

# APPEALS (CIVIL)

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- 1. Laws governing the civil appeals:** Laws applicable to the civil appeals are as under :
  - (i) Sections 96 to 99-A CPC & Order 41 CPC (appeals from original decrees)
  - (ii) Sections 100 to 103 CPC & Order 41 CPC (appeals from appellate decrees)
  - (iii) Sections 104 to 112 CPC & Order 43 CPC (appeals from orders)
  - (iv) Provisions in Special Acts regarding appeals
  - (v) Judicial pronouncements of the Supreme Court & High Courts
- 2. A first appeal filed u/s 96 CPC is continuation of the original suit:** A first appeal filed u/s 96 CPC is continuation of the original suit. See:
  - (i). Triloki Nath singh Vs. Anirudh Singh, (2020) 6 SCC 629
  - (ii). Dilip Vs. Mohd. Azizul Haq, AIR 2000 SC 1976
- 3.1. Pecuniary Jurisdiction of Civil Court in Uttar Pradesh w.e.f. 05.02.2016:** Vide Uttar Pradesh Civil Laws (Amendment) Act, 2015 read with Notification No. 35/IVg-27, Allahabad: Dated 05.2.2016 of the Allahabad High Court, different Sections of the Bengal, Agra and Assam Civil Courts Act, 1887 have been amended by the State Legislature of Uttar Pradesh. After the said amendments, pecuniary jurisdiction of different Civil Courts of the District Judiciary w.e.f. 05.02.2016 for different types of proceedings is as under:

Sl. No.	Name of Court	Nature of Case	Pecuniary Jurisdiction
1.	District Judge	Appeal	Twenty Five Lakh
2.	District Judge	Revision	Five Lakh
3.	Civil Judge (Senior Division)	Civil Suit	Unlimited
4.	Civil Judge (Junior Division)-cum- Parent Court having seniority exceeding three years	Civil Suit	Five Lakh
5.	Addl. Civil Judge (Junior Division)	Civil Suit	One Lakh
6.	Judge, Small Causes Court	SCC Suit	One Lakh
7.	Judge, Small Causes Court	Money Suit	Twenty Five Thousand

**3.2. Relevant C.L./Notification of the Allahabad High Court enhancing the appellate jurisdiction of the District Judges: See below:**

Allahabad High Court Notification  
No. 35/IVg-27, Dated: Allahabad: 05.02.2016

In exercise of the powers conferred by Sub-Section 1(b) of Section 21 of the **Bengal, Agra and Assam Civil Courts Act, 1887** as amended by the Uttar Pradesh Civil Laws (Amendment) Act, 2015 (UP Act No. 14 of 2015), the High Court is pleased to direct that an appeal from a decree or order of a Civil Judge where the value of the original suit in which, or in any proceeding arising out of which the decree or order was or is made, whether instituted or commenced before or after the date of publication of this notification in Official Gazettee did not or does not exceed twenty five lakhs rupees for purposes of filing appeals shall lie to the District Judges.

By order of the Court,  
(Sheo Kumar Singh-I)  
Registrar General

## ORDER

In pursuance of the provision of sub-section 1(b) of Section 21 of the Bengal, Agra and Assam Civil Courts Act, 1887 as amended by the Uttar Pradesh Civil Laws (Amendment) Act, 2015 (U.P. Act No. 14 of 2015), the High Court is pleased to **transfer all the First Appeals** arising from a decree or order of a Civil Judge, where the value of the Original Suit in which or in any proceeding arising out of the decree or Order was made whether instituted or commenced before or after the date of publication of Notification No. 35/IVg-27 Allahabad, Dated 05.02.2016, in the Official Gazzette, did not exceed **twenty five lakhs rupees**, to the respective District Judges having jurisdiction who may either decide it himself or assign it to any Additional Judge subordinate to him.

By order of the Chief Justice

Dated : 9.2.2016

S. No.	Case Type	File No.	Year	District	Judgment Passed By	Valuation of Appeal	Petitioner	Respondent	Letter No. & Date
1	CR	294	2014	Azamgarh	Addl. Civil Judge	525,000	Smt. Madhuri Devi & Ors.	Kailash Chand Bamawal and 3 Ors.	112-9.2.2016

**List of Civil Cases transmitted to District Courts of Pecuniary jurisdiction up to 25,00,000/- (Twenty Five Lakhs) under the orders of Hon'ble the Chief Justice**

S. No.	Case Type	File No.	Year	District	Judgment Passed By	Valuation of Appeal	Petitioner	Respondent	Letter No. & Date
1	CR	276	2012	Mirzapur	Civil Judge	1,000,000	Subham Maini	Anand Kumar & Another	124-10.2.2016
2	CR	343	2011	Mirzapur	Civil Judge	700,000	Narain Singh & Another	Shyam Ji Singh & Others	121-10.2.2016
3	CR	106	2006	Mirzapur	Civil Judge	222,000	Panna Devi	Bhudeo and Others	122-10.2.2016
4	CR	178	2012	Mirzapur	Addl. Civil Judge	800,000	Ravi Kumar Agrawal	Kailash Chandra Agrawal & Others	123-10.2.2016

**4.1. Right to appeal a substantive right:** Right to appeal is not merely a matter of procedure. It is a matter of substantive right. The right of appeal from decision of inferior tribunal to a superior tribunal becomes vested in a party when the proceedings are first initiated in, and before a decision is given by the inferior court. The pre-existing right of appeal is not destroyed by the amendment if the amendment is not made retrospective by express words or necessary intendment. However, unless a right of appeal is clearly given by a Statute, it does not exist. See

(i). Gujarat Agro Industries Vs. Municipal Corporation of Ahmedabad, AIR 1999 SC 1818

(ii). Hoosein Kasam Dada (India) Ltd Vs. State of M.P., AIR 1953 SC 221

**4.2. 'First appeal' a valuable right of the parties :** The first appeal is a valuable right of the parties and unless restricted by law the whole case is open for rehearing both on questions of fact and law. See :

(i) Parimal Vs. Veena, AIR 2011 SC 1150

(ii) Santosh Hazari Vs. Purushottam Tiwari, AIR 2001 SC 965

**5.1. An appeal lies only against a decree and not against judgment:** Under Section 96 CPC, an appeal lies only against a decree and not against judgment. See :

(i) Banarasi Vs Ram Phal, (2003) 9 SCC 606

(ii) Hari Shanker Vs. Jag Dayee, (2000) 39 ALR 120 (All)

**5.2. Appeal u/s 96 CPC lies only against decree :** An appeal u/s 96 CPC lies only against decree and not against judgment or any findings. See : Banarasi & Others Vs. Ram Phal, (2003) 9 SCC 606.

**5.3. Tests for determination whether order passed is a decree? :** The court with a view to determine whether an order passed by it is a decree or not must take into consideration the pleadings of the parties and the proceedings leading upto the passing of an order. The circumstances under which an order had been made would also be relevant. An order to qualify as decree must satisfy the following tests:

(i) There must be adjudication

(ii) Such adjudication must have been given in a suit

(iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit

(iv) Such determination must be of a conclusive nature

(v) There must be a formal expression of such adjudication.

See : **S. Satnam Singh & others Vs. Surender Kaur & another, AIR 2009 SC 1089.**

**5.4. Preliminary decree is appealable (Sec 97 CPC) :** An appeal lies against a preliminary decree. As per Section 97 CPC, failure to appeal against a preliminary decree precludes the aggrieved party from challenging the final decree. See :

(i) Mool Chand Vs. Dy. Director of Consolidation, AIR 1995 SC 2493.

(ii) Phool Chand Vs. Gopal Lal, AIR 1967 SC 1470

**5.5. Appeal to be filed in the appellate court and not in the trial court:**

Despite introduction of amendment in Order 41, rule 9 CPC w.e.f. 01.07.2002, it has been held by the Supreme Court that the apprehension that under Order 41, rule 9 CPC as amended w.e.f. 1.7.2002, the appeal can be filed in the court from whose decree the appeal is to be filed is unfounded. Appeal has to be filed under Order 41, rule 1 CPC in the court in which it is maintainable. All that Order 41, rule 1 CPC requires is that a copy of the memorandum of appeal should also be presented before the trial court which passed the decree. See: Salem Advocates Bar Association Vs Union of India, AIR 2003 SC 189 (Three-Judge Bench)

**5.6. No condition to be imposed while admitting appeal:** No condition should be imposed while admitting appeal for hearing on merits. Question of imposing condition would arise while passing execution of decree under Order 41, rule 5 CPC. See: G.L.Vijain Vs K. Shankar, AIR 2007 SC 1103.(Also see UP amendment in Order 41, rule 5(5) CPC.

**6.1. Who can file appeal u/s 96 CPC ?:** Unless a person is prejudicially or adversely affected by the decree, he is not entitled to file an appeal u/s 96 or u/s 100 CPC. See : Banarasi & Others Vs. Ram Phal, (2003) 9 SCC 606.

**6.2. Anyone out of several parties to suit aggrieved by decree can file appeal (Order 41, Rule 33 CPC) ? :** Where there are several defendants, who are equally aggrieved by a decree on a ground common to all of them, and only one of them challenges the decree by an appeal his own right, the fact that the other defendants do not choose to challenge the decree or that they have lost their right to challenge the decree, cannot render the appeal of the appealing defendant in fructuous on this ground. In fact, R. 4 and R. 33 of O. 41 CPC are enacted to deal with such a situation. In the instant, case, there were several defendants equally aggrieved by decree against them of whom "s" filed appeal which was failed for non-compliance with the office objections said fact

cannot have the consequence of defeating the appeal of the another appellant "B", O. 41, R. 4 read with R. 33 CPC invests the Supreme Court with sufficient power to entertain the appeal of "B" before the court and to make any appropriate order thereupon consonant with justice, equity and good conscience. See : Bajranglal Shivchandrai Ruia Vs. Shashikant N. Ruia, AIR 2004 SC 2546(Three-Judge Bench).

- 6.3. Only aggrieved person with the decree or order competent to file appeal :** To be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree is not entitled to file an appeal. See : Banarsi Vs. Ram Phal, (2003) 9 SCC 606
- 6.4. Only aggrieved person with the decree or order competent to file appeal :** A person aggrieved by and dissatisfied with the judgment and decree has locus standi. Against a decree, an appeal would be maintainable in terms of section 96 CPC. Such an appeal, however, would be maintainable only at the instance of a person aggrieved by it. Locus of a person to prefer an appeal is vital. A court cannot enlarge the scope of locus. An ex parte decree can be set aside by the court passing it or by an appellate court only at the instance of a person aggrieved thereby. See : Baldev Singh Vs. Surinder Mohan Sharma, AIR 2003 SC 225
- 6.5. Only aggrieved person with the decree or order competent to file appeal :** Appeal is creature of statute, hence can be filed only by person permitted by the statute and subject to the statutory permission regarding the filing of such appeal. See : Northern Plastics Ltd. Vs. Hindustan Photo Films Mfg. Co. Ltd. (1997) 4 SCC 452
- 6.6. Appeal by only one of several defendants (Order 41, rule 4, 33 & 11CPC) :** Appeal by one of the several defendants- another appeal subsequently filed by co-defendant dismissed for default – effect of on the earlier appeal- would not result in defeating the other defendants of the appeal. See : Bajranglal Shiv Chandra Rai(2004)5 SCC 272.
- 7.1. Memorandum of appeal must contain the grounds for appeal:**The appeal is the judicial examination. The memorandum of appeal contains the grounds on which judicial examination is invited for purpose of limitations and rules. A written memorandum is required to be filed. See : Laxmiratan Engg. Works Ltd. Vs. C.S.T., AIR 1968 SC 488(Three-Judge Bench).
- 7.2. Right to appeal can be exercised in the manner prescribed by law :** Right to appeal has to be exercised within the limits and according to the

procedure provided by law. It is filed for invoking the powers of superior court to redress the error of court below, if any. See : State of Haryana Vs. Maruti Udyog Ltd., AIR 2000 SC 2941

**7.3. Copy of appeal to be filed in the trial court ( C.L. No. 19/2008 dated 4.09.2008 ) :** Upon consideration of the judgment and order dated 25.10.2002 passed by the Apex court in Salem Advocates Bar Association Vs. UOI, the Hon'ble court has been pleased to direct that the appeal shall be filed u/o 41, rule 1 CPC in the court in which it is maintainable and a copy of the memorandum of appeal which has been filed in the appellate court should also be presented before the court against whose decree the appeal has been filed and the endorsement thereof shall be made by the decreeing court in a book called the "Register of appeals".

*Note- Earlier contrary Circular letter dated 13.12.2007 stood superseded vide aforesaid CL No. 19/2008 dated 4.09.2008.*

**7.4. Defects in the memorandum of appeal not to invalidate appeal :** Order 41, Rule 1 and Order 3, Rule 4CPC: Deficiencies will not invalidate memo of appeal if such omission or defect is not deliberate and signing of memo of appeal or presentation thereof before appellate court was with knowledge and authority of appellant. Said deficiency can be subsequently rectified either of motion of party or *suo moto* grant of permission by court. If pleader signing memo of appeal had appeared for the party in court(s) below, then he need not present a fresh vakalatnama along with memo of appeal as vakalatnama filed in court(s) below would be sufficient to sign and present memo of appeal. See : Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh, AIR 2006 SC 269.

**7.5. Second appeal after withdrawal of first appeal is maintainable?:** Right to file a proper appeal is not affected by withdrawal of an earlier incompetent appeal. An incompetent appeal will indeed be no appeal in the eye of law and cannot in any way prejudice the right of any appellant to file a proper appeal, if the right of appeal is not otherwise lost by lapse of time or any other valid reason. Order 23 Rule 1 CPC does not stand in the way of maintainability of the subsequent appeal. See : M. Ramnarain (P) Ltd. Vs. State Trading Corpn. Of India Ltd., AIR 1983 SC 786.

**8.1. Admission of appeal and duty of appellate court :** It is the duty of appellate court to examine the appeal at the stage of order 41, Rule 11 CPC and to dismiss the same, if it lacks merit and does not deserve admission. No alleged convention or practice can be allowed to override

the mandatory provision u/o 41 Rule 11 CPC. See: Shyam Prasad Mishra vs Vijay Pratap Singh, AIR 2006 All 56.

**8.2. Admission or rejection of appeal in part permissible :** Appellate Court has power u/s 96 & 100 CPC read with Order 41, rule 3 CPC to admit an appeal in part if parts thereof are severable. See : Bolin Chetia Vs. Jogadish Bhuyan, (2005) 6 SCC 81.

**8.3. Ordering deposit of money as condition precedent for admission of appeal not proper :** It is open for the appellate court to impose any condition as it may think fit and proper in the facts and circumstances of the case. Otherwise imposing a condition of deposit of money subject to which an appeal may be admitted for hearing on merits is not legally justified and such order cannot be sustained. See : Management of Devi Theatre Vs VishwaNath Raju, AIR 2004 SC 3325.

**8.4. Summary dismissal of appeal when possible u/s 96 CPC ? :** Court hearing first appeal against finding of facts must record its reasons, especially if it is the final court on finding of facts. One word order 'Dismissed' not permissible. While affirming judgment of lower court detailed discussion is not required. See : Kerala Transport Co. Vs. Shah Manilal Mulchand, 1991 Supp. (2) SCC 461

**9.1. Ex parte ad interim injunction order is appealable u/o 43, rule 1(r) CPC :** Order granting temporary injunction under Order 39, rule 1 CPC is appealable u/o 43, rule 1(r) CPC. Plea that only orders granting injunction which finally decide application 6-C2 are alone appealable is not tenable. All orders under Order 39, rule 1 CPC are interim orders and cannot be bifurcated as final orders and interim orders. See : Cosmopolitan Club Vs. Vinayak Kripa Inframart Co. Ltd, 2010 (5) ALJ (NOC) 601 (Allahabad) (DB).

**9.2. Appeal under Order 43, rule 1 CPC maintainable against an ex parte order of injunction passed u/o 39, rule 1& 2 CPC:** Appeal against an order passed on an application under Order 39, rule 1&2 CPC is maintainable under Order 43, rule 1 CPC. The choice is of the party affected by the order either to move the appellate court or to approach the same court which passed the ex parte order for any relief. See:

(i). A. Venkatasubbiah Naidu vs. S. Chellappan, AIR 2002 SC 3032.

(ii). New Kenilworth Hotel Pvt. Ltd vs. Orissa State Finance Corporation, (1997) 3 SCC 462

(iii) Moradabad Development Authority vs. Sai Sidhi Developers, AIR 2019 All 196 (Paras 11, 33)

**9.3. Appeal u/o 43, rule 1 (r) CPC not maintainable against mere issue of notice u/o 39, rule 3 CPC :** Where only notice u/o 39, rule 3 CPC was issued to defendant and the injunction application was not finally disposed off by the court u/o 39 rule 1 and 2 CPC, it has been held that appeal u/o 43, rule 1(r) CPC does not lie against mere issue of notice to defendant u/o 39, rule 3 CPC. See :

(i).Amrik Singh Vs M/s. Bala Ji Rice Mills, 2013 (119) RD 844 (All)

(ii).Syed Zafar Ali Vs. Saeed Ahmad, AIR 2006 All 300

(iii).H. Bevis & Co. & Others, Kanpur Vs. Ram Behari, AIR 1951 All 8 (DB).

**9.4. Under Order 43, Rule 1 CPC, appellate court should normally not interfere with the discretion of the trial court in granting interim Inction :** It is now well-entrenched in our jurisprudence that the appellate court should not flimsily, whimsically or lightly interfere in the exercise of discretion by a sub-ordinate court unless such exercise is palpably perverse ,arbitrary, capricious or against the settled principles of law. Perversity can pertain to the understanding of law or the appreciation of pleadings or evidence. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it would have come to a different conclusion. See :

(i).Neon Laboratories Ltd. Vs. Medical Technologies Ltd., (2016) 2 SCC 672 (*para 5*)

(ii).Wander Ltd vs. Antox India Pvt. Ltd., (1990) Suppl SCC 727

**9.5. Appellate court should not interfere u/o 43, rule 1 CPC with the order of grant or refusal of interim injunction:** Once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion based upon objective consideration of the material based before court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter. It is possible for the appellate court to form a different opinion on the issues of prima

facie case, balance of convenience, irreparable injury and equity. Unless the appellate Court comes to the conclusion that the discretion exercised by the trial court in refusing to entertain the prayer for temporary injunction is vitiated by an error apparent or perversity and manifest injustice has been done, there will be no warrant for exercise of power. See : Skyline Education Institute (Pvt.) Ltd. v. S.L. Vaswani & another, AIR 2010 SC 3221(Three-Judge Bench).

**9.6. Interim injunction in appeal u/o 43, rule 1(r) CPC not to be granted beyond the scope/prayer in the main appeal :** The scope of an interim application cannot be greater in scope than the main appeal filed u/o 43, rule 1(r) CPC. Grant of interim relief by appellate court in relation to issues which are not raised in main appeal filed u/o 43, rule 1(r) CPC is not permissible. See : Meena Chaudhary Vs. Commissioner of Delhi Police, (2015) 2 SCC 156.

**9.7. Relief not claimed in plaint not to be granted:** A relief larger than the one claimed by plaintiff in the suit cannot be granted by court. It is not open to the court to grant a relief to the plaintiff on a case for which there is no basis in the pleadings. See:

(i) Meena Chaudhary Vs. Commissioner of Delhi Police, (2015) 2 SCC 156.

(ii) Rajendra Tewary vs. Basudeo Prasad, 2002 (46) ALR 222 (SC)

(iii). Om Prakash Vs. Ram Kumar, (1991) 1 SCC 441 (Para 4).

(iii).Srinivas Ram Kumar Vs. Mahabir Prasad, AIR 1951 SC 177 (Three-Judge Bench)

(iv). M. Siddiq (Ram Janmabhumi Temple Vs. Suresh Das, (2020) 1 SCC 1 at pages 737 & 738 (Para 1228) (Five-Judge Bench).

(v). Venkataramana Devaru Vs. State of Mysore, AIR 1958 SC 255 ( Five-Judge Bench) ( Para 14).

**9.8. Appeal u/o 43, rule 1 r/w Section 104 and order 1 rule 10 & order 41, rule 33 CPC against order of temporary injunction by an appellant not party in suit maintainable :** There is nothing in order 43, rule 1 CPC that leave to appeal has to be applied for in any particular format. When the appellant was not stranger to the controversy and he was already party in a proceeding before BIFR, he could have maintained an appeal u/o 43, rule 1 CPC against an order of interim injunction. See : Ghanshyam Sharda Vs. Shiv Shankar Trading Company, (2015) 1 SCC 298.

**9.9. Temporary Injunction cannot be passed against a third party or stranger:** A temporary injunction cannot be passed under Order 39 ,

rules 1&2 CPC or under Order 22 CPC against a third party or stranger or a non party to the suit. See: West Bengal Housing Board vs. Pramila Sanfui, (2016) 1 SCC 743.

- 9.10. Writ petition under Article 227 against refusal of interim injunction maintainable:** A writ petition under Article 227 of the Constitution of India against an order passed by the Civil Court refusing to grant interim injunction under Order 39, Rules 1 & 2 CPC is maintainable. See: State of Jharkhand Vs. Surendra Kumar Srivastava, AIR 2019 SC 231.
- 9.11. Appeal not maintainable against an interlocutory order of injunction passed by appellate court u/o 43, rule 1(r) of CPC :** Since there is no express provision for an appeal from an interlocutory appellate order upon the appellate court exercising the power u/s 107(2) CPC, whether or not read with Section 108 CPC, the interlocutory order of injunction passed by the appellate court would not be appealable order. No appeal is maintainable against interlocutory order of injunction passed by appellate court whether u/o 43, rule 1(r) CPC or otherwise. But petition under Article 227 of the Constitution would be obviously maintainable. See : Sabyasachi Chatterjee Vs Prasad Chatterjee, AIR 2013 Calcutta 231 (Full Bench).
- 10. Revision against order issuing notice u/o 39 Rule 3 CPC lies:** Since no appeal lies against an order passed u/o 39 Rule 3 CPC, hence the bar of section 115(2) CPC is not applicable. See : Urmila Devi vs. Nagar Nigam, Lucknow, AIR 2003 All 158.
- 11.1. Extent of powers of first appellate court :** An appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is open for re-hearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all issues arising alongwith the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. See :
- (i) State Bank of India & another Vs. M/s. Emmsons International Ltd. and another, AIR 2011 SC 2906
  - (ii) Santosh Hazari Vs. Purushottam Tiwari, AIR 2001 SC 965.

- 11.2. Extent of powers of first appellate court u/s 96 read with Order 41, rule 33 CPC :** First appellate court can go into the questions of facts and appraise the evidence on record. See : Madanlal Vs. Yoga Bai, AIR 2003 SC 1880.
- 11.3. Jurisdiction of first appellate court u/o 41, Rule 11 CPC :** The jurisdiction of the court in first appeal extends to examine the question of facts as well as that of law. It is though true that of under O. 41 R. 11 CPC it would be open for the court to dismiss the appeal *in limine* at the time of admission but even examining the matter from that point of view the court while considering question of admission of appeal filed under Section 96 CPC, may admit the appeal if considered fit for full hearing having prima facie merit. Otherwise, if it finds that appeal lacks merit, it may be dismissed at the initial stage itself. Admission of appeal, subject to condition of deposit of some given amount, is not envisaged in section 96 read with O. 41 R. 11 CPC. Moreover, deposit of money would obviously have no connection with the merit of the case. Imposing a condition of deposit of money subject to which an appeal may be admitted for hearing on merit is not legally justified and such order cannot be sustained. See : Devi Theatre Vs. Vishwanath Raju, (2004) 7 SCC 337.
- 11.4. Powers of first appellate court under Order 41, rules 33 & 22 CPC are in three parts :** The first part confers on the appellate court very wide power to pass such order in appeal as the case may require. The second part contemplates that this power will be exercised by the appellate court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents. The third part is where there have been decrees in cross suits, this power is exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees. See : Biah Supply Syndicate Vs. Asiatic Navigation, AIR 1993 SC 2054.
- 11.5. Power of first appellate court:** First appellate court can re-appreciate the entire evidence and come to a different conclusion from a trial court. When a High Court either without adverting to a certain findings of a trial court or without reversing other findings, allowed first appeal, it was held improper because points involved required deeper consideration of the trial court's findings. Matter remitted for decision afresh. See : Jagannath Vs. Arulappa, (2005) 12 SCC 303.
- 11.6. Duty of first appellate court:** first appellate court, being the last court of appeal on facts, it is a duty of the first appellate court to go into all the

questions raised in the appeal and also the challenge of the evidence led in the case. If this not having being done the matter must be remitted for decision afresh. See : Rama Pulp & Paper Ltd Vs. Maruti N. Dhotre, (2005) 12 SCC 186.

**11.7. Duty of first appellate court :** First appellate court, in exercise of its powers u/s 96 CPC read with Order 41, rule 31 CPC is obliged to decide all issues arising in the case both on facts and law after appreciating the entire evidence. Disposal of appeal in a cryptic manner by a judgment bereft of concise statement of points for determination and decisions thereon and reasons is improper. See : UPSRTC, Uttar Pradesh Vs. Kumari Mamta, 2016 (2) ALJ 645 (SC)

**11.8. Duty of first appellate court :** First appellate court u/s 96 CPC must record its findings only after dealing with all the issues of law as well as of facts and with the evidence, oral as well as documentary, led by the parties. The appellate court must give reasons in support of its findings. If the court does not fulfill its obligations, the parties would not get the true benefit of the first appeal which is a valuable right on the basis of which parties have a right to be heard on questions of law as well as of facts. See : Madhukar Vs. Sangram, (2001) 4 SCC 756 (Three-Judge Bench)

**11.9. All questions of fact and law decided by the Trial Court remain open for re-consideration by the first appellate court :** Section 96 of the CPC provides for filing of an appeal from the decree passed by a court of original jurisdiction. Order 41, Rule 31 CPC provides the guidelines to the appellate court for deciding the appeal. This rule mandates that the judgment of the appellate court shall state:

- (a) points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.
- (e) Thus, the appellate court has the jurisdiction to reverse or affirm the findings of the Trial Court. It is settled law that an appeal is a continuation of the original proceedings. The appellate court's jurisdiction involves a rehearing of appeal on questions of law as well as fact. The first appeal is a valuable right, and, at that stage, all questions of fact and law decided by the Trial Court are open for re-consideration. The judgment of the appellate court must, therefore, reflect conscious application of mind and must record the court's findings, supported by reasons for its decision in respect of all the issues along with the contentions put forth and pressed by the parties. Needless to

say, the first appellate court is required to comply with the requirements of Order 41, Rule 31 CPC and non-observance of these requirements lead to infirmity in the judgment. See: Somakka (Dead) by LRs Versus K.P. Basavaraj (Dead) by LRs, 2022 SCC OnLine SC 736.

**11.10. Complying with the essentialities of order 41, rule 31 CPC is mandatory for the first appellate court:** It is mandatory for the first appellate court to comply with the essentialities of order 41, rule 31 CPC while deciding the first appeal. Without complying with the provisions of order 41, rule 31 CPC, first appeal cannot be decided. See:

(i) Manjula Versus Shyam Sundar, (2022) 3 SCC 90.

(ii) K.Karuppuraj Versus M. Ganesan, (2021) 10 SCC 777.

(iii) Malluru Mallappa Versus Kuruvathappa And Others, (2020) 4 SCC 313.

**11.11. Recording of reasons must for appellate court:** If having regard to the nature of oral evidences adduced before it, the Trial Judge came to the conclusion that the appellant had failed to prove her case, the first appellate court, as has rightly been held by the High Court, could not have reversed the said finding without assigning sufficient and cogent reasons thereof. See : Chinthamani Ammal Vs. Nadagopal Gounder, (2007) 4 SCC 163

**11.12. Cryptic and non-speaking appellate order not justifiable:** Dismissal of regular first appeal passing cryptic order on facts is not proper. If a first appeal deserved to be dismissed at the admission stage itself some reasons however brief, must be recorded therefor. See : Delhi, U.P., M.P. Transport Co. Vs. New India Assurance Co. (2006) 9 SCC 213

**11.13. Appellate court has discretion to pass a decree in favour of a non-appelling party if he is entitled to such a decree:** No rigid rule can be laid down and it would depend on facts of each case. In exceptional cases appellate court can pass such decree or order as ought to have been passed even in favour of a party who had not preferred an appeal. O. 41, R. 33 CPC enables the appellate court to pass any order or decree which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree and, (ii) such party or parties may not have filed an appeal. See :

(i).Chandramohan Vs Bapu, AIR 2003 SC 1754

(ii). K. Muthuswami Gounder Vs. N. Palaniappa Gounder, AIR 1998 SC 3118.

**11.14. Non-appelling plaintiffs or defendants can also be granted relief by the appellate court:** Some of plaintiffs whose claim was denied by the trial court and who had not challenged the same by way of appeal before

first appellate court were held to be entitled to the relief in second appeal. In a partition suit, all parties stand on the same pedestal and every party is a plaintiff as well as a defendant. Position of plaintiff and defendant can be interchangeable. Trial court could grant relief even to non-appealing plaintiffs and make an adverse order against all defendants and in favour of all plaintiffs, Merely because trial court had not granted relief in favour of some of the plaintiffs, that would not come in the way in the High Court allowing their claim. See: Azgar Barid Verus Mazambi Alias Pyaremabi, (2022) 5 SCC 334.

**11.15. Appellate Court can pass interim order :** The power to make interim order is, except where it is specifically taken away by the statute, implicit in the power to make a final order. It is exercised by the authority who has to make the final order or an Authority exercising appellate or revisional jurisdiction against an order granting or refusing an interim order like one u/o 39 Rule 1 & 2 CPC. The exercise of the power implies that the authority seized of the proceedings in which such an order is made will eventually pass a final order, the interim order serving only as a step in aid of such final order. The law does not permit the making of an interim order by one authority or court pending adjudication of the dispute by another. See : L.V. Ashok Kumar Lingala vs. State of Karnataka, AIR 2012 SC 53.

**11.16. Stay order when and how to be passed?:** The Supreme Court has issued following directions regarding the manner of passing of the stay orders and durations thereof in revisions and appeals filed against the orders of the trial courts:

(i). There must be a speaking order while granting stay of the proceedings

(ii). Once an stay order is passed, the challenge should be decided within two to three months and the matter should be taken up on a day today basis

(iii). Stay order should not be passed unconditionally or for indefinite period. Conditions may be imposed.

(iv). Stay order shall automatically lapse after six months if not extended further and the proceeding before the trial court shall automatically commence

(v).Extension of stay order can be passed only by an speaking order showin extra-ordinary situation

(vi). The above directions shall apply to both the civil as well as criminal matters

(vii). The above directions shall apply to both civil and criminal appellate and revisional jurisdictions. See: Asian Resurfacing of Road Agency (P) Ltd. Vs. CBI, (2018)16 SCC 299 (Three- Judge Bench)

**11.16.1. Meaning of “Stay Order” ?:** “While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending.” See: Shree Chamundi Mopeds Limited Vs. Church of South India Trust Association CSI Cinod Seceretary, Madaras, (1992) 3 SCC 1 (Three-Judge Bench) (Para 10)

**11.17. Discretionary power of appellate court u/o 41, Rule 33 CPC:** When circumstances exist which necessitate the exercise of discretion conferred on the appellate court by Order, 41 Rule 33 CPC, the appellate court cannot be found wanting when it comes to exercise its powers. See: Delhi Electric Supply Undertaking vs Basanti Devi, AIR 2000 SC 43.

**11.18. Deficiency in court fee occurred in trial court can be directed to be made good even at appellate stage :** It is well known legal position that appeal is continuation of suit and power of appellate court is co-extensive with that of the trial court. Deficiency in court fee occurred in

trial court can be directed to be made good even at appellate stage. See : Sardar Tajendra Singh Gambhir Vs. Sardar Gurpreet Singh, 2015 (1) ARC 616 (SC).

**11.19. Findings of facts recorded by lower court not to be ordinarily disturbed:** Findings recorded by lower court/authority in favour of the appellant cannot be interfered with by the appellate court/authority in absence of any appeal filed by the respondent. The object of R. 33 is to avoid contradictory and inconsistent decisions on the same questions in the same suit. The power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from. See : Choudhary Sahu Vs. State of Bihar, AIR SC 98.

**11.20. When can appellate court interfere u/s 96 CPC with the finding of facts recorded by the trial court?** : The appellate court may not interfere with the finding of the trial court unless the finding recorded by the trial court is erroneous or the trial court ignored the evidence on record. See : Venkatesh Construction Co. Vs. Karnataka Vidyuth Karkhane Limited, (2016) 4 SCC 119 (para 20) (Three-Judge Bench).

**11.21. Reversal of findings of trial court and duty of appellate court :** While reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. See :

(i) V. Prabhakara Versus Basavaraj K., (2022) 1 SCC 115.

(ii) State Bank of India & another Vs. M/s. Emmsons International Ltd. and another, AIR 2011 SC 2906

(iii) Santosh Hazari Vs. Purushottam Tiwari, AIR 2001 SC 965.

**11.22. When can appellate court not interfere with the findings of fact recorded by the trial court?** : The first appellate court should not disturb and interfere with the valuable rights of the parties which stood crystallized by the trial court's judgment without opening the whole case for re-hearing both on question of facts and law. More so, the appellate court should not modify the decree of the trial court by cryptic order without taking note of all relevant aspects, otherwise the order of the appellate court would fall short of considerations expected from the first

appellate court in view of the provisions of Order 41, rule 31 CPC and such judgment and order would be liable to set aside. See :

- (i) Parimal Vs. Veena, AIR 2011 SC 1150
- (ii) B.V. Nagesh Vs. H.V. Srinivassa Murthy, JT (2010) 10 SC 551

**11.23. Plea of jurisdiction can be raised at appellate stage :** Objection as to jurisdiction of the trial court can be raised at any stage. If the trial court had no jurisdiction in the matter, the doctrine of *coram non judice* would apply and the judgment and decree of the lower court being without jurisdiction cannot be upheld. See : Chief Engineer, Hydel Project Vs. Rabinder Nath, (2008) 2 SCC 350.

**11.24. Plea of absence of jurisdiction when not to be entertained by the appellate court ?:** A decision rendered without jurisdiction would *coram non judice*. It is a fundamental principle that a decree passed by a court without jurisdiction is nullity and its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of parties. But a distinction, however, must be made between a jurisdiction with regard to subject matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the later it would not be. See :

- (i) Mantoo Sarkar Vs. Oriental Insurance Company Ltd. & another, AIR 2009 SC 1022.
- (ii) Harshad Chimam Lal Modi Vs. DLF Universal Limited & another, (2005) 7 SCC 791.
- (iii) Chief Engineer, Hydel Project Vs. Rabinder Nath, (2008) 2 SCC 350.

**11.25. Consent/Waiver/Acquiescence not to confer jurisdiction:** Consent/waiver/acquiescence cannot confer jurisdiction upon a court incompetent to try the suit. See : Harshad Chimam Lal Modi Vs. DLF Universal Limited & another, (2005) 7 SCC 791.

**11.26. Appellate court can mould relief in accordance with the law having come into force during pendency of appeal:** Appeal is in continuation and rehearing of the suit. Appellate court is entitled to take into account even facts and events which came into existence after passing of decree appealed against. If a new enactment comes into force during the

pendency of appeal, appellate court can mould the relief by applying the new enactment. See : Dilip Vs. Mohd. Azizul Haq, AIR 2000 SC 1976.

**11.27. Merits of the case not to be discussed when court has no jurisdiction:** It is settled law that once court holds that it has no jurisdiction in the matter, it should not consider the merits of the matter. Kindly see: **Jagraj Singh vs. Birpal Kaur, AIR 2007 SC 2083.**

**12.1. Procedure to decide first appeal :** Order 41, rule 31 CPC provides for procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts. See :

- (i) H. Siddiqui Vs. A. Ramalingam, AIR 2011 SC 1492
- (ii) Parimal Vs. Veena, AIR 2011 SC 1150
- (iii) Shiv Kumar Sharma Vs. Santosh Kumari, AIR 2008 SC 171
- (iv) Gannamani Anasuya Vs. Parvatini Amarendra Chowdhary, AIR 2007 SC 2380
- (v) G. Amalorpvam Vs. R.C. Diocese of Madurai, (2006) 3 SCC 224
- (vi) Santosh Hazari Vs. Purushottam Tiwari, AIR 2001 SC 965

**12.2. Considering arguments of the parties must for appellate court :** The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all issues arising alongwith the contentions put forth and pressed by the parties for decision of the appellate court. See :

- (i) State Bank of India & another Vs. M/s. Emmsons International Ltd. & Another, AIR 2011 SC 2906
- (ii) Santosh Hazari Vs. Purushottam Tiwari, AIR 2001 SC 965

**12.3. Issues of facts and law both to be decided by the first appellate court :** The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. See :

- (i) State Bank of India & another Vs. M/s. Emmsons International Ltd. and another, AIR 2011 SC 2906
- (ii) Parimal Vs. Veena, AIR 2011 SC 1150
- (iii) Santosh Hazari Vs. Purushottam Tiwari, AIR 2001 SC 965
- (iv) K.N. Swami Vs. Irshad Basith, (2005) 10 SCC 243

(v) Madhukar Vs. Sangram, (2001) 4 SCC 756 (Three-Judge Bench)

**12.4. Appellate court to decide all issues in its judgment :** First appellate court is required to consider and decide all issues whether of law or facts or of both. See : State Bank of India & another Vs. M/s. Emmsons International Ltd. and another, AIR 2011 SC 2906

**12.5. Formulating points for determination by appellate court necessary :** As per Order 41, rule 31(a) CPC, it is required from the appellate court to formulate points for determination by it so that the contentions and the rival contentions of the parties may be tested on such points of determination. However, the appellate judgment cannot be said to be vitiated merely because proper points for determination are not framed by the appellate court. See :

(i). United Engineers and Contractors Vs Secretary to Govt. of AP, AIR 2013 SC 2239

(ii). Parimal Vs Veena, AIR 2011 SC 1150

(iii). H. Siddiqui Vs A. Ramalingam, AIR 2011 SC 1492

(iv). Anasuya Vs. Parvartini Amrendra Chowdhary, AIR 2007 SC 2380

(v). G. Amalarpavam Vs. R.C. Diocese of Madurai, (2006) 3 SCC 224

**12.6. Non-framing of points for determination not to vitiate appellate judgment:** Non-framing of points for determination would not vitiate the appellate judgment. See: Rattan Dev Vs. Pasam Devi, (2002) 7 SCC 441

**12.7. Recording of its own reasons must for appellate court :** Where the trial court had recorded reasons in its judgment/decreed and the same was also upheld by the appellate court but no reasons of its own were recorded by the appellate court, it has been held by the Hon'ble Supreme Court that the appellate court u/s 96 CPC must record its own reasons even if it is upholding the reasons recorded by the trial court. See :

(i) M/s. Malnad Traders Vs. M/s. New India Assurance Company Limited, AIR 2009 SC 2084.

(ii) Madhukar vs. Sangram, (2001) 4 SCC 756 (Three- Judge Bench)

**12.8. Appeal cannot be dismissed on merits in default of appearance of appellant :** In view of bar of the Explanation added to Order 41, rule 17 CPC w.e.f.1.2.1977, a civil appeal cannot be dismissed on merits in absence of the appellant or his counsel. The option of the appellate court is to dismiss the appeal in default of the appellant. But the appeal can be heard on merits if the respondent does not appear. See :

(i). Harbans Pershad Jaiswal Vs. Urmila Devi Jaiswal, (2014) 5 SCC 723

- (ii).Secretary, Department of Horticulture, Chandigarh Vs. Raghu Raj, AIR 2009 SC 514
- (iii). Ramesh Chandra Goyal Vs. IV ADJ, Agra, 2006 (6) ALJ 34
- (iv). Ajit Kumar Singh Vs Chiranjibi Lal, (2002) 3 SCC 609
- (v).Shokat Ali Vs. VI Addl. District Judge, Bulandshahr, 2000 (3) AWC 2277 (Allahabad)

**12.9. Appeal not to be dismissed in default on merits:** Once an appeal is admitted and is placed for hearing on merits, it can be dismissed for default of the appellant or his advocate but cannot be decided on merits in their absence. See : Secretary, Dept. of Horticulture, Chandigarh vs. Raghu Raj AIR 2009 SC 514.

**13.1. Production of additional evidence by parties at appellate stage and relevant considerations for permitting it :** If an application is filed by the party under Order 41, rule 27 CPC to produce additional evidence at appellate stage, the duty of the court is to decide the same on merit and consider as to whether the document or other evidence sought to be adduced has any relevance or bearing on the issues involved. See :

- (i) Malyalam Plantations Limited Vs. State of Kerala, AIR 2011 SC 559
- (ii) Shyam Gopal Bindal Vs. Land Acquisition Officer, AIR 2010 SC 690
- (iii) Jatinder Singh Vs. Mehar Singh, AIR 2009 SC 354
- (iv) Mahavir Singh Vs. Naresh Chandra, AIR 2001 SC 134.

**13.2. Production of additional evidence when to be allowed u/o 41, rule 27 CPC :** Additional evidence/ documents which were in existence at time of filing of appeal, can be admitted as additional evidence u/o 41, rule 27 CPC. See :

- (i) Louis Paiva Vs. Nagar Palika Parishad, Saharanpur, 2007 (69) ALR 794 (Alld)
- (ii)Shri Durga Bhagwati Industries Vs. Om Prakash Lohiya, 2006 (64) ALR 492 (Alld)
- (iii) Jaipur Development Authority Vs. Kailashwati Debi, 1997 (31) ALR 678 (SC)

**13.3. An application filed u/o 41, rule 27 CPC for production of additional evidence during the pendency of appeal to be heard and decided at the time of final hearing of the appeal :** An application u/o 41, rule 27 CPC for taking additional evidence on record at an appellate

stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored. See : Union of India Vs. Ibrahim Uddin, (2012) 8 SCC 148 (*para 52*).

**13.4. Power of appellate court under order 41, rule 27 CPC discretionary and to be used sparingly :** The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. See : Union of India Vs. Ibrahim Uddin, (2012) 8 SCC 148 (*para 36*).

**13.5. Appellate court should not ordinarily allow new evidence to be adduced under Order 41, Rule 27 CPC :** The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in

fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. The inadvertence of the party or this inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realize the importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment. See : Union of India Vs. Ibrahim Uddin, (2012) 8 SCC 148 (*paras 37, 38, 39, 40 & 41*).

**13.6. Relevant considerations for permitting production of additional evidence u/o 41, rule 27 CPC:** The true test to be applied in dealing with the application for additional evidence u/o 41, rule 27 CPC is whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and additional evidence so brought on record will have to be ignored. See : Natha Singh Vs. The Financial Commissioner, AIR 1976 SC 1053.

**13.7. Vigilance or negligence of party not relevant for invoking power u/o 41, rule 27 CPC to permit production of additional evidence :** Invocation of powers of appellate court u/o 41, rule 27(1)(b) CPC does

not depend upon vigilance or negligence of parties in producing the evidence but the real test would be whether the document in question would throw light on germane issue and is necessary for pronouncing judgment. See : Wadi Vs. Amilal, (2015) 1 SCC 677.

- 13.8. Inadvertence or lack of proper legal advice not a ground to admit additional evidence u/o 41, rule 27 CPC :** Inadvertence or lack of proper legal advice cannot be a ground u/o 41, rule 27 CPC to admit additional evidence at appellate stage as it does not constitute substantial cause. See : Haryana State Industrial Development Corporation Vs. M/s Cork Manufacturing Company, AIR 2008 SC 56
- 13.9. Rejection of application u/o 41, rule 27 CPC when justified?** It has been held by the Hon'ble Supreme Court that rejection of application for production of additional evidence u/o 41, rule 27 CPC after a period of 10 years from the date of filing of the appeal cannot be termed to be erroneous or an illegal exercise of discretion. See : N. Kamalam Vs. Ayya Samy, AIR 2001 SC 2802
- 13.10. Rejection of application u/o 41, rule 27 CPC when proper ?** Provision u/o 41, rule 27(1)(b) CPC can be invoked only if the court requires any document to be produced or witnesses to be examined to enable it to pronounce judgment or for any other substantial cause. Documents sought to be produced were part of government record and could have been filed earlier. The documents sought to be produced were not documents which came into existence after filing of the suit. Application u/o 41, rule 27 CPC therefore rightly rejected. See : State of Gujarat Vs. Mahendra Kumar Parshottambhai Desai, 2006 (63) ALR 806 (SC).
- 13.11. Documentary evidence when to be admitted u/o 41, rule 27 CPC?** Two of the documents came into existence after the passing of the decree by the trial court. Appellate court may allow documentary evidence to be produced u/o 41, rule 27 CPC r/w Sec 107 (1)(d) CPC if the party establishes that such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. See :) Adil Jamshed Frenchman Vs. Sardar Dastur Schools Trusts & Others, 2005 (2)SCJ 236.
- 13.12. Lacuna to fill up in evidence not to be allowed u/o 41, rule 27 CPC:** Additional evidence in appeal u/o 41, rule 27(1)(b) CPC cannot be filed by a party at appellate stage as of right. Attempt to fill up gap in the case left out before the trial court cannot be permitted. Additional District

Judge therefore illegally allowed application u/o 41, rule 27 CPC and the same was set aside. See :

(i). Shri Kishore Vs. Roop Kishore, 2006 (62) ALR 414 (All)

(ii). Natha Singh Vs. The Financial Commissioner, AIR 1976 SC 1053

**14.1. Remand of appeal an 'interlocutory order':** Remand of appeal u/o 41, rule 23-A CPC is an interlocutory order which does not terminate the proceedings and hence it could be challenged from the final order. See :

(i) Mangal Prasad Tamoli Vs. Narvedshwar Misra, 2005 (2) SCJ 515

(ii) Chatrughan Vs. Dhanpati Rai, 2007 (69) ALR 861 (All)

**14.2. Appeal must be remanded to the trial court for deciding as to who is the LR of the deceased party :** Interpreting the provisions of Order 41, rule 25 CPC read with Proviso to Order 22, rules 4 & 5 CPC, it has been ruled by the Hon'ble Supreme Court that if a question arises in appeal as to who is the legal representative of the deceased party, the appeal must be remanded to the trial court as an enquiry on question as to who is LR of the deceased party can be done only by the trial court. It is, therefore, necessary for the appellate court remand the appeal to trial court for recording such finding. See : Karedla Parthasaradhi Vs. Gangula Ramanamma, AIR 2015 SC 891.

**14.3. Remanding case to trial court to frame fresh issue and decide the suit afresh :** If an issue on any specific and material question of fact was not framed and decided by the trial court which in the opinion of the first appellate court appears to be necessary to be framed and decided, then the appellate court should not frame and decide such issue if there is no sufficient evidence available before it to decide the same and in such cases, the appellate court, in exercise of its power under section 96 CPC read with order 41, rule 24 CPC remand the matter to the trial court with the direction to frame such issue and decide the suit afresh. See :

(i) M/s. Divya Exports Vs. M/s. Shalimar Video Company and others, AIR 2011 SC 3063.

(ii) Nicholas V. Menezes Vs. Joseph M. Menezes, (2009) 4 SCC 791

(iii) Remco Industrial Workers House Building Co-operative Society Vs. Lakshmeesha M. & Others, 2003 SAR (Civil) 804 (SC)

Note: SAR = *Supreme Appeals Reporter*

**14.4. Remand order directing retrial/de novo trial of suit when permissible? :** If the trial court had disposed of the matter on merits and not on any preliminary issue, the order of the appellate court directing re-trial of the case is valid in terms of its powers under order 41, rule 23-

A CPC. See : Jegannathan Vs. Raju Sigamani & another, (2012) 5 SCC 540.

- 14.5. Unnecessarily remanding case deprecated by the Supreme Court :** Relying upon a Supreme Court decision rendered in Smt. Dr. D. Kaur Vs. Smt. Kanti Khare, 1981 ARC 664 (SC), unnecessarily remanding cases has been deprecated by the Hon'ble Allahabad High Court. See : Dr. Neeraj Bhasin Vs. Ashok Bhasin, 2006 (63) ALR 56 (All)(LB).
- 14.6. Appellate Court cannot order a fresh trial under Order 41, rule 27 CPC :** An appellate court cannot order a fresh trial. Such a course is not permissible under Order 41, rule 27 CPC when it has not proceeded under Order 41, rule 25 CPC or remanded the case under Order 41, rule 23 CPC. See : The Municipal Corporation of Greater Bombay Vs. Lala Pancham, AIR 1965 SC 1008 (Five-Judge Bench).
- 14.7. Rewriting overruled judgment after remand amounts to judicial indiscipline :** If a judgment is overruled by the higher court, the judicial discipline (on remand) requires that the Judge whose judgment is overruled must submit to the judgment (of the higher court). He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment. See :
- (i) Markio Tado Vs. Takam Sorang, (2013) 7 SCC 524 (*para 31* )
  - (ii) State of W.B. Vs. Shivananda Pathak, (1998) 5 SCC 513 (*para 28*)
- 15.1. Fresh issue u/o 41, rule 25 CPC when not to be framed? :** Non framing of issues not fatal where parties went to trial fully knowing the rival cases and led all evidence. See :
- (i) Sachchidanand Pandey Vs. Dr. Ram Pher Singh, (2004) 22 LCD 350 (All) (LB)
  - (ii) Parasnath Vs. Rameshwar Ram, 1999 SCD 422 (Allahabad)
  - (iii) Nedu Nuri Kame Swaramma Vs. Sampati Subba Rao, AIR 1963 SC 884
- 15.2. Failure to frame issues when not fatal?** Failure to frame formal issues by Court would not invalidate findings of binding judgment between parties. See : Commissioner of Endowments Vs. Vittal Rao, 2005 (2) AWC 1984 (SC)
- 16.1. Ex-parte decree is appealable :** When an application u/o 9, rule 13 CPC for setting aside an ex-parte decree is dismissed, the defendant cannot prefer an appeal u/o 43, rule 1 CPC. The appellant cannot raise

same contention in the first appeal. Principles of res judicata applies in different stages of the same proceedings. Once ex-parte judgment is reserved u/o 20, rule 1 & 2 CPC, application by defendant u/o 9, rule 7 CPC does not lie. Remedy of the defendant is by way of order 9, rule 13 CPC or appeal. See : Bhanu Kumar Jain Vs. Archana Kumar, 2005 (1) SCJ 243 (Three-Judge Bench).

**16.2. Ex-parte decree and scope of interference by the appellate court :** In case the matter does not fall within the four corners of Order 9, Rule 13 CPC, court has no jurisdiction to set aside ex parte decree. Second proviso to Order 9, Rule 13 CPC makes it obligatory on the appellate court not to interfere with an ex parte decree unless it meets the statutory requirement. See : Parimal Vs. Veena, AIR 2011 SC 1150.

**16.3. An application u/o 9, rule 13 CPC not to be entertained after disposal of the appeal on the ground of limitation :** An application u/o 9, rule 13 CPC cannot be entertained by the trial court after the appeal against the ex-parte decree was dismissed by the appellate court on the ground of limitation. See :

(i) P. Kiran Kumar Vs. A.S. Khadar, (2002) 5 SCC 161

(ii) Rani Chowdhary Vs. Lt. Col. Suraj Jit Chowdhary, (1982) 2 SCC 596

**16.4. Appeal u/o 43, Rule 1 CPC maintainable after dismissal of application u/o 9, Rule 13 CPC :** When an ex parte decree is passed, the defendant has two options viz. to file an appeal and to file an application under Order 9, rule 13 CPC. He can take recourse to both the proceedings simultaneously. But in the event of the appeal being dismissed, the result would be that the ex parte decree passed by the trial court would stand merged in the order of the appellate court. Therefore, in view of the Explanation appended to Order 9, rule 13 CPC, application under Order 9, rule 13 CPC would not be maintainable. When an application under Order 9, Rule 13 CPC is dismissed, the defendant can prefer an appeal under Order 43, Rule 1 CPC. The appellant cannot raise same contention in the first appeal. Principle of res judicata applies at different stages of the same proceedings. See : Bhanu Kumar Jain Vs. Archana Kumar, AIR 2005 SC 626 (Three-Judge Bench)

**16.5. Application to set aside ex parte decree u/o 9 , Rule 13 CPC not maintainable after dismissal of appeal against such ex parte decree :** Where there has been an appeal against ex parte decree and the same

has been disposed off on any ground ( even on limitation), the application u/o 9, Rule 13 CPC would not lie and should not be entertained. See :

(i) Shyam Sundar Sarma Vs. Pannalal Jaiswal, 2005 (1) SCJ 180

(ii) P. Kiran Kumar Vs. A.S Khadar, (2002) 5 SCC 161

(iii) Rani Choudhary Vs. Lt. Col. Suraj Jit Choudhary, (1982) 2 SCC 596.

- 17.1 Limitation period of 90/30 days for filing appeal :** As per Article 116 of the Limitation Act, 1963, limitation period for filing an appeal against a decree or order to the High Court is 90 days and 30 days to any other appellate court from the date of the decree or the order.
- 17.2. Law of limitation or some other law to bar filing of appeal:** The right to appeal conferred on any party may be lost to the party in appropriate cases by the provisions of some law as the law of limitation and also by the conduct of the party and in appropriate cases a party may be held to have become disentitled from enforcing the right of appeal which he may otherwise have. See : M. Ramnarain (P) Ltd. Vs. State Trading Corpn. Of India Ltd., AIR 1983 SC 786.
- 17.3. Time-barred appeal and condonation of delay:** (O. 41 R. 3-A –CPC) Application for condonation of delay in filing appeal- when defence of limitation is upheld, whether appeal itself is deemed to have been dismissed. There is no corresponding requirement for admission of applications for suits after overcoming the barriers of limitations. A suit which is dismissed on the grounds of limitation may be appealed against as decree. No final view expressed. See : Essar Constructions Vs. N.P. Rama Krishna Reddy, (2000) 6 SCC 94.
- 17.4. Time-barred appeal and condonation of delay (order 41, rule 3-A(1) CPC & 3(1) CPC) :** Filing of memorandum of appeal without application for condonation of delay held, consequences not fatal – unintentional lapses of a litigant should not result in closing of doors of the court permanently– word ‘shall’ in R. 3-A(1) does not foreclose the chance to rectify a mistake. See : State of M.P. Vs. Pradeep Kumar, (2000) 7 SCC 372.
- 17.5. Dismissal of time barred appeal and its legal effects:** Dismissal of appeal even on ground of limitation is a dismissal for all purposes – finality of the judgment. See : Bindeshwari Prasad Singh Vs. State of Bihar, AIR 2002 SC 2907.
- 17.6. Delay of 1942 days in filing appeal due to laxity of lawyer held unsatisfactory and not fit to be condoned:** In the case noted below,

the appellants took the plea that their lawyer did not take timely steps which resulted in causing delay of 1942 days in filing the appeal. The Supreme Court held that the delay was inordinate and unexplained. The said explanation was found to be insufficient and the Supreme Court refused to condone the delay. See: State Officer, Haryana Urban Development Authority Vs. Gopi Chand Atreja, AIR 2019 SC 1423.

**18.1. Cross-objections or cross-appeal by defendant not necessary to oppose appeal filed by plaintiff/appellant:** In the case of plaintiff's appeal against partial decree, the respondent can even without filing any appeal or cross-objection, can for the purpose of sustaining the impugned part of decree attack the findings on which the part of decree passed against him was based. Under O. 41 R. 22 CPC, before 1976 amendment, it was open to the respondent defendant who had not taken any cross objection to the partial decree passed against him, to urge in opposition to the appeal of the plaintiff, a contention which if accepted by the trial court would have resulted in total dismissal of the suit. The filing of cross-objection, after 1976 amendment is purely optional and not mandatory. See : Ravinder Kumar Sharma Vs. State of Assam, AIR 1999 SC 3571

**18.2. No relief to be granted to the party in the absence of cross appeal by him :**When appeal is filed by defendant against the grant of relief of compensation or refund, the plaintiff as respondent can seek the relief of specific performance of contract or modification of decree only by taking cross-objection or by filing appeal of his own. In absence of cross-objection or cross-appeal appellate court cannot grant relief to plaintiff in exercise of power under O. 41 R. 33. See : Banarsi Vs. Ram Phal, AIR 2003 SC 1989.

**18.3. Right to take cross-objection is substantive right of appeal conferred by Order 41, Rule 22 CPC:** Available grounds of challenge against the judgment, decree or order impugned remained the same whether it is an appeal or a cross-objection. The difference lies in the form and manner of exercising the right; the terminus a quo (the starting point) of limitation also differs. See : Municipal Corp. of Delhi Vs. International Security and Intelligence Agency, AIR 2003 SC 1515.

**18.4. Cross Appeals maintainable :** Cross Appeals are maintainable u/o 41, Rule 22 CPC. See : Dhanraj Singh Choudhary vs. Nathulal Vishwakarma, AIR 2012 SC 628.

19. **Succession certificate and power of appellate court:** Grant of succession certificate in proceedings under Sec 373 of the Succession Act could not bar any party to raise same issue in a suit for partition- such decision is not final between the parties and Sec 387 of Succession Act takes the decision outside the purview of explanation VIII<sup>th</sup> to Sec 11. See : Madhavi Amma Bhawani Amma Vs. Kunjikutti Pillai Meenakshi Pillai, AIR 2000 SC 230
20. **Infructuous appeal :** For finality of judgment where appeal therefrom is rendered infructuous. See : Dharam Dutt Vs. UOI, AIR 2004 SC 1295.
21. **Order returning plaint for presentation to proper court not appealable u/o 43, Rule 1 CPC:** An order returning plaint for presentation to proper court is not an appealable order u/o 43, Rule 1 CPC. See : Nilgiri Estate Pvt. Ltd. Vs. Khaniva Housing (India) Pvt. Ltd., AIR 2012 Calcutta 60 (DB).
22. **Order of lower authority merges into that of the superior authority :** A judicial order passed by the trial court merges in the order passed by the appellate or revisional court. It cannot be said that an appellate or revisional decision in which the decision of the trial court has merged is still a case arising out of the original suit. After merger, the decision arising out of the original suit vanishes. See : Jaswant Singh Vs. Smt. Kusum Lata Devi, 2012 (116) RD 383 (All)(LB).
23. **No appeal lies from the decree of the JSCC :** As per Section 96(4) CPC, no appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.
- 24.1. **Compromise should be challenged before the judge recording the compromise and not in appeal :** Party concerned should approach the court which recorded the compromise in the first instance rather than straight away filing appeals as it is judge before whom the compromise was recorded who is privy to events that led to the compromise order and is thus in a better position to deal with validity of compromise. See: Y. Sleebachen & Others Vs. State of Tamil Nadu through Superintending Engineer Water Recourses Organization/Public works Department and Another, (2015) 5 SCC 747.
- 24.2. **Suit challenging compromise decree not maintainable:** A person questioning lawfulness of a compromise decree must approach the same court which recorded the compromise. Independent suit filed by the

stranger to compromise is not maintainable. See: Triloki Nath Singh Versus Anirudh Singh, (2020) 6 SCC 629.

- 25. Proper remedy against an order rejecting plaint under Order 7, rule 11 CPC is first appeal u/s 96 CPC :** Proper remedy against an order rejecting plaint under Order 7, rule 11 CPC is first appeal u/s 96 CPC. Writ petition under Article 227 of the Constitution against order rejecting plaint is not maintainable. See: Sayyed Ayaz Ali Versus Prakash G. Goyal and Others, (2021) 7 SCC 456.

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