PREM KISHORE & ORS.

v.

BRAHM PRAKASH & ORS.

(Civil Appeal No. 1948 of 2013)

MARCH 29, 2023

[SUDHANSHU DHULIA AND J. B. PARDIWALA*, JJ.]

Code of Civil Procedure, 1908 – s. 11, Or. 7 R. 11, Or, 9 R. 8, Or. 17 R. 3 – Delhi Rent Control Act, 1958 – s. 14(1)(a) – The landlord (original plaintiff) filed an eviction petition against the respondent (tenant) – The respondent filed the written statement and denied the relationship of landlord and tenant – Thereafter, the landlord failed to appear before the Rent Controller for the purpose of establishing the relationship of landlord and tenant between the parties – Rent controller proceeded to dismiss the eviction petition and the same was not challenged by way of appeal – After the demise of the landlord, the appellant (successors in interest) filed another eviction petition – The respondent raised the plea of res judiciata u/s 11 and preferred an application under Or. 7 R. 11 for rejection of plaint – Additional Rent Controller declined to reject the plaint – Aggrieved by it, the respondent preferred a civil revision petition before the High Court and the same was allowed by the High Court by holding that the fresh eviction petition filed by the appellant is hit by principles of res judicata as landlord was having been afforded an opportunity to lead evidence and having failed to produce any evidence in the Court, it has to be taken as a decision on merits under Or.17 Rule 3 for the purpose of Section 11 of the Code – On appeal, held: High Court committed an error in taking the view that the order passed by the Additional Rent Controller could be said to be one passed in exercise of powers under Rule 3 of Or. 17 – The order did not purport to be one of dismissal for default or on merits and it cannot be taken to mean other than what it purported to be – Further, the order of the Rent Controller did not purport to be a final disposal of the suit and what it did was that it merely stopped the proceedings and it did nothing more and therefore this is not final decision of the suit

* Author

within the meaning of Or. 9 Rule 8 and Or. 17 Rule 3 resply of the CPC – Suit is revived.

Code of Civil Procedure, 1908 – When it would not be Res judicata in a subsequent suit – Held: Where the former suit is dismissed by the trial court for want of jurisdiction, or for default of the plaintiff's appearance, or on the ground of non-joinder or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation, or for failure to pay additional court fee on a plaint which was undervalued, or for want of cause of action, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be res judicata in a subsequent suit.

Allowing the appeal, the Court

HELD:

1. The guiding principles for deciding an application under Order 7 Rule 11(d) of the CPC can be summarized as follows:- (i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to; (ii) The defence made by the defendant in the suit must not be considered while deciding the merits of the application; (iii) To determine whether a suit is barred by *res judicata,* it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and (iv) Since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused. [Para 33]

2. The general principle of *res judicata* under Section 11 of the CPC contain rules of conclusiveness of judgment, but for *res judicata* to apply, the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit. Further, the suit should have been decided on merits and the decision should have attained finality. Where the former suit is dismissed by the trial court for want of jurisdiction, or for default of the plaintiff's appearance, or on the ground of non-joinder or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation, or for failure to pay additional court fee on a plaint which was undervalued, or for want of cause of action, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be *res judicata* in a subsequent suit. [Para 34]

3. In the case on hand, after the first eviction petition was instituted, the defendants therein filed their written statement denying the relationship of landlord and tenant. After the written statement came on record, no further evidence was led by the plaintiffs. All that was on record was in the form of pleadings in the plaint. The Additional Rent Controller took the view that after the written statement came on record, it was the duty of the plaintiffs to establish or prove the landlord tenant relationship and having failed to adduce any evidence, the suit was liable to be dismissed and accordingly was dismissed. The High Court interpreted or rather construed the order of the Additional Rent Controller as one under Rule 3 of Order 17 and, therefore, took the view that the findings as regards the relationship of landlord and tenant could be said to be on merits. The power conferred on Courts under Rule 3 of Order 17 of the CPC to decide the suit on the merits for the default of a party is a drastic power which seriously restricts

the remedy of the unsuccessful party for redress. It has to be used only sparingly in exceptional cases. Physical presence without preparedness to co-operate for anything connected with the progress of the case serves no useful purpose in deciding the suit on the merits and it is worse than absence. In any contingency, the discretion is always with the Court to resort to Rule 2 or 3 respectively or to grant an adjournment for deciding the suit in a regular way in spite of default. Rules 2 and 3 respectively are only enabling provisions. In order to decide the suit on the merits, the mere existence of the conditions enumerated in Rule 3 alone will not be sufficient. There must be some materials for a decision on the merits, even though the materials may not be technically interpreted as evidence. Sometimes the decision in such cases could be on the basis of pleadings, documents and burden of proof. Anyhow, it is appreciable for the Court to indicate by the judgment that the decision is for default or on the merits. The only alternative of the Court in cases covered by Rule 3 or the explanation to Rule 2 is not to decide on the merits alone. If such an interpretation is given, it will amount to an unjustified preference to one who purposely absents than to one who presents but unable to proceed with the case. 'Appearance' and 'presence' have well recognised meanings. They imply presence in person or through pleader properly authorised for the purpose of conducting the case. Rule 3 comes into play only when presence is to proceed with the case, but default is committed in any one of the three ways mentioned in Rule 2 or explanation to Rule 2 is extracted. Those are cases in which some materials are there for the Court to decide the case on the merits and not cases where decision could only be for default. That is clear from a combined reading of Rules 2 and 3 respectively and the explanation. In this case, none of these conditions were present and the decision was evidently for default. Rule 2 alone is attracted. The order did not purport to be one of dismissal for default or on merits and it cannot be taken to mean other than what it purported to be. It is in ordinary phraseology; not legal phraseology and it cannot be divested of its ordinary meaning. Its ordinary meaning is that

the proceeding was closed and the suit would not count as a pending one. The later description would be redundant if the order was one of final disposal of the suit. The order did not purport to be a final disposal of the suit. It merely stopped the proceedings. It did nothing more. This is not final decision of the suit within the meaning of Order 9 Rule 8 and Order 17 Rule 3 resply of the CPC. [Paras 50, 52, 55]

V. Rajeshwari v. T.C. Saravanabava **(2004) 1 SCC 551 : [2003] 6 Suppl. SCR 927;** *Kamala & others v. K.T. Eshwara Sa* **(2008) 12 SCC 661 : [2008] 7 SCR 39;** *Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust* **(2012) 8 SCC 706 : [2012] 6 SCR 404;** *Soumitra Kumar Sen v. Shyamal Kumar Sen* **(2018) 5 SCC 644;** *Srihari Hanumandas Totala v. Hemant Vithal Kamat* **(2021) 9 SCC 99;** *B. Janakiramaiah Chetty v. A.K. Parthasarthi & Ors.* **(2003) 5 SCC 641 : [2003] 3 SCR 369;** *Prakash Chander Manchanda v. Janki Manchanda* **(1986) 4 SCC 699 : [1987] 1 SCR 288 – relied on.**

Union of India v. Nanak Singh **AIR 1968 SC 1370 : [1968] 2 SCR 887;** *Satyadhyan Ghosal & Ors. v. Smt. Deorajin Devi & Anr.* **AIR 1960 SC 941 : [1960] 3 SCR 590;** *Om Prakash Gupta v. Rattan Singh* **(1964) 1 SCR 259;** *Gulabchand Chhotalal Parikh v. State of Gujarat* **AIR 1965 SC 1153 : [1965] SCR 547 – referred to.**

Har Dayal v. Ram Ghulam **AIR (31) 1944 Oudh 39;** *Nila v. Punun* **AIR 1936 Lahore 385;** *Govindoss Krishnadoss v. Rajah of Karvetnagar & Anr.* **AIR 1929 Madras 404;** *Prativadi Bhayankaram Pichamma v. K. Sreeramulu* **AIR 1918 Mad 143 (FB);** *Mariannissa v. Ramkalpa Gorsin* **ILR 34 Cal 235;** *Gopi Kishan v. Ramu,* **AIR 1964 Raj 147;** *Shidramappa Irappa Shivangi v. Basalingappa Kushnapa Kumbhar* **AIR 1943 Bom 321 : 1943 SCC Online Bom 16 : ILR 1944 Bom 1 (FB);** *R. Ravindran v. M. Rajamanickam* **2006 SCC Online Mad 169 – referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1948 of 2013.

From the Judgment and Order dated 04.05.2010 of the High Court of Delhi at New Delhi in CRP No.1332 of 2002.

Mohan Pandey, M/s. Mukesh Kumar Singh and Co., Advs. for the Appellants.

Ajay Kumar Talesara, Jamshed Bey, Mudit Talesara, Parvinder Chauhan, Advs. for the Respondents.

The Judgment of the Court was delivered by

J. B. PARDIWALA, J.

This appeal, by special leave, is at the instance of the original plaintiff (landlord) of an eviction petition filed under the provisions of the Delhi Rent Control Act, 1958 (for short, 'the Act 1958') and is directed against the judgment and decree passed by the High Court of Delhi dated 04.05.2010 in the Civil Revision Petition No. 1332 of 2002 by which the High Court allowed the revision petition filed by the defendant (tenant) thereby rejecting the plaint under the provisions of Order 7 Rule 11 of the Code of Civil Procedure (CPC) on the ground that the eviction petition was barred by the principles of *res judicata*.

Factual Matrix

2. The facts giving rise to this appeal may be summaried as under.

3. It is the case of the appellants that the respondents herein were inducted as tenants on 27.12.1987 by the father of the appellants in respect of the property bearing House No. 163 (Old No. 143) situated at Village Dhakka, Kingsway Camp, Delhi on monthly rent of Rs. 1050/- excluding the electricity, water and house tax. According to the appellants, the tenancy was for residential purpose. It is also their case that the rent was duly paid till February, 1993.

4. The father of the appellants served a demand notice dated 04.03.1996 on the respondents claiming the arrears of rent to the tune of Rs. 27,800/-. According to the appellants, the notice was duly served upon the respondents. However, the arrears of the rent was not cleared.

5. In such circumstances referred to above, the father of the appellants filed an eviction petition on 21.05.1996 bearing Eviction Petition No. 149 of 1996 under Section 14(1)(a) of the Act 1958.

6. In the said eviction petition, the respondents filed their written statement and denied the relationship of landlord and tenant.

7. It appears from the materials on record that after the written statement was filed by the respondents denying the relationship of landlord and the tenant, the plaintiffs failed to appear before the Rent Controller for the purpose of establishing the relationship of landlord and tenant between the parties. The plaintiffs were granted numerous opportunities to adduce evidence to establish the relationship of landlord and tenant. The record reveals that the last such opportunity granted to the plaintiffs to adduce evidence was on 09.09.1997 and again on 01.11.1997.

8. In such circumstances referred to above, the Rent Controller proceeded to pass the following order dated 27.01.1998:-

> "27.1.1998
>
> Present: Counsel for the Petitioner Sh. Chander Shekhar.
>
> Cl. For Petitioner submits that no witness has come today nor summoned. No ground for further adjournment. Last opportunity was granted to Petitioner on 9.9.97 & then on 1.11.97. Still the Petitioner has not cared to call witness.
>
> The PE is thus closed.
>
> Since the relationship of Landlord tenant itself is under dispute and the petitioner has failed to adduce any evidence to establish this fact, I am of the opinion that there is no point in fixing the case further for RE. The petition is thus dismissed as the petitioner has failed to establish his case. File be consigned.
>
> Sd/-
>
> 27.1.1998
>
> R. Kiran Nath
>
> RENT CONTROLLER: DELHI"

9. It is not in dispute that no appeal was preferred against the aforesaid order dismissing the eviction petition. During the life time of the original plaintiff, namely, Samey Singh, no fresh eviction petition under Section 14(1)(a) of the Act 1958 was filed.

10. After the demise of Samey Singh (original plaintiff), the appellants herein claiming as successors in interest filed another eviction petition registered as Eviction Petition No. 136 of 2001 against the respondents herein under Section 14(1)(a) of the Act 1958 claiming *inter alia* arrears of rent from 01.03.1993 till the date of issuance of notice i.e. till 18.05.2001. A written statement was filed by the respondents herein taking the stance that Samey Singh (the original plaintiff of the first eviction petition) i.e. the predecessor in interest of the appellants herein had failed to prove the relationship of landlord and tenant between the parties and in such circumstances, the same cannot be permitted to be reopened in the second eviction petition as the same would be barred by the principles of *res judicata*.

11. It appears that the respondents herein preferred an application under the provisions of Order 7 Rule 11 of the CPC stating that the Eviction Petition No. 136 of 2001 was barred by the principles of *res judicata* and the plaint be rejected accordingly.

12. The Additional Rent Controller declined to reject the plaint vide order dated 23.07.2002. The Additional Rent Controller while rejecting the application filed by the respondents for rejecting of the plaint took the view that the second eviction petition filed under Section 14(1)(a) of the Act 1958 was based on a fresh notice dated 18.05.2001 on separate cause of action and that there was no finding on merits as regards the relationship of landlord and tenant between the parties in the order dated 27.01.1998 referred to above. The Additional Rent Controller in such circumstances took the view that the plea of *res judicata* was not tenable in law. The application under Order 7 Rule 11(d) of the CPC was accordingly rejected.

13. The respondents herein being dissatisfied with the order passed by the Additional Rent Controller challenged the same by filing the Civil Revision Petition No. 1332 of 2002 in the High Court of Delhi.

14. The High Court allowed the civil revision petition and rejected the plaint of the Eviction Petition No. 136 of 2001 on the ground that the same was hit by the principles of *res judicata.* The High Court while allowing the civil revision Petition filed by the respondents herein observed as under:-

"17. In the present case in hand, Sh. Samey Singh, the predecessor-in-interest of the respondents/landlords failed to produce any evidence to establish the relationship of landlord and tenant between the parties in the first eviction petition filed by him under Section 14(1)(a) of the Act. As the said decision was not taken in appeal by any of the parties, the same attained finality. Having been afforded an opportunity to lead evidence and having failed to produce any evidence in the Court, it has to be taken as a decision on merits under Order XVII Rule 3 of the Code of Civil Procedure for the purpose of Section 11 of the Code.

18. By filing a subsequent eviction petition, the respondents cannot be permitted to do directly, what they could not do indirectly. Failure to adduce evidence, resulting in dismissal of the claim of the respondents for want of proof, is in reality, a decision on merits. Just as if the petitioner therein had produced evidence, which the Court had considered as inadequate proof and had dismissed it upon the said ground. Applicable to such a situation is the legal maxim, *'De non apparentibus et non existentibus eadem est ratio'*. It is a rule which applies to those things, which do not appear, and to things which do not exist. So, for maintaining his right to claim arrears of rent, if Sh.Samey Singh was required to prove that he was the landlord of the petitioner, but he failed to do so, the Rent Controller had no option but to decide the issue against him on account of non-production of evidence. In other words, what does not appear, must be regarded as non-existent.

19. In these circumstances, the decision of the Rent Controller dated 27.01.1998, has to be taken as a decision on the merits of the matter. Merely because a subsequent cause of action has been pleaded by the respondents in the second eviction petition by claiming arrears of rent not only for the period for which the first eviction petition was filed, but also for the subsequent period upto 18.05.2001, cannot be a ground to hold that the second eviction petition was maintainable. The relationship of landlord and tenant between the parties was not established in the earlier proceedings and the same point is directly and substantially in issue in the second petition wherein the foundation to claim the arrears of rent is the stand of the respondents (petitioners therein) that they are the landlords of the petitioner herein. The findings returned by the Rent Controller in his order dated 27.01.1998 passed in the first petition

have to be held to be findings on merits and having been adjudicated conclusively, are final in nature and act as a bar of *res judicata* on the second eviction petition preferred by the respondents.

20. In view of the aforesaid facts and circumstances, this Court is of the opinion that the impugned order dated 23.07.2002 is not in accordance with law and cannot be sustained. The said order is therefore set aside and quashed. The application filed by the petitioner under Order VII Rule 11 of the CPC is allowed. It is held that the second eviction petition filed by the respondents under Section 14(1)(a) of the Act is liable to be rejected being barred by the principles of *res judicata*. Ordered accordingly."

(Emphasis supplied)

15. Being dissatisfied with the aforesaid order passed by the High Court, the appellants, claiming to be the lawful owners and landlord of the property in question, have come up before this Court by way of the present appeal.

Submissions on behalf of the appellants

16. The learned counsel appearing on behalf of the appellants vehemently submitted that the High Court committed a serious error in taking the view that the second Eviction Petition No. 136 of 2001 was not maintainable in law as the same was hit by the principles of *res judicata*. He would submit that the plaint could not have been rejected under the provisions of Order 7 Rule 11(d) of the CPC as the issue of *res judicata* could be said to be a mixed question of law and fact. He would submit that there is no averment in the plaint of the Eviction Petition No. 136 of 2001 on the basis of which it could be said that the eviction petition is barred by any provisions of law.

17. The learned counsel further submitted that the High Court also committed an error in applying the principles of Order 17 Rule 3 of the CPC as the first order passed by the Rent Controller dated 27.01.1998 in the first eviction petition was not on merits and, therefore, no finding could be said to have been rendered as regards the relationship of landlord and tenant which could be said to be binding between the parties in the second eviction petition.

18. In such circumstances referred to above, the learned counsel prays that there being merit in his appeal, the same may be allowed and the impugned order be set aside.

Submissions on behalf of the respondent No. 1

19. The learned counsel appearing for the respondent No. 1, on the other hand, vehemently opposed the present appeal by submitting that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order.

20. He would submit that in the first round of litigation, late Samey Singh (original plaintiff) was given sufficient time and opportunities by the Rent Controller to establish the landlord tenant relationship. However, Samey Singh failed to appear before the court and also failed to lead any evidence in that regard. In such circumstances, the Rent Controller was justified in dismissing the eviction petition

21. The learned counsel would submit that the High Court rightly observed that the order dated 27.01.1998 passed by the Rent Controller in the first round of litigation could be said to be under the provisions of Order 17 Rule 3 of the CPC and, if that be so, then the finding that the original plaintiff i.e. Samey Singh was not able to establish the landlord tenant relationship could be said to be on merits. He would submit that once such finding has come on record, the appellants later in point of time claiming through Samey Singh as successors in interest could not have preferred a fresh eviction petition on the very same grounds as the same would be hit by the principles of *res judicata.* He would submit that the High Court rightly rejected the plaint of the eviction petition under the provisions of Order 7 Rule 11(d) of the CPC.

22. Learned counsel appearing for the respondent No. 1 in support of submissions has placed reliance on the following decisions:-

    1. ***Union of India v. Nanak Singh,*** **AIR 1968 SC 1370 : (1968) 2 SCR 887**

    2. ***Satyadhyan Ghosal & Ors. v. Smt. Deorajin Devi & Anr.,*** **AIR 1960 SC 941 : (1960) 3 SCR 590**

    3. ***Har Dayal v. Ram Ghulam,*** **AIR (31) 1944 Oudh 39**

4. ***Nila v. Punun,*** **AIR 1936 Lahore 385**

5. ***Govindoss Krishnadoss v. Rajah of Karvetnagar & Anr.,*** **AIR 1929 Madras 404**

6. ***Om Prakash Gupta v. Rattan Singh,*** **(1964) 1 SCR 259**

7. ***Gulabchand Chhotalal Parikh v. State of Gujarat,*** **AIR 1965 SC 1153**

Analysis

23. Having heard the learned counsel for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court was justified in rejecting the plaint of the eviction petition on the ground that the second eviction petition was barred by the principles of *res judicata.*

24. Order 7 Rule 11 of the CPC reads as follows:-

"**11. Rejection of plaint.**— The plaint shall be rejected in the following cases:—

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

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the

valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

(Emphasis supplied)

25. Order 7 Rule 11(d) of CPC provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". Hence, in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case. Before proceeding to refer to precedents on the interpretation of Order 7 Rule 11(d) CPC, we find it imperative to refer to Section 11 of CPC which defines *res judicata*:-

"***11. Res judicata.***—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

26. Section 11 of the CPC enunciates the rule of *res judicata* : a court shall not try any suit or issue in which the matter that is directly in issue has been directly or indirectly heard and decided in a 'former suit'. Therefore, for the purpose of adjudicating on the issue of *res judicata* it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on *res judicata*, before referring to *res judicata* as a ground for rejection of the plaint under Order 7 Rule 11. Justice R C Lahoti (as the learned Chief Justice then was), speaking for a two Judge bench in ***V. Rajeshwari v. T.C. Saravanabava,*** **(2004) 1 SCC 551,** discussed the plea of *res judicata* and the particulars that would be required to prove the plea. The Court held that it is necessary to refer to the copies of the pleadings, issues and the judgment of the 'former suit' while adjudicating on the plea of *res judicata*:-

"11. The rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

× × × ×

13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in *Syed Mohd. Salie Labbai v. Mohd. Hanifa* [(1976) 4 SCC 780] the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as *res judicata.* It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in *Gurbux Singh v. Bhooralal* [AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of *res judicata* and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Council *in Kali Krishna Tagore v. Secy. of State for India in Council* [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit."

(Emphasis supplied)

27. This Court in the case of ***V. Rajeshwari*** (supra) observed that the rule of *res judicata* does not strike at the root of the jurisdiction of the Court trying the subsequent suit. It is a rule of estoppal based on the public policy of achieving finality to litigation. The plea of *res judicata* is founded on proof of certain facts and then applying the law to the facts so found. It is, therefore, necessary that the foundation for the belief must be laid in the pleadings and then the issue must be framed and tried.

28. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether *res judicata* can be the basis or ground for rejection of the plaint. In ***Kamala & others v. K.T. Eshwara Sa,*** **(2008) 12 SCC 661,** the Trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. Justice S.B. Sinha speaking for the two Judge Bench examined the ambit of Order 7 Rule 11(d) of the CPC and observed:-

"21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."

(Emphasis supplied)

The Court further held:-

"23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained."

(Emphasis supplied)

29. The above view has been consistently followed in a line of decisions of this Court. In ***Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust,*** **(2012) 8 SCC 706,** Justice P. Sathasivam (as the learned Chief Justice then was), speaking for a two judge Bench, observed that:-

"10. […] It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order 7 Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.

11. This position was explained by this Court in *Saleem Bhai v. State of Maharashtra* [(2003) 1 SCC 557], in which while considering Order 7 Rule 11 of the Code, it was held as under: (SCC p. 560, para 9)

> "9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit—before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court."

It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in *Raptakos Brett & Co. Ltd. v. Ganesh Property* [(1998) 7 SCC 184] and *Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express* [(2006) 3 SCC 100]."

30. Similarly, in ***Soumitra Kumar Sen v. Shyamal Kumar Sen,*** **(2018) 5 SCC 644,** an application was moved under Order 7 Rule 11 of the CPC claiming rejection of the plaint on the ground that the suit was barred by *res judicata*. The Trial Judge dismissed the application and the judgement of the Trial Court was affirmed in revision by the High Court. Justice A.K. Sikri, while affirming the judgment of the High Court, held:-

> "9. In the first instance, it can be seen that insofar as relief of permanent and mandatory injunction is concerned that is based on a different cause

of action. At the same time that kind of relief can be considered by the trial court only if the plaintiff is able to establish his locus standi to bring such a suit. If the averments made by the appellant in their written statement are correct, such a suit may not be maintainable inasmuch as, as per the appellant it has already been decided in the previous two suits that Respondent 1-plaintiff retired from the partnership firm much earlier, after taking his share and it is the appellant (or appellant and Respondent 2) who are entitled to manage the affairs of M/s Sen Industries. However, at this stage, as rightly pointed out by the High Court, the defence in the written statement cannot be gone into. One has to only look into the plaint for the purpose of deciding application under Order 7 Rule 11 CPC. It is possible that in a cleverly drafted plaint, the plaintiff has not given the details about Suit No. 268 of 2008 which has been decided against him. He has totally omitted to mention about Suit No. 103 of 1995, the judgment wherein has attained finality. In that sense, the plaintiff-Respondent 1 may be guilty of suppression and concealment, if the averments made by the appellant are ultimately found to be correct. However, as per the established principles of law, such a defence projected in the written statement cannot be looked into while deciding application under Order 7 Rule 11 CPC."

(Emphasis supplied)

Referring to ***Kamala*** (supra), the Court further observed that:-

"12. … The appellant has mentioned about the earlier two cases which were filed by Respondent 1 and wherein he failed. These are judicial records. The appellant can easily demonstrate the correctness of his averments by filing certified copies of the pleadings in the earlier two suits as well as copies of the judgments passed by the courts in those proceedings. In fact, copies of the orders passed in judgement and decree dated 31-3-1997 passed by the Civil Judge (Junior Division), copy of the judgment dated 31- 3- 1998 passed by the Civil Judge (Senior Division) upholding the decree passed by the Civil Judge (Junior Division) as well as copy of the judgment and decree dated 31-7-2014 passed by Civil Judge, Junior Division in Suit No. 268 of 2008 are placed on record by the appellant. While deciding the first suit, the trial court gave a categorical finding that as per MoU signed between the parties, Respondent 1 had accepted a sum of Rs 2,00,000 and,

therefore, the said suit was barred by principles of estoppel, waiver and acquiescence**.** In a case like this, though recourse to Order 7 Rule 11 CPC by the appellant was not appropriate, at the same time, the trial court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decide the same in the first instance. In this manner the appellant, or for that matter the parties, can be absolved of unnecessary agony of prolonged proceedings, in case the appellant is ultimately found to be correct in his submissions."

(Emphasis supplied)

31. This Court in the case of ***Soumitra Kumar Sen*** (supra) was examining a case where the defendant had moved an application before the Trial Court under Order 7 Rule 11 of CPC requesting the Court to reject the plaint on the ground of *res judicata.* The Courts below had rejected such a prayer upon which the defendant had approached this Court. This Court, referring to its various judgements on the point, upheld such orders observing that if the averments made by the appellant in the written statement are correct, the suit may not be maintainable. However, at this stage, as rightly held by this Court, the defence in the written statement cannot be gone into. One has to look into the plaint for the purpose of deciding application under Order 7 Rule 11 of the CPC.

32. While holding that "recourse to Order 7 Rule 11" by the appellant was not appropriate, this Court observed that the Trial Court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decided them in the first instance. The Court held that this course of action would help the appellant avoid lengthy proceedings.

33. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) of the CPC can be summarized as follows:-

    (i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

    (ii) The defence made by the defendant in the suit must not be considered while deciding the merits of the application;

    (iii) To determine whether a suit is barred by *res judicata,* it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent

suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

(iv) Since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.

(See : ***Srihari HanumandasTotala v. Hemant Vithal Kamat,* (2021) 9 SCC 99)**

34. The general principle of *res judicata* under Section 11 of the CPC contain rules of conclusiveness of judgment, but for *res judicata* to apply, the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit. Further, the suit should have been decided on merits and the decision should have attained finality. Where the former suit is dismissed by the trial court for want of jurisdiction, or for default of the plaintiff's appearance, or on the ground of non-joinder or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation, or for failure to pay additional court fee on a plaint which was undervalued, or for want of cause of action, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be *res judicata* in a subsequent suit.

35. In the present case, before examining the defendants' ground of *res judicata* to oppose the eviction petition, several aspects may have to be looked into. Whether such an issue was substantively at issue in the previous suit and similar such other questions may crop up. Powers under Order 7 Rule 11 of CPC under such circumstances would not

be available. The High Court therefore, committed an error in rejecting the plaint.

36. The seminal question that we need to decide in the present appeal is whether the first suit i.e. the Eviction Petition No. 149 of 1996 filed by late Samey Singh was dismissed on merits. To put it in other words, whether the finding recorded by the Rent Controller while dismissing the Eviction Petition No. 149 of 1996 that the eviction petition deserves to be dismissed as the plaintiff Samey Singh had failed to establish the relation of landlord and tenant between the parties could be said to be on merits so as to render the second Eviction Petition No. 136 of 2001 not maintainable on the principles of *res judicata*.

37. The High Court took the view that the first suit i.e. Eviction Petition No. 149 of 1996 could be said to have been dismissed under the provisions of Order 17 Order 3 of the CPC and, therefore, the finding recorded therein as regards the relationship of landlord and tenant could be said to be on merits and thus binding in the subsequent proceedings.

38. In the aforesaid context, we may look into the provisions of Order 17 Rules 2 and 3 respectively of the CPC which are as follows:-

"Order 17 Rules 2 and 3:

2. Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.— Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,—

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule 2."

39. Order 17 Rule 2 of the CPC provides that where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit.

40. The *Explanation* appended to Order 17 Rule 2 of the CPC provides that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party was present.

41. Order 17 Rule 3 of the CPC, however, provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent, proceed under Rule 2.

42. The scope of Order 17 Rule 2 and Order 17 Rule 3 of the CPC came up for consideration before this Court in the case of ***B. Janakiramaiah Chetty v. A.K. Parthasarthi & Ors.,*** **(2003) 5 SCC 641,** wherein Justice Arijit Pasayat speaking for the Bench held in paras 7 to 10 as under:-

"7. In order to determine whether the remedy under Order 9 is lost or not what is necessary to be seen is whether in the first instance the Court had resorted to the Explanation of Rule 2.

8. The Explanation permits the court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the court is to be exercised in a given circumstance. For application of the provision, the court has to satisfy itself that:

(a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the

day is one to which the hearing of the suit is adjourned. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance i.e. where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear on the date to which hearing of the suit has been adjourned. If such is the factual situation, the court may in its discretion deem as if such party was present. Under Order 9 Rule 3 the court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. We are primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are "proceed with the case". Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the court or not.

9. In Rule 2, the expression used is "make such order as it thinks fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the only course open to the court is to proceed under Rule 2, when a party is absent. Explanation thereto gives a discretion to the court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the court to decide the suit forthwith. The basic distinction between the two rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the court. The

power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision."

(Emphasis supplied)

43. The Full Bench decision of the Madras High Court in ***Prativadi Bhayankaram Pichamma v. K. Sreeramulu,*** **AIR 1918 Mad 143 (FB)** and the decision of the Calcutta High Court in ***Mariannissa v. Ramkalpa Gorsin,*** **ILR 34 Cal 235** fell for consideration of the Full Bench of the Rajasthan High Court in ***Gopi Kishan v. Ramu,*** **AIR 1964 Raj 147,** and Bombay High Court in ***Shidramappa Irappa Shivangi v. Basalingappa Kushnapa Kumbhar,*** **AIR 1943 Bom 321 : 1943 SCC Online Bom 16 : ILR 1944 Bom 1 (FB).**

44. The full Bench of the Rajasthan High Court in the case of ***Gopi Kishan*** (supra) observed as under:-

"8. In *Prativadi Bhayankaram Pichamma v. Kamisetti Sreeramulu,* AIR 1918 Mad 143 (FB), the Full Bench of the Madras High Court has held that Rules 2 and 3 of Order XVII of the Code, of Civil Procedure are mutually exclusive. Where the conditions of Rule 2 are fulfilled even if the circumstances envisaged by Rule 3 are existent and applicable, Rule 2 should be applied. The reasons which persuaded the learned Judges to make this preference are that when a party has failed both

to appear as well as to produce evidence or to perform an act for which time was granted to it, it will be unjust in the party's absence to assume that its failure to produce evidence or to perform the act was unjustified he being absent and, therefore, unable to offer any explanation for its failure to produce evidence or to do acts in furtherance of the progress of the suit. Equity demanded that the Court should proceed under Order XVII Rule 2 Civil Procedure Code treating the case to be one of mere absence. Wallis, C. J., a member of this Full Bench of the Madras High Court, however, expressed a different view that Rules 2 and 3 were not mutually exclusive. *M. Agaiah v. Mohd. Abdul Kareem,* AIR 1961 Andh Pra 201 is a Full Bench decision of the Andhra Pradesh High Court which has adopted the view taken by the Madras High Court in Pra-tivadi's case, AIR 1918 Mad 143(2) (FB). The Andhra Pradesh High Court has not referred to the decisions of other High Courts which have taken a contrary view. The High Court of Rangoon in *Ma Hla Nyun v. Ma, Aye Myint,* AIR 1937 Rang 437, the High Court of Nagpur in *Bhioraj Jethmal v. Janardhan Nagorao;* AIR 1933 Nag 370 and Judicial Commissioner's Court of Bhopal in *Hashmat Rai v. Lal Chand,* AIR 1952 Bhopal 43 have adopted the same view as the High Court of Madras.

9. The other view taken by the Calcutta High Court in *Mariannissa v. Ramkalpa Gorsin,* ILR 34 Cal 235 considered the relationship between Section 157 and 158 of the Code of Civil Procedure, 1882, which correspond to Order XVII rules 2 and 3 respectively of the Code of Civil Procedure of 1908 and expressed the view that the existence of material was necessary for the application of Section 158 which corresponds to Rule 3 of Order XVII. In this case issues were framed and after various adjournments the case came up for hearing on 10th March, 1905. The plaintiff had asked for and obtained process for witnesses but as they did not appear on the date fixed for trial the plaintiff prayed for the issue of warrant of arrest for one of them. This application was refused. The pleader for the plaintiff thereupon intimated to the Court that he had no further instructions to appear in the case and the subordinate Judge dismissed the suit, for want of prosecution. When the plaintiff made an application to set aside the order of dismissal under Section 102 (Order IX Rule 8) the defendant took a preliminary objection that the suit bad been dismissed not under Section 102 but under Section 158 (Order

XVII Rule 3) and consequently the remedy of the plaintiff was by way of review and not for restoration. The plaintiff eventually 'appealed to the High Court. The learned Judges observed,—

"It is obvious that the scope of Section 157 is quite distinct from that of Section 158. Section 158 appears to contemplate a case in which the Court has materials before it to enable it to proceed to a decision of the suit .....what Section 158 provides is, that the mere fact of a party making default in the performance of what he was directed to would not lead to the dismissal of the plaintiff's suit, if he was the party in default, or the decreeing of the claim against the defendant, if the defendant was the person, who made the default; the words 'notwithstanding su'ch default' clearly imply that the Court is to proceed with the disposal of the suit in spite of the default, upon such materials as are before it. Section 157, on the other hand, speaks of the disposal of the suit, and undoubtedly includes cases in which there might not be any materials before the Court to enable it to pronounce a decision on the merits, for instance, if the event contemplated in Sections 97, 98, 99 Clause (a) and 102 happens, although, if the contingency mentioned in Section 100, Clause (a) happens, there would be materials before the Court, and a decision on the merits. ....."

(Emphasis supplied)

45. We may also look into the Full Bench decision of the Bombay High Court in the case of ***Shidramappa Irappa Shivangi*** (supra) wherein the following was held:-

"The general provisions about appearances of parties in Order III, Rule 1, are that a party can appear in person or by a recognized agent or by a pleader appearing, applying or acting on his behalf. These are made subject to any other express provision of law. Such an express provision is in Order V, Rule 1, where the mode of appearance by a defendant is stated to be either (a) in person, or (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or (c) by a pleader accompanied by some person able to answer all such questions. The forms of summons given in forms Nos. 1 and 2 of appx. B to the first schedule also contain the same instructions. Where, therefore, the defendant does not appear in person and there is none else to instruct

his pleader, the only person through whom ha can be said to appear is a pleader who must be duly instructed and able to answer all material questions. It follows, therefore, that if the pleader is present in Court on any day of hearing but has no instructions as to how to proceed with the case, there is no appearance of the defendant. Whether a pleader is duly instructed is a question of fact, but if he refuses to take part in the trial on the ground that he has no instructions and then withdraws from the case either after, or without making, an application for adjournment, all further proceedings against the defendant become ex parte. If the Court thereafter asks the plaintiff to lead evidence and then passes a decree in his favour, it must be regarded as an ex parte decree. The defendant would then be at liberty to apply to set it aside under Order IX, Rule 13. …"

46. In ***Gopi Kishan*** (supra) the Full Bench of the Rajasthan High Court gave an illustration as to when Rule 2 or Rule 3 of Order 17 would apply. We quote the relevant observations of the Full Bench as under:-

"18. Rule 2 confers discretion in the Court, in the event of a party being absent, either to dispose of the suit in one of the modes directed by Order 9 or to make such other order as it thinks fit. Rule 3, however, envisages a situation where a party to whom time has been granted for the production of evidence or for the performance of any other act necessary to the further progress of the suit and such party fails to produce the evidence or to perform the act for which time had been allowed the Court may. notwithstanding such default proceed to decide the suit forthwith. When a party to whom time has been granted for the production of evidence or for the performance of any other act also does not appear it is clearly a case of double default. Not only the party has failed to do that for which time was granted to it but has also failed to appear. In our opinion this double default does not take away the case from the purview of Order XVII Rule 3. We are unable to agree with the interpretation given in the Full Bench Madras case that Rules 2 and 3 are mutually exclusive. There can be cases as the one before us, where time was granted to a party to produce evidence but the party not only failed to produce evidence but also absented itself and it cannot be said that Order XVII Rule 3 cannot apply to such a case.

19. In a long series of decisions adopting the view of the Calcutta High Court for diverse reasons it has been held that the existence of material is necessary for deciding a suit under Order XVII Rule 3. The language of the statute does not expressly indicate the existence of material as an essential condition for its application. This interpretation has been influenced apparently by the word 'decide' to mean decide on merits. In Ramkaran's case, ILR (1953) 3 Raj 798 the learned Judges of this Court felt persuaded by the provisions of Order XX Rule 4 of the Code of Civil Procedure to hold that the existence of material was necessary and because only pleadings and issues were on record they opined that the dismissal should be construed to be one under Order XVII Rule 2. On the other hand in Amarsingh's case, 1953 Raj LW 365, the learned Judges were of the view that where the plaintiff failed to discharge the burden placed on him in the suit, the logical conclusion was that the suit should be dismissed whether material existed or not. No decision has attempted to indicate the exact kind of quantum of material which is requisite for the operation of Order XVII Rule 3. The difficulty of such a task is easy to appreciate. In the wide varieties of cases and complexities of situation formulation of universal rules, is a task not easy of attainment. The indications," however, are as in Ramkaran's case, ILR (1953) 3 Raj 798 that the material may mean 'evidence' on record. The obvious question which arises next is whether can absence of evidence altogether exclude the applicability of Order XVII Rule 3? It is difficult to lay down such a, wide proposition. The intention of Order XVII Rule 3 as has been noticed is that a party seeks time to produce evidence or do something to further the progress of a suit and makes default in doing either, a Court may decide the suit forthwith. To our mind, it is too wide a proposition to lay that in no case where evidence has not been led Rule 3 would be inapplicable. The test should be whether the Court before whom the suit is pending on the basis of material before it is in a position to decide the suit forthwith, the default of a party notwithstanding. The pleadings, of the parties and issues arising therefrom may in some cases enable a Court to decide the suit forthwith. Suppose in a suit on a promissory note the execution of which has not been denied by the defendant and the defendant pleads want of consideration seeking time to produce evidence. Time is allowed but he makes default in producing evidence. Can the suit be not decided in

view of the legal presumption contained in Section 118 of the Negotiable Instruments Act? In a converse case the defendant denies execution and the plaintiff is granted time to prove execution and he makes default. Can the suit be not decided on the ground of the default made by the plaintiff in discharging the burden of proof placed on him? In the first illustration it can perhaps be said that the promissory note execution whereof has been admitted constitutes evidence and there is material on record to attract the applicability of Rule 3. In the second illustration; however, the execution not having been admitted there is obviously no evidence. The plaintiff fails to discharge his duty. Can we say that the suit should be disposed of in accordance with Order IX as per Order XVII Rule 2? The answer is plainly in the negative for the situations envisaged under Order IX are different than the one we have in the illustration. Can it be said that the Court may pass such other order as it thinks fit as laid down in Rule 2 of Order 17? Such an order can be no other than to adjourn the case for plaintiff's absence in a situation such as this. Therefore, if the plaintiff fails to discharge the burden placed on him in view of the pleadings and consequent issues despite the opportunity afforded to him the case cannot be adjourned for his evidence ad infinitum and the Court at some stage or the other has to decide it for want of evidence. Even in a contested suit issues are sometimes decided for want of evidence and so can the whole suit. Therefore, in our opinion the existence of material does not necessarily mean existence of evidence. If a suit can be decided despite the lack of evidence on the material before it Order XVII Rule 3 can be said to govern the case. Material on record need not be given a technical meaning and equated to evidence. The circumstances of each case will regulate the exercise of discretion vested in a Court. It is for the Court to exercise its discretion and to indicate without ambiguity whether it is exercising its powers under Order XVII Rule 3 or not. It is correct that the application, of Rule 3 restricts the future remedies of a defaulting party and is a stringent provision, and, therefore, it should be applied with circumspect caution and judicial restraint, Ramkaran's case, ILR (1953) 3 Raj 798 therefore, has to be read with the aforesaid modification. No exception can, however, be taken to the reasoning adopted in Amarsing's case, 1953 Raj LW 365."

(Emphasis supplied)

47. Thus the Full Bench took the view that if the plaintiff fails to discharge the burden placed on him in view of the pleadings and consequent issues despite the opportunity afforded to him, the case may not be adjourned for his evidence *ad infinitum* and the court must at some stage or the other decide for want of evidence. The Full Bench took the view that the existence of material would not necessarily mean existence of evidence. If the suit can be decided despite the lack of evidence on the material before it, then in such circumstances Order 17 Rule 3 of the CPC would govern the case.

48. The aforesaid dictum as laid by the Rajasthan High Court appears to be in conflict with the decision of this Court in the case of ***Prakash Chander Manchanda v. Janki Manchanda,*** **(1986) 4 SCC 699,** wherein this Court observed as under:-

> "6. …It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2, Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fail to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined upto that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30th October 1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiffs evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that upto the

date i.e. 30th October, 1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under Order 9.

7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not' be disputed that the Court when proceeded to dispose of the suit on merits had committed an error. Unfortunately even on the review application, the learned trial Court went on in the controversy about Order 17 Rules 2 and 3 which existed before the amendment and rejected the review application and on appeal, the High Court also unfortunately dismissed the appeal *in limine* by one word."

(Emphasis supplied)

49. Thus the dictum as laid by this Court in ***Prakash Chander Manchanda*** (supra) is that it will be within the discretion of the Court to proceed under Rule 3 even in the absence of evidence but such discretion is limited only in cases where a party which is opposing has led some evidence or has examined substantial part.

50. Let us apply the aforesaid dictum as laid by this Court to the facts of the present case. In the case on hand, after the first eviction petition was instituted, the defendants therein filed their written statement denying the relationship of landlord and tenant. After the written statement came on record, no further evidence was led by the plaintiffs. All that was on record was in the form of pleadings in the plaint. The Additional Rent Controller took the view that after the written statement came on record, it was the duty of the plaintiffs to establish or prove the landlord tenant relationship and having failed to adduce any evidence, the suit was liable to be dismissed and accordingly was dismissed. The High Court interpreted or rather construed the order of the Additional Rent Controller as one under Rule 3 of Order 17 and, therefore, took the view that the findings as regards the relationship of landlord and tenant could be said to be on merits.

51. We are afraid, the High Court committed an error in taking the view that the order passed by the Additional Rent Controller could be said to be one passed in exercise of powers under Rule 3 of Order 17 of the CPC.

52. The power conferred on Courts under Rule 3 of Order 17 of the CPC to decide the suit on the merits for the default of a party is a drastic power which seriously restricts the remedy of the unsuccessful party for redress. It has to be used only sparingly in exceptional cases. Physical presence without preparedness to co-operate for anything connected with the progress of the case serves no useful purpose in deciding the suit on the merits and it is worse than absence. In any contingency, the discretion is always with the Court to resort to Rule 2 or 3 respectively or to grant an adjournment for deciding the suit in a regular way in spite of default. Rules 2 and 3 respectively are only enabling provisions. In order to decide the suit on the merits, the mere existence of the conditions enumerated in Rule 3 alone will not be sufficient. There must be some materials for a decision on the merits, even though the materials may not be technically interpreted as evidence. Sometimes the decision in such cases could be on the basis of pleadings, documents and burden of proof. Anyhow, it is appreciable for the Court to indicate by the judgment that the decision is for default or on the merits. The only alternative of the Court in cases covered by Rule 3 or the explanation to Rule 2 is not to decide on the merits alone. If such an interpretation is given, it will amount to an unjustified preference to one who purposely absents than to one who presents but unable to proceed with the case. 'Appearance' and 'presence' have well recognised meanings. They imply presence in person or through pleader properly authorised for the purpose of conducting the case. Rule 3 comes into play only when presence is to proceed with the case, but default is committed in any one of the three ways mentioned in Rule 2 or explanation to Rule 2 is extracted. Those are cases in which some materials are there for the Court to decide the case on the merits and not cases where decision could only be for default. That is clear from a combined reading of Rules 2 and 3 respectively and the explanation. In this case, none of these conditions were present and the decision was evidently for default. Rule 2 alone is attracted. (see : ***R. Ravindran v. M. Rajamanickam,*** **2006 SCC Online Mad 169)**

53. The order passed by the Rent Comptroller dated 27.01.1998 referred to in para 8 of this judgment, has a different angle too. Let us once again read the order passed by the Rent Controller closely. The order is in two parts. In the first part, the Rent Controller says that the counsel for the plaintiff is present. Then, he proceeds to observe that the counsel for the plaintiff made a statement that no witness has come today nor they were summoned. The Rent Controller, further, notes that on none of the grounds further adjournment has been prayed for. Thereafter, he states that the last opportunity was granted to the plaintiff on 09.09.1997 and thereafter, on 01.11.1997. However, the plaintiff did not care to call his witnesses. In such circumstances, the Rent Controller closed the eviction petition proceedings. The exact words used by the Rent Controller in the order dated 27.01.1998 are: "*the PE is thus closed*." In the second part of the order, the Rent Controller, thereafter, proceeds to observe that since the relationship of Landlord-Tenant is under dispute and the plaintiff has failed to produce any evidence to establish such relationship, he did not find any good reason to fix the case further for recording of evidence. In such circumstances, he dismissed the eviction petition, as the plaintiff could be said to have failed to establish his case. In the last, he observed that the file be consigned.

54. At the stage of hearing of the case, Order 17 of the CPC, applied. Under that Order on a date of adjourned hearing, if a party was absent, the Court either would act under Order 9 or otherwise as it thought fit; or if a party was present but it did not produce evidence, it would proceed to decide the suit forthwith without benefit of evidence. This last thing tantamounts that the Court was to say whether the suit was or was not proved, either wholly or in part and to pass the decree accordingly.

55. The moot question is whether the eviction petition was dismissed for default which dismissal would certainly bar a fresh suit if instituted on the same cause of action. The words, which we have quoted above, certainly do not mean dismissal either on merits or on default. It was argued before us that the order should only be taken to mean what an order under Order 17 can possibly be and nothing else. We are not impressed by such submission. The order did not purport to be one of dismissal for default or on merits and it cannot be taken to mean other than what it purported to be. It is in ordinary phraseology; not

legal phraseology and it cannot be divested of its ordinary meaning. Its ordinary meaning is that the proceeding was closed and the suit would not count as a pending one. The later description would be redundant if the order was one of final disposal of the suit. The order did not purport to be a final disposal of the suit. It merely stopped the proceedings. It did nothing more. This is not final decision of the suit within the meaning of Order 9 Rule 8 and Order 17 Rule 3 resply of the CPC.

56. In the result, the appeal succeeds and is hereby allowed. The impugned judgement and decree is, therefore, set aside. Needless to add two things. First, we have not expressed any opinion on rival contentions regarding the applicability or otherwise of the principle of res judicata or for that matter any other contentious issue in the pending suit. Secondly, nothing stated in this judgment will prevent the concerned defendants from requesting the Court to decide such an issue as a preliminary issue. Such an application would obviously be decided on its merits about which also we expressed no opinion. The suit is revived.

57. There shall be no order as to costs.

58. Pending application, if any, also stands disposed of.

Headnotes prepared by: Ankit Gyan
(*Assisted by :* Shivesh Raghuvanshi and Mahendra Yadav, LCRAs)

Result of the case: Appeal allowed.