THE HIGH COURT OF MEGHALAYA

CR (P) No.30/2014

Smti. Jyoti Vaswani,
W/o (L) Shri. Pishu Vaswani,
R/o Nongrim Road, Laitumkhrah,
Shillong, East Khasi Hills District,
Meghalaya. **:::::** Petitioner

- ***Vs*** -

1. Smti. Reshma Vaswani,
W/o Shri. Haresh Vaswani,
R/o Broadway Hotel,
G.S. Road, Police Bazar, Shillong.

2. Shri. Haresh Vaswani,
S/o (L) Kishanchand Vaswani,
R/o Hotel Broadway,
G.S. Road, Police Bazar, Shillong, EKHD, Meghalaya.

3. Shri. Kishanchand Thadani,
S/o (L) Charumull,
C/o Bhagwandas Departmental Stores,
Police Bazar, G.S. Road,
East Khasi Hills District, Shillong,
Meghalaya.

4. Shri. Arjandas Thadani,
S/o (L) Smti. Rukmanibai Thadani,
C/o Bhagwandas Stores,
Police Bazar, G.S. Road, Shillong
East Khasi Hills District,
Meghalaya. **:::::** Respondents

BEFORE
THE HON'BLE MR. JUSTICE T NANDAKUMAR SINGH

For the petitioner	:	Mr. K Paul, Adv.
For the respondents	:	Mr. B Bhattacharjee, Adv
Date of hearing	:	***20.05.2015***
Date of Judgment	:	***24.06.2015***

JUDGEMENT AND ORDER

This revision petition is directed against the judgment and order of the learned Assistant District Judge, Shillong dated 19.06.2014 for

dismissing the application being Misc. Case No.31 (H) 2013 under Section 151 of the Code of Civil Procedure (for short 'CPC'), which was filed 24 years after the passing of compromise decree dated 15.05.1989 in T.S. No.6 (H) 1988, for recalling the said compromise decree dated 15.05.1989 and also against the impugned order dated 20.10.2014 for dismissing the Review Petition No.1 (H) 2014 for reviewing the said impugned judgment and order dated 19.06.2014 passed in Misc. Case No.31 (H) 2013.

2. Heard Mr. K Paul, learned counsel for the petitioner and Mr. B Bhattacharjee, learned counsel for the respondents.

3. This case has a long chequered history. Sans detail, concise fact of the case, leading to the filing of the present revision petition is noted. In the year 1988, the respondent No.1/plaintiff Smti. Reshma Vaswani filed the suit i.e. T.S. No. 6 (H) 1988 for declaration and injunction. The respondent No.1/plaintiff is one of the owners of the undivided piece of land being Plot No.43 having a total area of 9800 Sq.ft., and the share of the respondent No.1/plaintiff is 1/4th (one fourth) which comes to 2450 Sq.ft. (more or less). The said piece of land is situated at Police Bazar and covered by Patta No.63 issued by the Deputy Commissioner, East Khasi Hills, Shillong dated 20.01.1970. The respondent No.1/plaintiff acquired 1/4th (one fourth) share in the said land by virtue of Registered Deed of Gift dated 15.01.1988 executed by (L) Smti. Parbati Bai, wife of (L) Odermal Thadani, who was the owner of the 1/4th (one fourth) of the said piece of land and whose name was duly mutated in Plot No.43 of Patta No.63 under an order passed in Mutation Case No.28 of 1984 jointly with three others namely, Shri. Kishand Chand, Proforma Defendant No.2, Proforma Defendant No.3 Smti. Rukamani Bai, wife of (L) Lachman Das and Defendant No.1 Shri. Ashok

Bhagwandas, Son of (L) Bhagwandas, Police Bazar, G.S. Road, Shillong. The relief (s) sought for in T.S. No.6 (H) 1988 are:

> (i) a declaration that the defendant No.1 Ashok Bhagwandas has no legal right to disturb in any way the lawful possession of the plaintiff i.e. present respondent No.1 over the piece of land measuring approximately 2450 Sq.ft. (more or less) just by the side of G.S. Road, Police Bazar, Shillong and adjacent to R.C.C. building constructed by the proforma defendant No.2 i.e. Shri. Kishan Chand which is in occupation of the plaintiff/present respondent No.1 on the strength of her undivided 1/4th (one fourth) share in the Plot No.43 covered by Patta No.63;
>
> (ii) a perpetual injunction restraining the defendant No.1 Shri. Ashok Bhagwandas his labourers, workers, employees, mistries and agents from taking forcible possession or dismantling the structure raised by the plaintiff/present respondent No.1 thereon or entering into the said land or disturbing in any way the peaceful possession of the plaintiff/present respondent No.1 over the said piece of land or the structure standing thereon and;
>
> (iii) full cost of the suit together with such other relief or reliefs as the plaintiff/present respondent No.1 is entitled to in law and equity.

4. During the pendency of the said title suit i.e. T.S. No. 6 (H) 1988, the defendant No.1 (Shri.Ashok Bhagwandas) gifted his share (i.e. 1/4) in the said piece of land to the present writ petitioner under the Gift Deed registered on 29.03.1989. The present petitioner filed an application for impleadment as a party on 08.05.1989 and vide order dated 08.05.1989, the present petitioner was allowed to be impleaded as one of the defendants in the said T.S. No. 6 (H) 1988. On 08.05.1989, a joint application for compromise was filed by the plaintiff/present respondent No.1, the

defendants including the present petitioner in the said T.S. No.6 (H) 1988. The present petitioner as a defendant also signed the said application for compromise dated 08.05.1989. The said joint compromise petition dated 08.05.1989 reads as follows:-

"***IN THE COURT OF THE ASSISTANT DISTRICT JUDGE***
AT SHILLONG

TITLE SUIT No. 6 (H) OF 1988
MISC. CASE No. 92 (H) OF 1988

Srimati Reshma Vaswani …. Plaintiff

-VERSUS-

Shri. Ashoke Bhagwandas & Ors
…. Defendants

IN THE MATTER OF:

A joint application of Compromise of the Suit

The Parties abovenamed beg to state as follows:-

1. That the plaintiff filed the instant Title Suit for declaration and injunction restraining the Defendant from disturbing her peaceful possession of onefourth undivided share of the land situated at G.S. Road, Police Bazar, Shillong being Plot No.43 covered by Patta No.63 issued by the Deputy Commissioner, East Khasi Hills, Shillong dated 20th January, 1970 which she acquired by virtue of a Registered Deed of Gift dated 15th January, 1988 executed by late Parbati Bai who was the owner of the undivided one-fourth share in the said property.

The plaintiff also obtained an ad-interim injunction in Misc. Case No.92 (H) of 1988 arising out of the said Title Suit No.6 (H) 1988.

2. The Defendant contested the Suit and filed appeal against the order of ad-interim injunction.

The two other co-owners of the land who were made Proforma Defendants and who have been possessing separately their one-fourth shares in the property without dispute did not contest the suit.

3. That the parties have now compromised the Suit and settled all disputes in respect of the said property on following terms and conditions:-

(a) That the Plaintiff shall occupy and posses the piece of land measuring approximately 2450 Sq.ft. as marked and delineated as the Plot No. D in the sketch map annexed herewith, drawn by the parties in respect of the aforesaid Patta land.

(b) That the piece of land measuring approximately 2450 Sq.ft. and shown and marked as Plot No. A in the aforesaid sketch map annexed herewith will go to the Defendant.

(c) That the plots shown as Plots Nos. B and C each measuring 2450 Sq.ft. approximately are under the occupation of Proforma Defendant 1 and 2 respectively and they have been possessing their respective plots by constructing buildings and structures thereon without any dispute and objection by the parties.

(d) That the parties shall be entitled to their peaceful and separate possession enjoyment of their respective plots as shown in the sketch map annexed and as stated above, make their own constructions without any objection or obstruction by other party and also take all steps for their separate enjoyment of the property.

(e) That during the pendency of Suit the Defendant No.1 (Ashoke Bhagwandas) made a Gift of his share of 2450 Sq.ft. of land in the said Patta property as per registered Deed of Gift dated 29th September, 1988 in favour of Smti. Jyoti Vaswani, wife of Shri. Pishu Vaswani of Laitumkhrah, Shillong and the said Donee Jyto Vaswani, hereby agrees to this settlement and demarcation of shares as shown in the sketch map annexed and declares that she is agreeable to enjoy and posses the Plot A as shown in the said sketch map and shall have no further claim on any further land in the said property.

(f) That the parties will bear their own costs.

It is therefore, prayed that your Honour may be pleased to pass a compromise decree in the suit on the above terms and conditions and this petition may form part of the Decree.

And for this act of kindness, your petitioner as in duty bound, shall every pray.

Humble Plaintiff,
Sd/- Reshma Vaswani

Dated: Shillong
The 8th May, 1989

Humble Defendant
Sd/- P. Vaswani

Attorney of Shri. Ashok Bhagwandas
Sd/- Jyoti Vaswani (present petitioner)

VERIFICATION

I, Shri. Reshma Vaswani, aged about 31 years, wife of Shri. Harish Vaswani of G.S. Road, Police Bazar, Shillong do hereby declare and state that the statements made in paragraphs 1 to 3 are true to my knowledge and belief and the rest are humble submissions to the Hon'ble Court; and in verification whereof I sign this 8th day of May, 1989.

Sd/- Reshma Vaswani"

The Title Suit No.6 (H) 1988 was disposed of under a compromise decree dated 15.05.1989 in terms of the said application for compromise dated 08.05.1989.

5. Thereafter in the year 1991, the petitioner instituted a suit being T.S. No.10 (H) 1991 alleging that the said compromise decree dated 15.05.1989 on the basis of the joint application for compromise dated 08.05.1989 filed by the plaintiff/present respondent No.1 and defendants including the present petitioner is a fraudulent one. In the Title Suit No. 10 (H) 1991 which was filed against the said Shri. Ashoke Bhagwan Das Thadani, S/o (L) Bhagwandas Thadani who transferred his 1/4th (one fourth) share in the said undivided property to the present petitioner under the said registered Deed of Gift, the present respondent No.1 and two others, the main relief sought was for a declaration that the compromise decree i.e. 15.05.1989 is a fraudulent one and not legally tenable. The petitioner filed an application dated 22.03.2000, without seeking liberty to institute a fresh suit, for withdrawal of T.S. No.10 (H) 1991. Accordingly, the learned Assistant District Judge, Shillong passed the order dated 22.03.2000 for dismissing the suit i.e. T.S. No.10 (H) 1991 on withdrawal. The said order of the Assistant District Judge dated 22.03.2000 passed in T.S. No.10 (H) 1991 reads as follows:-

"*IN THE COURT OF ASSISTANT DISTRICT JUDGE*
AT SHILLONG

Title Suit No.10 (H) 91

Smti. Jyoti Vaswani. …. Plaintiff

-Versus-

Smti. Reshma Vaswani and others …. Defendants

ORDER

22.3.2000

Both parties are present with their respective counsels. The plaintiff filed Petition No.123/2000 stating that she withdraws the suit abandoning all claims against the defendant.

As such on withdrawal of the suit, case stands dismissed and disposed off.

Sd/ B Giri,
Assistant District Judge,
Shillong"

After withdrawal of the said T.S. No.10 (H) 1991 without seeking liberty to file fresh civil suit on the same cause of action, the petitioner in the year 2001 again instituted a suit being T.S. No.4 (H) 2001 in the Court of the Assistant District Judge, Shillong alleging the same plea that the said compromise decree dated 15.05.1989 is a fraudulent one. The respondent No.1 contested the suit and also filed an application challenging the maintainability of the said T.S. No.4 (H) 2001. The main relief sought for in the said T.S. No.4 (H) 2001 are for declarations that (i) the said decree dated 15.05.1989 purported to be the compromise decree based on some wrong documents and dates etc., detrimental to the interest of the Plaintiff and others in T.S. No.6 (H) 1988 is a fraudulent one and not legally tenable and executable and (ii) also that the subsequent order dated 22.03.2000 in T.S. No.10 (H) 1991 of the same Court of Assistant District Judge, Shillong was based on false promises that amount to breach of trust and duping the

plaintiff and her husband and (iii) also the said decree dated 15.05.1989 and order dated 22.03.2000 are also null and void. After hearing the parties, the learned trial court rejected the said T.S. No.4 (H) 2001 vide order dated 03.03.2004 for the reasons that withdrawal of the earlier suit i.e. T.S. No.10 (H) 1991 comes within the provisions of Order 23 Rule 1 of the CPC and also that as the said T.S. No.10 (H) 1991 had been withdrawn without liberty to institute a fresh suit in respect of the subject matter of such suit i.e. T.S. No.10 (H) 1991 or such part of the claim, the new suit i.e. T.S. No.4 (H) 2001 is barred by Order 23 Rule 1 (4) of the CPC. For easy reference, the relevant portion of Order 23 of the CPC is quoted hereunder:-

"*ORDER XXIII*

WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim.- *(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the court is satisfied,—

a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff,—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]

1A. When transposition of defendants as plaintiffs may be permitted.- *Where a Suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order I, the court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.*

2. Limitation law not affected by first Suit.- *In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.*

3. Compromise of suit.- *Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit]:*

[Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.]

[Explanation: An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

*[**3A. Bar to suit**.- No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.]"*

6. Against the said order dated 03.03.2004, the petitioner filed an appeal being RFA No.(SH)6/2008 in the erstwhile Gauhati High Court. The erstwhile Gauhati High Court vide judgment and order dated 16.12.2011 dismissed the appeal and upheld the order dated 03.03.2004 passed by the learned Assistant District Judge, Shillong. The said appeal i.e. RFA No.(SH)6/2008 was heard along with CR(P) No.8/2009 filed by the present petitioner against the respondent No.1 challenging the order dated 31.03.2009 passed by the Board of Revenue and order dated 01.10.2008 passed by the Additional Deputy Commissioner, East Khasi Hills District, Shillong in Case No.L.14/3/2008 concerning the same plot of land. In paragraph 20 of the plaint in T.S. No.4 (H) 2001, it is stated that the cause of action of the suit i.e. T.S. No.4 (H) 2001 arose on and from 15.09.1999 and also on 15.09.1999 and also from the date of passing the compromise decree i.e. 15.05.1989. The relevant portion of the said judgment and order of the erstwhile Gauhati High Court dated 16.12.2011 wherein, the Hon'ble High Court held that the subsequent suit i.e. T.S. No.4 (H) 2001 was barred by Order 23 Rule 1 (4) of the CPC reads as follows:-

> "….. *As already noticed earlier, Title Suit No. 10(H) of 1991 was withdrawn by the appellant without the permission of the trial court vide the order dated 22-3-2000, which is in the following terms:*
>
> > *"22-3-2000. Both parties are present with their respective counsel. The Plaintiff files petition 123/2000 stating that she withdraws the suit abandoning all claims against the defendant.*
> >
> > *As such on withdrawal of the suit, case stands dismissed and disposed off.*
> >
> > *Sd/- B. Giri, Assistant District Judge,*
> > *Shillong."*
>
> *11. In the preliminary objection raised by the respondent, she specifically raised the issue that as the appellant had*

abandoned Title Suit No. 10(H) of 1991 without the permission of the trial court, she was precluded from bringing a fresh suit in respect of the same subject-matter. Order 23, Rule 1 CPC deals with withdrawal of suit or abandonment of part of a claim, the relevant portions whereof are reproduced below:

*"**Rule 1. Withdrawal of suit or abandonment of part of claim***

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:
Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order 32 extend, neither the suit nor any part of the claim shall be abandoned without leave of the court.

(2) *** Omitted ***

(3) Where the Court is satisfied –

(a) that a suit must fail by reason of some formal defect,

or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with a liberty to institute a fresh suit in respect of the subject- matter of such suit or such part of the claim.

(4) Where the plaintiff –

(a) abandons any suit or part of claim under sub-rule (1),

or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule(3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

*12. A plain reading of Rule (1)(3) and Rule 1(4) of Order 23 CPC in juxtaposition will indicate in no uncertain terms that where a plaintiff withdraws from a suit without obtaining the permission of the court, he is precluded from instituting a fresh suit in respect of the same subject-matter, and against the same defendant. The rule is mandatory. In **Helim Ullah v. Hakim Ali, AIR 1935 Cal 157**, the plaintiff withdrew his suit with the consent of the defendant but without the leave of the*

court to bring a fresh suit on the same cause of action on the plea that the matter would be referred to arbitration. The arbitration having proved abortive, it was held that he could not institute a fresh suit on the same cause of action. The term "subject-matter" means series of acts or transactions alleged to exist giving rise to the relief claimed. The "subject-matter" in sub-rule (4) means the cause of action. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as in the first. Mere identity of some of the issues in the two suits does not bring about an identity of the subject- matter in the two suits. However, a suit on a different cause of action is not barred although the suit may relate to the same property: though the subject-matter of the suits may be identical, the subject-matter of the subsequent suit will not be barred unless the cause of action in both the suits are one and the same. To sum up, where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter. As already noticed, the expression "subject-matter" has a reference to a right in the property. The expression includes the cause of action and the relief claimed. Even if part of the claim abandoned in the first suit is found to be the genesis of the cause of action claimed in the second suit, the second suit is not maintainable if liberty to file another suit was not granted in the first suit.

13. The question which now falls for consideration is, whether the cause of action and the relief claimed in the TS No. 10(H) of 1991 and the cause of action and the relief claimed in the subsequent suit, namely, TS No. 4(H) of 2001 are substantially identical? In the plaint of TS No. 10(H) of 1991, the appellant had asserted that the cause of action for the suit "arose on and from 18th April, 1988, the date of encroachment on plot No. A, 15.9.1988, the date on which the suit bearing No. T.S. 6(H)1988 was mischievously filed and on and from 15.6.1989 on which the decree out of that case was obtained by way of fraud as described herein above and also on and from each date of unauthorised occupation of the land and on other dates within the jurisdiction of this Court and as such the Court has jurisdiction to entertain it". In the subsequent suit i.e. TS No. 4(H) of 2001, the appellant pleaded in the plaint that ***"the cause of action in the present suit arose on and from 15.09.1999 on which date the Defendant No. 1 and her husband Shri Harish Vaswani/Defendant No. 2 came with a proposal to the Plaintiff at her residence as contained in paragraph No. 12 and on and from 22.3.2000 on which date Title Suit No. 10(H) of 1991 was allowed to be withdrawn fraudulently once again at the proposal of the Defendant No. 1 and 2 and accepted by the Plaintiff and also on and from each date of unauthorised occupation of the Plaintitff's land by the Defendant No. 1 and on other dates within the***

jurisdiction of the Court and as such the Court has jurisdiction to entertain this suit. And as the decree dated 15.05.1989 and the order dated 22.03.2000 purported to be by the consent of the Parties was obtained fraudulently in playing fraud, breach of trust over the Plaintiff and/or also over the Court, as such that decree and order allowing withdrawal do not estopped the Plaintiff from filing the present suit as contemplated under the principle of estoppel". *I have earlier extensively reproduced the relief claimed in both the first suit and the instant suit. There were eight reliefs claimed in the earlier suit whereas ten reliefs are claimed in the second suit. Except for relief (b) claimed in the second suit, the remaining relief claimed in both the suits are identical. It is, however, the contention of Mr. ODV Ladia, the learned counsel for the appellant that the appellant, by challenging the legality of, or by claiming additional relief for setting aside, the order dated 22-3-2000 on the ground that this order had been obtained by fraud, has furnished a fresh cause of action, and, as such, the second suit is not barred.*

14. It is true that if the second suit is based on a fresh cause of action, Order 23, Rule 1(4) will not operate as a bar against her for instituting such a suit. However, if the cause of action claimed in the second suit is founded on the basis of the part of the claim abandoned in the first suit, in the absence of obtaining leave to file a fresh suit, the second suit will not be maintainable. According to the appellant, the first suit had been withdrawn by her on the basis of the settlement arrived at between her and the respondent in which it had been agreed that the latter would allow her to use a path measuring 4' to 5' wide from the back side for movement of men and materials for her, etc., but at the time of withdrawal of the suit, those terms and conditions were not incorporated: she has thus been cheated by the respondent once again. This is how the second suit came to be filed by her with a fresh cause of action. As already indicated, the second suit is based not only on this cause of action, but also on the basis of the cause of action of the first suit. In my opinion, the cause of action of the second suit and that of the first suit are intricately linked and the first suit is, therefore, found to be the genesis of cause of action claimed in the second suit. Even if the second suit succeeds, no right in respect of the suit property can accrue to the appellant until and unless she succeeds in the first suit, which, however, as already noted, had already been withdrawn by her without the permission of the trial court and is, therefore, not maintainable being barred by Order 23, Rule 1(4) CPC. In other words, the plea regarding fraud cannot materially improve the case of the appellant for sidestepping the embargo imposed by Order 23, Rule 1(4), CPC. Clever drafting cannot create an illusion of a cause of action. The trial court has the duty to examine the party searchingly and nip such clever drafting in the bud at the first hearing or the moment it comes to its notice. In the view that I have taken, the learned Assistant District did not commit any illegality in holding that the instant suit is not maintainable being barred by Order 23, Rule 1(4) of the Code.

> *15. The last question which falls for consideration is whether a plaint can be rejected under Order VII, Rule 11 CPC even after settlement of issues or at the starting of the trial? A plain reading of Order VII, Rule CPC does not bar rejection of a plaint at any stage of the proceeding if the suit is barred by law. In other words, the starting of the trial or settlement of issues is no bar to such an action: Order VII, Rule 11 does not place any restriction in this behalf. see* ***Unniraman v. Padmanabhan, AIR 1988 Ker 257****. The term "law referred to in Order VII, Rule 11 does not refer to an enacted law alone but also takes within its sweep established legal principles or doctrines which can bar a suit such as res judicata, estoppel, waiver or acquiescence. Irrespective of any objection taken by he defendant, it is the duty of the trial court to see if the plaint really discloses any cause of action or if the plaint is barred by law. For this reason, it is the plaint only, which is to be seen for a decision under Order VII, Rule 11. Order VII, Rule 11 applies to those cases only where the statement made by the plaintiff in the plaint without any doubt or dispute shows that the suit is barred by any law in force. In the instant case, it is self-evident from the plaint that the earlier suit filed by her had been withdrawn by her without leave of Court. Therefore, the suit is barred by Order 23, Rule 1(4) CPC. As the suit is so barred, the trial court correctly rejected the plaint under Order VII, Rule 11 CPC. The impugned order, therefore, does not warrant the interference of this Court…..*"

7. The petitioner filed the SLP being SLP (C) No.11218 of 2012 against the order of the High Court dated 16.12.2011 for dismissing the said appeal i.e. RFA No.(SH)6/2008. The Apex Court dismissed the said SLP vide order dated 19.04.2012. The petitioner again filed review petition being Review Petition (C) No.1352 of 2012 in the Apex Court for reviewing the order dated 19.04.2012 for dismissing the SLP (C) No.11218 of 2012 filed against the said judgment and order of the High Court dated 16.12.2011 for dismissing the said RFA No.(SH)6/2008 filed against the order of the trial court dated 03.03.2004 for dismissing the T.S. No.4 (H) 2001 as not maintainable. The Apex Court also dismissed the said review petition i.e. Review Petition (C) No.1352 of 2012 vide order dated 23.08.2012, which reads as follows:-

"*IN THE SUPREME COURT OF INDIA*
CIVIL APPELLATE JURISDICTION

REVIEW PETITION (C) NO (s). 1352 OF 2012

IN

Special Leave Petition (C) 11218 of 2012

JYOTI VASWANI *Petitioner (s)*

VERSUS

RESHMA VASWANI & ORS *Respondent (s)*

ORDER

1. This petition has been filed for review of order dated 19.04.2012 passed in SLP (C) No.11218 of 2012.

2. We have perused the Review Petition and record of the Special Leave Petition and are convinced that the order, of which review has been sought, does not suffer from any error apparent warranting its reconsideration.

3. Hence, the Review Petition is dismissed.

…….J.
[G.S. SINGHVI]
……..J.
[SUDHANSU JYOTI MUKHOPADHAYA]

NEW DELHI
AUGUST 23, 2012
Chamber Matter *SECTION XIV"*

8. 24 years after passing the said compromise decree dated 15.05.1989, the petitioner who had lost her case of fraud against the said compromise decree dated 15.05.1989 right from the trial court to the Supreme Court filed an application being Misc. Case No.31 (H) 2013 under Section 151 of the CPC in the trial court i.e. in the Court of the Assistant District Judge, Shillong for recalling the said compromise decree dated 15.05.1989 passed in the said T.S. No.6 (H) 1988 alleging that the said compromise decree dated 15.05.1989 was obtained by committing fraud by the respondent No.1 and three others defendants of the said T.S. No.6 (H) 1988. The learned trial court vide impugned judgment and order dated

19.06.2014 dismissed the Misc. Case No.31 (H) 2013 as not maintainable. The learned trial court had formulated three points for deciding as to the maintainability of the Misc. Case No.31 (H) 2013. The said three points are mentioned in paragraph 3 of the impugned judgment and order dated 19.06.2014 and the decisions for point No.1 that "whether the application is maintainable?" are in paragraph 4 of the impugned judgment and order dated 19.06.2014 and also the decisions for point No.2 that "whether the application is barred by law?" are in paragraph 5 of the impugned judgment and order dated 19.06.2014. For easy reference, paras 3, 4, 5 & 6 of the impugned judgment and order dated 19.06.2014 are quoted hereunder:-

> "*3. For the purpose of deciding this application the following points are required to be framed for determination*.
>
> *(a) Whether the application is maintainable?*
>
> *(b) Whether the application is barred by law?*
>
> *(c) Whether the compromise decree is valid and not void or voidable?*
>
> *4.* ***Point No. (a): Whether the application is maintainable?***
>
> *Dr. ODV Ladia submitted that the remedy available in a compromise or consent decree is to file an application under Section 151 CPC. In support of his contention he relied on the following decisions:*
>
> ***(I) Pushpa Devi Bhagat versus Rajinder Singh and others reported in 2006 (5) SCC 566***
>
> ***(II) Banwari Lal versus Chando Devi reported in AIR 1993 SC 1139***
>
> ***(III) Horil versus Keshav and another reported in (2012) 5 SCC 525.***
>
> *Mr. B Bhattacharjee while arguing on the issue of maintainability submitted that a compromise decree cannot be recalled/reviewed or modified/altered in exercise of jurisdiction of Section 151 CPC as there exists specific remedy in law. The*

learned counsel argued that remedy to recall a compromise decree is contained in order 23 rule 3 of the Code of Civil Procedure and the inherent powers are to be exercised in very exceptional circumstances for which the code lays down no procedure. The learned counsel relied on the following decisions

(I) Arjun Singh v Mohindra Kumar reported in AIR 1964 SCC 993

(II) Nainsingh v Koonwarjee reported in AIR 1970 SC 997

(III) National Institute of Mental Health & Neuro Sciences versus C Parameshwara reported in (2005) 2 SCC 256

(IV) Vinod Seth versus Devinder Bajaj and another reported in (2010) 8 SCC 1

(V) Ram Prakash Agarwal and another versus Gopi Krishan and others reported in (2013) 11 SCC 296

*In **Arjun Singh v Monindra Kumar reported in AIR 1964 SCC 993** it has been observed:*

"19. ….. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the power conferred by the Code. The prohibition contained in the code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates……"

*In **Nainsingh v Koonwarjee reported in AIR 1970 SC 997** it has been observed:*

"4. ….. Under the inherent power of Courts recognized by S 151 CPC a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of Section 151 of the Code where a party has his remedy provided elsewhere in the Code and he neglected to avail himself of the same....."

In ***National Institute of Mental Health & Neuro Sciences versus C Parameshwara reported in (2005) 2 SCC 256*** *wherein it has been observed:*

> *"12. In the case of Manohas Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal it has been held that inherent jurisdiction of the court to make orders ex debito justitiae is undoubtedly affirmed by Section 151 CPC but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive. ….."*

In ***Vinod Seth versus Devinder Bajaj and another reported in (2010) 8 SCC 1****, it has been observed:*

> "*28. As the provisions of the Code are not exhaustive, Section 151 is intended to apply where the Code does not cover any particular procedural aspect, and interests of justice require the exercise of power to cover a particular situation. Section 151 is not a provision of law conferring power to grant any kind of substantive relief. It is not a procedural provision saving the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. It cannot be invoked with reference to a matter which is covered by a specific provision in the Code. It cannot be exercised in conflict with the general scheme and intent of the Code. It cannot be used either to create or recognize rights, or to create liabilities and obligations not contemplated by any law."*

From the above decisions it is a settled position of law that the inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of Section 151 of the Code where a party has his remedy provided elsewhere in the Code and he neglected to avail himself of the same.

The other consideration in deciding the maintainability of the instant application is whether there are specific provisions in the code to deal with an application for recall of a compromise decree. Proviso to Order 23 rule 3 CPC provides:

> *"3. Compromise of suit.- Where it is proved …..*
> *Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question, but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.*

Explanation ……..”

In ***Pushpa Devi Bhagat versus Rajinder Singh and others reported in 2006 (5) SCC 566*** *it has been observed*

“*17. The position that emerges from the amended provisions of Order 23 can be summed up thus:*

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96 (3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromises (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was no lawful in view of the bar contained in rule 3-A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree is to approach the court which recorded the compromise and made the decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not.”

In ***Horil versus Keshav and another reported in (2012) 5 SCC 525*** *para 11 it has been held:*

“*11. It was further held in* ***Banwari Lal in para 13 and 14 as follows: (SCC pp.588-89)***

“13. When the amending Act was introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, ‘the court shall decide the question’, the court before which a petition of compromise is filed and which recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the Explanation to the proviso says that an agreement or compromise

'which is void or voidable under the Contract Act …..' shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the Explanation, a court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Contract Act. Even Rule 1 (m) of Order 43 has been deleted under which an appeal was maintainable against an order recording compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96 (1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 43 of the Code."

In ***Ram Prakash Agarwal and another versus Gopi Krishan and others reported in (2013) 11 SCC 296*** *it has been observed:*

"19. In view of the above, the law on this issue stands crystallized to the effect that the inherent powers enshrined under Section 151 CPC can be exercised only where no remedy has been provided for in any other provision of CPC. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot be used in conflict of any other provision, or in case a remedy has been provided for by any other existing provision, or in case a remedy has been provided for by any other provision of CPC. Moreover, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised."

From the foregoing decisions of the Apex Court, it is a settled position that proviso to order 23 rule 3 CPC provides the remedy to challenge a compromise decree.

In view thereof, the instant application u/s 151 CPC is not maintainable. The proper remedy would have been to approach the court by filing an application under proviso to Order 23 rule 3 CPC. Thus, Point no.1 is decided in the negative.

5. ***Point No. (b) Whether the application is barred by law?***

Mr. B Bhattacharjee argued that the present petition seeking recalling of the compromise decree dated 15.05.1989 has been filed after a delay of almost 24 (twenty four) years and the same is barred under article 137 of the Limitation Act, 1963.

The learned counsel submitted that the compromise was within the knowledge of the petitioner since 15.05.1989 and no application for condonation of delay has been filed by the petitioner. Mr. B Bhattacharjee further argued that the petition is barred by the law of estoppel in view of the fact that the petitioner had earlier filed T S 10 (H) 1991 on the same cause of action alleging fraud and subsequently withdrew the same and again filed T S 4 (H) 2001 on the same cause of action and the same was rejected on the point of maintainability. The learned counsel submitted that the foundation in all subsequent suit and also in the present petition is fraud and the same is hit by resjudicata and estoppel. He relied on the following decisions:

(I) Vijayabai v Shriram Tukaram reported in AIR 1999 SC 431

(II) Hemoram Saikia v Loboram Saikia reported in (2002) 2 GLR 594.

On the point of resjudicata, the learned counsel for the petitioner submitted that the basis for challenging the consent decree is the factum of fraud and the same is not hit by resjudicata and the Limitation Act does not apply to an application under section 151 CPC

For the purpose of deciding this point, it is necessary to understand the provisions of Section 17 of the Limitation Act 1963 which provides

"*17. Effect of fraud or mistake.- (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act.-*

(a) the suit or application is based upon the fraud of the defendant or respondent or agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided ……"

The limitation act does not specify the period of limitation for filing an application for setting aside of a compromise decree. However, article 137 of the Limitation Act 1963 provides for a limitation period of three years for any other application for which no period of limitation is provided elsewhere in this division. The knowledge of fraud being committed was within the knowledge of the petitioner as far back as in 1991 when she filed Title Suit 10 (H) 1991. The period of limitation would begin to run from 1991. This instant application has been filed after a delay of 24 (twenty four) years and in view thereof, the instant application is barred by limitation*.*

In ***Vijayabai v Shriram Tukaram reported in AIR 1999 SC 431*** *it has been observed:*

> "*14. It would be impermissible to permit an party to raise an issue interse where such an issue under the very Act has been decided in an earlier proceeding. Even if res judicata in its strict sense may not apply but its principle would be applicable. Parties who are disputing now, if they were parties in an earlier proceeding under the very Act raising the same issue would be stopped from raising such an issue both on the principle of estoppel and constructive res judicata……"*

In ***Hemoram Saikia v Loboram Saikia reported in (2002) 2 GLR 594*** *it has been observed:*

> *"5. Regarding first substantial question of law formulated. This aspect regarding consent decree came up for consideration before the Apex Court in the following cases:*
>
> *(i)* ***AIR 1954 SC page 352 (Shankar Sitaram Sontakke and another v Balkrishna Sitaram Sontakke and others)*** *wherein in paragraph 9 the Supreme Court pointed out as follows:*
>
> *"A consent decree is as binding upon the parties thereto as a decree passed by invitum. If the compromise is not vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of 'res judicata' and the same cannot be reopened by filing a fresh suit."*
>
> *(ii)* ***AIR 1967 SC page 591 (Pulvarthi Venkata Subba Rao and others v Valluri Jagannadha Rao (deceased)*** *by his heirs and legal representative and other) wherein the Supreme Court pointed out as follows:*

"*A compromise decree is not a decision by the court. It is the acceptance by the Court of something to which the parties has agreed. A compromise decree merely sets the seal of the court on the agreement of the parties. The court does not decide anything. Nor can it be said that a decision of the Court was implicit in it. Only a decision by the Court can be res judicata whether statutory under S 11 of the Code of Civil Procedure or constructive as a matter of public policy on which the entire doctrine rests. Such a decree cannot strictly be regarded as decision on a matter which was heard and finally decided and cannot operate as resjudicata, but such a decree might create an estoppel by conduct between the parties and that being the position, that matter again cannot be reopened by the parties."*

The compromise decree was recorded as far as in 1989. Thereafter, in 1991 the petitioner herein filed Title suit no.10 (H) 1991 challenging the compromise decree passed in Title suit no.6 (H) 1988 but subsequently withdrew the same without seeking liberty to file afresh. Thereafter, in 2001 the petitioner herein filed title Suit 4 (H) 2001 challenging the validity of the consent decree dated 15.05.1989 passed in Title Suit No.6 (H) 1988 on the ground that the same was obtained by fraud. However, the suit was dismissed. The petitioner preferred an appeal before the Hon'ble High Court and the Apex Court but the appeal was dismissed. The decision of Hemoram Saikia v Loboram Saikia clearly lays down that a compromise decree cannot strictly be regarded as decision on a matter which was heard and finally decided and cannot operate as resjudicata, however, by the conduct of the petitioner herein, the parties are estopped from reopening the matter again.

From the foregoing discussions I have no hesitation in concluding that the instant application u/s 151 CPC is barred by limitation and estoppel.

Thus point no.2 is answered in the positive.

6. From the foregoing discussions, the instant application is liable to be dismissed in view of the settled position of law that the application u/s 151 CPC is not maintainable and is barred by limitation and estoppel. The instant application not being maintainable in law, I do not consider it necessary to decide on the point of validity of the compromise decree, which would require adjudication on merits."

9. The petitioner also filed an application being Review Petition No.1 (H) 2014 for reviewing the impugned order dated 19.06.2014 in the Court of the Assistant District Judge, Shillong and the learned trial court after

hearing the parties at length, dismissed the review petition vide order dated 20.10.2014. Hence, the present revision petition against the impugned judgment and order dated 19.06.2014 for dismissing the application being Misc. Case No.31 (H) 2013 and the impugned judgment and order dated 20.10.2014 for dismissing the review petition i.e. Review Petition No.1 (H) 2014.

10. The learned trial court in the impugned judgment and order dated 19.06.2014 by referring to the decisions of the Apex Court in ***(i) Arjun Singh v. Mohindra Kumar: AIR 1964 SC 993; (ii) Vinod Seth v. Devinder Bajaj: (2010) 8 SCC 1; (iii) Nainsingh v. Koonwarjee: AIR 1970 SC 997 and; (iv) National Institute of Mental Health & Neuro Sciences v. C Parameshwara: (2005) 2 SCC 256***, had correctly held that the inherent power of the Court under Section 151 of the CPC must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. Section 151 of the CPC is intended to apply where the Code does not cover any particular procedural aspect and interests of justice require the exercise of power to cover a particular situation. The learned trial court had also correctly held in the impugned judgment and order dated 19.06.2014 by referring to the decisions of the Apex Court in ***Pushpa Devi Bhagat v. Rajinder Singh & Ors: (2006) 5 SCC 566; Horil v. Keshav & Anr: (2012) 5 SCC 525 and; Ram Prakash Agarwal v. Gopi Krishan & Ors: (2013) 11 SCC 296*** that in the event a party has obtained a decree or order by playing fraud, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot be used in conflict of any other provision. Order 23 Rule 3 of the CPC clearly provides the remedy

for recalling the compromise decree, if obtained, by playing fraud. Therefore, the application being Misc. Case No.31 (H) 2013 filed under Section 151 of the CPC 24 years after passing the compromise decree dated 15.05.1989 is not maintainable in the given case, inasmuch as in the application under Section 151 of the CPC, the petitioner cannot raise same point that the compromise decree was obtained by playing fraud after the two title suits i.e. T.S. No.10 (H) 1991 and T.S. No.4 (H) 2001 for declaration that the compromise decree dated 15.05.1989 is a fraudulent one and not tenable, had not been entertained by the trial court, the High Court and the Supreme Court. The Misc. Case No.31 (H) 2013 which was filed after 24 years of passing the compromise decree dated 15.05.1989 for recalling the same (i.e. compromise decree dated 15.05.1989) is also barred by limitation inasmuch as, the petitioner had signed the joint application for compromise dated 08.05.1989 and also that after she came to know as early as 1991 that the application for compromise dated 08.05.1989 was filed on misinterpretation of fact, she filed the T.S. No.10 (H) 1991 in the Court of the Assistant District Judge, Shillong.

11. It is also the case of the petitioner that without taking into consideration of Order 23 Rule 3 of the CPC the learned trial court had wrongly passed the said order dated 03.03.2004 for dismissing the T.S. No.4 (H) 2001 as not maintainable and also the High Court passed the said order dated 16.12.2011 for dismissing the appeal i.e. RFA No.(SH)6/2008 against the said order of the learned trial court dated 03.03.2004 and also the Apex Court also passed the said order dated 19.04.2012 for dismissing the SLP (C) No.11218 of 2012 against the said judgment and order of the High Court dated 16.12.2011 passed in RFA No.(SH)6/2008 and also the Apex Court passed the order dated 23.08.2012 for dismissing the Review Petition (C) No.1352 of 2012 for reviewing the said order dated 19.04.2012 and as such,

the said judgments and orders of the High Court and the Apex Court are judgments *per incuriam*. I am afraid that the High Court is not the competent court to decide as to whether or not a judgment of the Apex Court is a judgment *per incuriam* and also that by deciding a particular decision of the Supreme Court is *per incuriam* decision, the High Court cannot neglect the binding of that decision of the Apex Court. The Apex Court in ***South Central Railway Employees Cooperative Credit Society Employees Union v. B. Yashodabai & Ors: (2015) 2 SCC 727*** held that when a higher court has rendered a particular decision, said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside – If litigants or lawyers are permitted to argue that something that was correct, but was not argued earlier before a higher court, and on that ground if courts below are permitted to take a different view in a matter, possibly the entire law in relation to precedents and ratio decidendi will have to be rewritten and there would be a total chaos – Moreover, by not following law laid down by Supreme Court, High Court or subordinate courts would also be violating provisions of Article 141. Paras 14 & 15 of the *SCC* in ***South Central Railway Employees Cooperative Credit Society Employees Union's*** case ***(Supra)*** read as follows:-

> "*14. We are of the view that it was not open to the High Court to hold that the judgment delivered by this Court in* ***South Central Railway Employees Cooperative Credit Society Employees Union v. Registrar of Coop. Societies: (1998) 2 SCC 580: 1998 SCC (L&S) 703*** *was per incuriam.*
>
> *15. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when C.A. No.4343 of 1988 was decided:* ***South Central Railway Employees Cooperative Credit Society Employees***

Union v. Registrar of Coop. Societies: (1998) 2 SCC 580: 1998 SCC (L&S) 703. *If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be re-written and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the Subordinate Courts would also be violating the provisions of Article 141 of the Constitution of India*."

12. The Apex Court in ***Director of Settlements A.P. & Ors v. M.R. Apparao & Anr: (2002) 4 SCC 638*** held that the decision of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court. The relevant portion of para 7 of the *SCC* in ***M.R. Apparao's*** case ***(****Supra)*** reads as follows:-

"*7. ….. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (see* ***Ballabhadas Mathurdas Lakhani v. Municipal Committee, Malkapur: (1970) 2 SCC 267: AIR 1970 SC 1002 and AIR 1973 SC 794 (sic))****. When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate court to follow the decision of the Supreme Court. …..*"

13. The Apex Court in ***Markio Tado v. Takam Sorang: (2013) 7 SCC 524*** held that non-compliance with the decision of the Apex Court by the subordinate court i.e. High Court amounts to judicial impropriety and indiscipline inasmuch as, under Article 141 of the Constitution of India law declared by the Supreme Court is binding to all courts within the territory of

India. Paras 30 & 31 of the *SCC* in ***Markio Tado's*** case ***(Supra)*** read as follows:-

> "*30. Before we conclude, we may state that it is unfortunate that such acts of judicial impropriety are repeated inspite of clear judgments of this court on the significance of Article 141 of the Constitution. Thus, in a judgment by a bench of three Judges in* ***Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P) Ltd.: (1997) 6 SCC 450****, this court observed: (SCC p.463, para 32)*
>
> > *"****32****. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."*
>
> *31. We may as well refer to Para 28 of the* ***State of W.B. v. Shivanand Pathak: (1998) 5 SCC 513: 1998 SCC (L&S) 1402*** *wherein this court observed: (SCC p.524)*
>
> > *"****28****. If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to the judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment."*

***Revisonal jurisdiction of the High Court under Section 115 of the CPC and its limitation*.**

14. For considering the revisional jurisdiction of the High Court, it would be profitable to quote Section 115 of the CPC, which reads as follows:-

> *"****115. Revision.-*** *(1) The High Court may call for the record of any case which has been decide by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears —*
>
> > *(a) to have exercised a jurisdiction not vested in it by law, or*
> >
> > *(b) to have failed to exercise a jurisdiction so vested, or*

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:—

[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

[(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.]

[(3) A revision shall not operate as a stay of suitor other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]

[Explanation .- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a Suit or other proceeding.]"

15. While exercising the jurisdiction under Section 115 of the CPC, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words "illegality" and "with materials irregularity" as used in Clause (c) do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors whether of fact or of law, after the prescribed formalities have been complied with. (***Ref:- M/s D.L.F. Housing and Construction Co. (P) Ltd. Vs. Sarup Singh & Ors: AIR 1971 SC 2324***). Para 8 of the ***M/s D.L.F. Housing and Construction Co. (P) Ltd.*** case (*Supra*) reads as follows:-

”8. The position thus seems to. be firmly established that while exercising the jurisdiction under s. 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under s. 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under s. 115 of the Code when there. was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal.”

16. Erroneous decision on a question of fact or of law having no relation to question of jurisdiction of Subordinate Officer cannot be corrected. It is well settled that the revisional jurisdiction of the High Court is confined to cases of illegal or irregular exercise or non-exercise or illegal assumption of the jurisdiction by the subordinate courts. If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with material irregularity even if it decides the matter wrongly. In other words, it is not open to the High Court while exercising its jurisdiction under Section 115 of the CPC to correct errors of fact howsoever gross or even errors of law unless the errors have relation to the jurisdiction of the

court to try the dispute itself. (***Ref:- Sher Singh (dead) through LRs Vs. Joint Director of Consolidation & Ors: AIR 1978 SC 1341***). Para 6 of the ***Sher Singh*** case (*Supra*) reads as follows:-

> *"6. As the above section is pari materia with S.115 of Civil P.C., it will be profitable to ascertain the scope of the revisional jurisdiction of the High Court. It is now well settled that the revisional jurisdiction of the High Court is confined to cases of illegal or irregular exercise or non-exercise or illegal assumption of the jurisdiction by the subordinate courts. If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with material irregularity even if it decides the matter wrongly. In other words, it is not open to the High Court while exercising its jurisdiction under section 115 of the Code of Civil Procedure to correct errors of fact howsoever gross or even errors of law unless the errors have relation to the jurisdiction of the- court to try the dispute itself."*

17. While exercising the revisional jurisdiction, the High Court should not, on reappraisal of the evidence, interfere with the order of the court below on the mere fact that different view is possible. A distinction between the appellate and the revisional jurisdictions of the Courts is a real one. The right to appeal carries with it the right of rehearing both on questions of law and fact, unless the statute conferring the right to appeal itself limits the rehearing in some way, while the power to hear a revision is generally given to a particular case is decided according to law. Under Section 115 of the CPC, yet its revisional jurisdiction could only be exercised for a limited purpose with a view to satisfying itself that the decision under challenge before it is according to law. The High Court cannot substitute its own findings on a question of fact for the findings recorded by the Courts below on reappraisal of evidence. (***Ref:- Patel Valmik Himatlal & Ors Vs. Patel Mohanlal Muljibhai (dead) through LRs: AIR 1998 SC 3325***). Paras 5, 6, 7 & 8 of the ***Patel Valmik Himatlal*** case (*Supra*) reads as follows:-

"5. The ambit and scope of the said section came up for consideration before this Court in ***Hleper Girdharbhai v. Saiyed Mohmad Mirasahed Kadri, (1987) 3 SCC 538: (AIR 1987 SC 1782)*** *and after referring to a catena of authorities, Sabyasachi Mukharji, J, drew a distinction between the appellate and the revisional jurisdictions of the Courts and opined that the distinction was a real one. It was held that the right to appeal carries with it the right of rehearing both on questions of law and fact, unless the statute conferring the right to appeal itself limits the rehearing in some way, while the power to hear a revision is generally given to a particular case is decided according to law. The Bench opined that although the High Court had wider powers than that which could be exercised under Section 115 of the Code of Civil Procedure, yet its revisional jurisdiction could only be exercised for a limited purpose with a view to satisfying itself that the decision under challenge before it is according to law. The High Court cannot substitute its own findings on a question of fact for the findings recorded by the Courts below on reappraisal of evidence. Did the High Court exceed its jurisdiction?*

6. The powers under Section 29(2) are revisional powers with which the High Court is clothed. It empowers the High Court to correct errors which may make the decision contrary to law and which errors go to the root of the decision but it does not vest the High Court with the power to rehear the matter and re-appreciated the evidence. The mere fact that a different view is possible on reappreciation of evidence cannot be a ground for exercise of the revisional jurisdiction.

7. In the instant case we find that the High Court fell into an error in reappraising the entire evidence and recording a finding on the basis of that reappreciation without in any way pointing out any error of law or material irregularity as may have been committed by the trial court or the first appellate court. In our opinion even the appreciation of evidence by the High Court was not correct. Certain facts were assumed by the High Court which were not on record and generalization was made without any basis. In this connection a reference to paragraph 12 of the order of the High Court would be relevant. It reads:-

> *"12. This would clearly meant that starting of the said Branch Office was clearly recorded in form of a Commission Agency Agreement in Exh.78, another copy of which is at Ext.110, and that was done openly and publicly inviting particularly the business community to attend the function. If the idea was to sublet the premises, a tenant would hardly be expected to advertise the fact in this manner."*

8. The question whether or not the premises had been sublet could not be decided on the basis whether a tenant generally is "expected to advertise the fact in this manner." The findings recorded by both the trial court and the first appellate court

based on critical appreciation of the terms of the agreement Exh.78 and the evidence led by the parties on the record suffered from no error or material irregularity. Both the Courts had rightly come to the conclusion that the tenant had in fact sublet the suit premises and parted with the possession of the premises without consent of the landlord. There was no error committed by the Courts below which required any correction at the hands of the High Court in exercise of its revisional jurisdiction. The judgment of the High Court, under the circumstances, cannot be sustained."

18. The Apex Court in ***Sri.Kempaiah Vs. Smt.Chikkaboramma & Ors: AIR 1998 SC 3335***, held that "High Court in its order virtually re-appreciated the evidence placed before the authorities as if it was a first appeal not noticing that it was only a proceeding arising under Section 115 of the CPC. Therefore it was not open to the High Court at all to re-appreciate the matter unless it could find that the District Judge had committed any error of jurisdiction or acted with material irregularity affecting his jurisdiction." Para 5 of the ***Sri.Kempaiah*** case (*Supra*) reads as follows:-

"5. So far as the direction to re grant to respondents 2 to 4 the lands in question is concerned, we are constrained to state that the High Court in its order virtually re-appreciated the evidence placed before the authorities as if it was a first appeal not noticing that it was only a proceeding arising under section 115 of the Code of Civil Procedure. The learned District Judge had referred to every piece of material placed before the Court in the shape of oral or documentary evidence and came to the conclusion as we have noticed earlier in the course of this order. Therefore, it was not open to the High Court at all to re-appreciate the matter unless it could find that the District Judge had committed any error of jurisdiction or acted with material irregularity affecting his jurisdiction. No such contention has been recorded. On this ground alone the order made by the High Court on this aspect of the matter will have to be set aside."

19. Order passed by subordinate court can be interfered in revision whenever a subordinate court goes wrong in law on the vital question either by breach of some provisions of law or by committing material defects in

procedure which has resulted in manifest injustice, it goes outside the jurisdiction conferred on it, and its decision can be interfered with under Section 115 for lack of jurisdiction, irrespective of the question as to whether such an order was passed by the subordinate court in exercise of discretion under Section 151. (***Ref:- Oil & Natural Gas Commission, Nazira Vs. Ganesh Prasad Singh & Ors: AIR 1983 Gauhati 8 (D.B.)***). Para 14 of the ***Oil & Natural Gas Commission, Nazira*** case (*Supra*) reads as follows:-

> *"14. From the conspectus of the decisions of the Supreme Court and also of the House of Lords in the cases referred to above, in our opinion, whenever a subordinate court goes wrong in law on the vital question either by breach of some provisions of law or by committing material defects in procedure which has resulted in manifest injustice, it goes outside the jurisdiction conferred on it, and its decision can be interfered with U/s 115 of the CPC for lack of jurisdiction, irrespective of the question as to whether such an order was passed by the subordinate court in exercise of discretion u/s 115 of the Code. It depends on the facts and circumstances of each case and no general principle can be laid down."*

20. For the foregoing discussions, this Court is of the considered view that the learned trial court had correctly passed the impugned judgment and order dated 19.06.2014 in exercise of the jurisdiction so vested and had not acted in exercise of her jurisdiction with material irregularity in passing the impugned judgment and orders dated 19.06.2014 and 20.10.2014. Thus, this revision petition is devoid of merit and it is dismissed.

JUDGE

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