2001 Rules. Merely because the writ petitioner was adjudged suitable on the touchstone of the 1963 Rules, we are afraid, it cannot be said that he was given appointment to the post of ad hoc Additional District Judge under the 1963 Rules. As noted above, there was no vacancy to be filled by promotion in cadre strength of Senior Branch of the service under the 1963 Rules on that date.

The essence of the reason given by the Committee is that when appellants were appointed as Additional District Judges, no vacancy to be filled by way of promotion to the Senior Branch of the service was available either in the cadre or in the ex-cadre. When no vacancy was available against which the writ petitioner could have been brought into the cadre then his claim for seniority in the cadre over the appellants did not arise. The above Report of the Committee was accepted by the Full Court and the writ petitioner's representation claiming seniority over the appellants was rejected. There is no legal flaw at all in the decision of the Full Court which is founded on the above view of the Committee. In view of the admitted factual position, the proviso following the main provision in Rule 17 of the 1963 Rules does not help the writ petitioner at all.

In Brij Mohan Lal (AIR 2002 SC 2096), a three-Judge Bench of this Court, inter alia, considered the Fast Track Courts scheme. In paragraph 10 of the judgment, this Court gave various directions. Direction no. 14 in that para is relevant which can be paraphrased as follows:

(i) No right will be conferred on judicial officers in service for claiming any regular promotion on the basis of his/her appointment on ad hoc basis under the scheme.

(ii) The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre.

(iii) In case any judicial officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade.

Learned senior counsel for the writ petitioner heavily relied upon the third part of direction no. 14. As a matter of fact, this part has been relied upon in the impugned judgment as well. It is submitted on behalf of the writ petitioner that on promotion to the Senior Branch cadre of Superior Judicial Service during his tenure in the Fast Track Courts, the writ petitioner is entitled to the counting of the service rendered by him in the Fast Track Court as a service in Superior Judicial Service (Senior Branch). The submission overlooks the first two parts of direction no. 14, one, no right will be conferred in judicial service for claiming any regular promotion on the basis of his/her appointment on ad hoc basis under the scheme; and two, the service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In our opinion, until the vacancy occurred in the cadre of Superior Judicial Service (Senior

Branch) which was to be filled up by promotion, the service rendered by the writ petitioner in the Fast Track Court cannot be deemed to be service rendered in the Superior Judicial Service, Senior Branch. Rather until then, he continued to be a member of the parent cadre, i.e., Superior Judicial Service (Junior Branch). The third part of direction no. 14, in our view, does not deserve to be read in a manner that overrides the 1963 Rules.

We have already indicated above that on 05.01.2002 or 26.04.2002, there was no vacancy in the cadre of Superior Judicial Service (Senior Branch) for being filled up by promotion. Such vacancy in the Senior Branch cadre of the service occurred on 15.12.2003 and from that date the writ petitioner has been given benefit of his service rendered in the Fast Track Court. The administrative decision by the Full Court is in accord with the 1963 Rules, the 2001 Rules and the legal position already indicated above. The view of the Division Bench in the impugned judgment is legally unsustainable. The impugned judgment is liable to be set aside and is set aside.

**Appeal is allowed**, as above, with no order as to costs.

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**9. O.9, R.13**

***Sushil K. Chakravarty(D) Thr. Lrs. V. M/s Tej. Properties Pvt. Ltd. AIR 2013 SC 1732.***

**P. SATHASIVAM AND JAGADISH SINGH KHEHAR, JJ.**

**ISSUE**

**Setting aside ex parte decree – Belated application-Condonation of dealy- Suit for specific performance decreed ex parte-Application for setting aside filed by LRs. Of defendant belatedly – Plea that they were unaware of suit property and pending litigation- Falsified by proceedings initiated by one of heirs declare partnership between plaintiff and defendant as illegal during pendency of suit-Rejection of application under O.9, R.13-Justified.**

**O. 22, R. 4(4)**

**Exemption to plaintiff to proceed without substitution of LRs of deceased defendant – Grant of – Whether conscious decision – Suit for specific performance – Defendant after filling W.S. not appearing in suit till his death – Fat of defendant's death brought to notice of Court by plaintiff – Court despite notice allowing suit to progress further – Court in facts, can be said to have taken conscious decision to exempt plaintiff from getting LRs substituted. (Para – 26)**

We have given out thoughtful consideration to the submissions advanced at the hands of the learned counsel for the appellant. The real issue which needs to be determined with reference to the contention advanced at the hands of the

learned counsel for the appellant under Order XXII, Rule 4(4) of the Code of Civil Procedure is whether the learned single Judge while proceeding with the trial of CS(OS) No. 2501 of 1997 was aware of the death of the plaintiff(defendant)Sushi K.C.(the appellant herein). And, further, whether the learned single Judge of the High Court had thereafter, taken a conscious decision to proceed with the suit without insisting on the impleadment of the legal representatives of the deceased defendant Sushil K.C. It is possible for us, in the facts of this case, to record an answer to the question posed above. We shall now endeavour to do so. It is not a matter of dispute, that Sushil K.C. had died on 3.6.2003. It is also not a matter of dispute, that on 29.08.2003 under Order XXII, Rule 4(4) of the Code of Civil Procedure, for proceeding with CS(OS) No. 2501 of 1997 ex parte, by bringing to the notice of the learned single judge, that Sushil K.C. had died on 3.6.2003. That being the acknowledged position, when the learned single Judge allowed the proceedings in CS(OS) No. 2501 of 1997 to progress further, it is imperative to infer, that the court had taken a conscious decision under Order XXII, Rule 4(4) of the Code of Civil Procedure, to proceed with the matter ex parte as against interests of Sushil K.C. (the defendant therein), without first requiring Tej Properties (the plaintiff therein) to be impleaded the legal representatives of the deceased defendant. It is, therefore, that the evidence was recorded on behalf of the plaintiff therein, i.e., Tej Properties (the respondent herein) on 28.1.2005. in the aforesaid view of the matter, there is certainly no doubt in our mind, that being mindful of the death of Sushil K.C., which came to his knowledge through IA No. 7696 of 2006, a conscious decision was taken by the learned single Judge, to proceed with the matter ex-parte as against the interests of Sushil K. C. This position adopted by the learned single Judge in CS (OS) No. 2501 of 1997 was clearly permissible under Order XXII, Rule 4(4) of the Code of Civil Procedure. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has filed to appear and contest the suit, if the court considers it fit to do so. All the ingredients of Order XXII, Rule 4(4) of the Code of Civil Procedure stood fully satisfied in the facts and circumstances of this case. In this behalf all that needs to be noticed is, that the defendant Sushil K. C.having entered appearance in CS(OS) No. 2501 of 1997, had filed his written statement on 6.3.1998. Thereafter, the defendant Sushil K.C. stopped appearing in the said civil suit. Whereafter, he was not even represented through counsel. The order to proceed against Sushil K.C. ex parte was passed on 1.8.2000. Even thereupon, no efforts were made by Sushil K.C. participate in the proceedings of CS(OS) No. 2501 of 1997, till his death on 3.6.2003. It is apparent, that the trial court was mindful of the factual position noticed above and consciously allowed the suit to proceed further. When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C. it was done on the court's satisfaction, that it was a fit case to exempt the plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole defendant

Sushil K.C.(the appellant herein). This could only have done, on the satisfaction that the parameters postulated under Order XXII, Rule 4(4) of the Code of the Civil Procedure, stood complied. The fact that the aforesaid satisfaction was justified, has already been affirmatively concluded by us, herein above. We are therefore of the considered view, that the learned single Judge committed no error whatsoever in proceeding with the matter in CS(OS) No. 2501 of 1997 ex parte, as against the sole defendant Sushil K.C., without impleading his legal representatives in his place. We therefore, hereby uphold the determination of the learned single Judge, with reference to Order XXII, Rule 4(4) of the Code of Civil Procedure.

For the reasons recorded herein above, we find no merit in the instant appeals and the same are accordingly dismissed.

***Appeals dismissed.***

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**10. O. 37, R. 3(5)**
**Britannia Industries Limited V. Punjab National Bank & Ors. 2013 (I) CLR (SC) – 1182**
**AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ**
**ISSUE**

**Summery suit for recovery of amount of bill of exchange – Claim of appellant-plaintiff was based on a purported bill of exchange for a sum of Rs. 1 core only.**

Bill of exchange was drawn by two persons, respondents 3 and 4 respectively, as partners in the firm (respondent 2) – Bill of Exchange was accepted by M/s. 'L' (not made a party to the suit) and was further shown to be accepted by respondent 1-Bank- It was then shown to be endorsed by respondent NO. 2 in favour of appellant-plaintiff and was delivered to it, who, thus, claimed to have become the endorsee and the holder of the bill, of exchange in question – Bill of exchange was presented for payment, but respondent 1 refused to make payment, thereby dishonouring the bill – Appellant-plaintiff filed the suit for recovery of amount of bill of exchange along with interest – Trial Court decreed the suit – Appeal filed by respondent-Bank was allowed by the High Court – Division Bench of the High Court held that there was no material to hold that the alleged bill of exchange was a validly executed instrument – It was held that the alleged bill of exchange was brought into existence by practising fraud and collusion and it was not a valid instrument and binding on respondent – Whether judgment of the High Court was sustainable – Held , Yes.

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