INHERENT POWERS OF CIVIL COURTS VIS-À-VIS PROVISIONS OF ORDER VII RULE 11 OF THE CODE OF CIVIL PROCEDURE.

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In this essay an attempt will be made to understand the nature, scope and width of the inherent powers of the Court saved by Section 151 of the Code of Civil Procedure (the Code hereinafter). The text will be the inherent powers of the Court and the sub-text the order of rejection of plaint under Order VII Rule 11 of the Code. The provisions of section 151 of the Code contain the Legislative recognition of the powers of every Civil Court to pass necessary orders to subserve the ends of justice and to prevent the abuse of process of the Court in cases coming before it. These powers are not conferred on the Court but are inherent in every Civil Court. Since the section itself does not lay down any guideline when to resort to inherent powers and when not except for using the two key phrases that is "Ends of Justice" and "Abuse of process of Court" the Courts often were led astray and lot of misuse of these powers occurred. In a series of decisions the Supreme Court has enunciated the scope and ambit of the inherent powers under section 151 of he Code. These decisions are –

(1) Padam Sen Vs State of UP A.I.R 1961 SC 218,
(2) Monohar Lal Vs Seth Hiralal A.I.R 1962 SC 527
(3) Arjun Singh Vs. Mahindra Kumar, A.I.R 1964 SC 993
(4) Mahendra Vs Sushila, A.I.R 1965 SC 364
(5) Ramkaran Das Vs Bhagwan Das, A.I.R 1965 SC 1144
(6) Raja Soap Factory Vs S.P. Shantharaj, A.I.R 1965 SC 1449
(7) Ram Chand and Sons Sugar Mills Vs Kanhayalal, A.I.R 1966 SC 1899
(8) Nainsingh Vs Koonwarjee, A.I.R 1970 SC 997
(9) Cotton Corporation of India Vs United Industrial Bank, A.I.R 1983 SC 1272
(10) Budhia Swain Vs Gopinath Deb, A.I.R 1999 SC 2089

Running through all the above cases, apart from the trite principle of law that inherent powers relate to procedure and not to substantive rights of the parties, are the broad guidelines for correct application of inherent powers. In the above cases the Supreme Court naturally was considering different points of law and fact arising before the Court. But the exposition of the guidelines except for the emphasis on a phrase here and / or a word there is the same. A summary of these principles may be excerpted from Mulla's Code of Civil Procedure 16th Edition at page 1425 :-

"Inherent jurisdiction must be exercised, subject to the rule that, if the Code does contain specific provisions, which could meet the necessities of the case in question, such provisions should be followed, and the inherent jurisdiction must not be invoked. Such provisions need not be express, they may be implied, or even implicit, from the very nature of the provisions made for the contingencies to which they relate. Accordingly, where certain orders are passed in the suit, and the suit is thereafter disposed off, an application under this section, challenging those orders as being without jurisdiction, and for the restoration of the suit, is incompetent, there being a specific remedy under the Code, by way of an appeal or a review. It is only when there is no clear provision in the Code, that inherent jurisdiction can be invoked. In such a case, the Court may devise a procedure, which would be permissible under the law, for achieving the ends of justice.

In Ram Chand & Sons Sugar Mills Pvt. Ltd. Vs Kanhayalal Bhargav, (A.I.R 1966 CC 1899) the Supreme Court in this connection, observed that, the inherent power of the Court 'is in addition to and complimentary to the powers expressly conferred under the Civil Procedure Code ; but that power will not be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of S 151 of the Code, they do not control the undoubted power of the Court to make suitable order to prevent the abuse of the process of the Court'. Thus, inherent powers of the court, would not include a power of revision under S 115 of the Code, even in cases to which that section is not applicable. Similarly, in view of the express provision in 037, r 4, for setting aside a decree passed under that order, an application to do so, under this section, would be untenable. Also, this section cannot be resorted to in order to avoid the application of 01, r10, when an application under that rule has been rejected. If relief can properly be obtained in a separate suit, there is no justification for invoking S 151, and the court will not by virtue of its inherent jurisdiction, amend a consent decree on the ground of fraud, unless the fraud is a

fraud upon the Court, or set aside a consent decree on the ground of coercion, there being a suitable remedy by way of a suit. A Court cannot make use of the special provisions of this section, where the applicant has his remedy provided elsewhere in the Code, and has neglected to avail of the same".

More or less the same principles were reiterated in Budhia Swain Vs Gopinath Deb A.I.R 1999 SC 2089 using a different phraseology Para 8 of the Judgment reads thus :

" In our opinion a Tribunal or Court may recall an order earlier made by it if **(i)** *the proceedings culminating into an order suffer from inherent lack of jurisdiction and such lack of jurisdiction is patent* **(ii)** *there exist fraud or collusion in obtaining the judgment* **(iii)** *there has been a mistake of the Court prejudicing a party* **(iv)** *a judgment is rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented. The power to recall a judgment will not be exercised when the ground for reopening proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceedings such as by way of appeal or review was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence".*

With this load of principles emanating from the Supreme Court on the inherent powers one may now turn to the sub-text of this article that is the provisions of Order VII Rule 11 of the Code, which with effect from 1.7.2002 read thus :

" 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 written 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……..".

Under the proviso to the above added with effect from 1.2.1977 by the amendment Act of 1976 the time to be fixed by the Court under clauses (b) and (c) above "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 doing the needful. On the clauses (e) and (f) newly added by the Code of Civil Procedure (Amendment) Acts 1999 & 2002 in A.I.R 2003 S.C 189 the Supreme Court has observed that there should not be automatic rejection under these clauses but the Court should "ordinarily give an opportunity for rejectifying the defects and in the event of same not being done the Court will have the liberty or the right to reject the plaint". Rule 12 requires that the Judge upon rejecting the plaint shall record an order to that effect with reasons for such order and lastly Rule 13 says that the rejection of plaint under any of the clauses under Rule 11 shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Section 2(2) of the Code defines a "decree" and it includes rejection of a plaint. Thus an order rejecting a plaint is appealable under section 96 of the Code.

Rule 3 of Order XX of the Code states that " the Judgment shall be dated and signed by the Judge in Open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review." It has also to be noted that general power of extension of time for doing some act prescribed or allowed by the Code under section 148 of the Code after the coming into force of Code of Civil Procedure (Amendment) Act 1999 with effect from 1.7.2002 has been limited to "thirty days in total".

It is trite to say that principles are easily noticed but error occurs in their application. On the law and the principles emanating from the Supreme Court one would think that there would be uniformity and decisiveness in application or otherwise of section 151 of the Code to order of rejection of plaint especially rejection under clause (c) of Rule 11 of order VII. Among the High Courts that have had occasion to deal with the question four different trends have emerged. In the first group of High Courts are Kerala High Court, Karnataka High Court, Hyderabad High Court, Gujarat High Court, Rajasthan High Court and Patna High Court. Authoritative view of these High Courts is that a petition under Section 151 of the Code is not competent to set aside an order of rejection of a plaint, the order being a decree in Law. The second trend is visible in the decisions of the Allahabad and the Oudh High Courts. According to these High Courts petition under Section 151 of the Code can be treated as a fresh plaint if it is filed along with deficit court-fee and within the limitation of the suit. Allahabad however, later veered to the view that a petition under Section 151 of the Code is maintainable even without the conditions mentioned in earlier case. The third trend is discernible in the judgments of the Calcutta High Court. Within the High Court two earlier Division Bench judgments hold that no petition under Section 151 of the Code lay but two later Division Bench judgments on apparent reliance on a Full Bench decision of the same High Court though not on the exact point held otherwise. The conflict like in the Allahabad High Court though of a different kind has not been resolved in both the High Courts. At the other end of spectrum constituting the fourth trend are the decisions of the Orissa High Court joined later by those of the Gauhati High Court.

One may begin from the decision of the Kerala High Court. In A.I.R 1959 Ker 406 following primarily Allahabad High Court it had been held that an application under section 151 of the Code to set aside order of rejection of a plaint is maintainable if the application is filed accompanied with the deficit court-fee and if on the date of the application a fresh suit will not be barred. In other words such an application can be treated as a fresh plaint under order VII Rule 13 and the court-fee on the rejected plaint can be computed to the fresh plaint. Relying on this case in A.I.R 1999 Ker 185 the same view is reiterated. The above two are single Bench Judgments. The latest case from Kerala is reported in A.I.R 2001 Kerala 353 Mable Vs. Dolores. This division Bench Judgment can be said to be the authorititive pronouncement from Kerala High Court. It has overruled not only A.I.R 1959 Ker 406 and A.I.R 1999 Ker 185 but also has overruled another single Bench judgment of Kerala High Court reported in (1992) 2 Ker LJ 84. The Judgment relies on AI.R 1962 SC 527 A.I.R 1964 S.C 993 and A.I.R 1966 S.C 1899. The same view has been reiterated in connection with rejection of an appeal for non-payment of balance court-fee in the Division Bench judgment dated 28.11.2001 summary where of can be read in A.I.R 2002 NOC. 248 (Kerala)

The Judgment lays down that "a remedy by way of an appeal has necessarily to be understood as a substantive remedy available to a party and that "when an appeal is provided, the party aggrieved gets an opportunity to have his whole case reconsidered by the appellate Court". It is unequivocally held that a plaintiff is not entitled to invoke the jurisdiction of the Court under section 151 of the Code when a plaint gets rejected in terms of Order VII Rule 11.

Turning now to the view of the Karnataka High Court one finds that in A.I.R 1987 Karnataka 264 the question fell for determination directly. The judgment quoted the para excerpted hereinbefore from Mulla's C.P.C 16th edition at page 1425 from the 14th Edition at page 787. It dissented from A.I.R 1975 Orissa 178 and A.I.R 1972 Patna 289 on the ground that "Both these judgments have not considered the effect of a remedy available to the party". The judgment lays down in no uncertain terms : "But when the Civil Procedure Code has provided for the remedy of an appeal against the rejection of the plaint, it, in my opinion, would not be open to the Court to have recourse to the inherent power under S 151 C.P.C, and recall the order of rejecting the plaint. If such requests are to be granted, then the remedy provided by the Civil Procedure Code for appeal would be meaningless".

The judgment noticed that order rejecting a plaint is a decree under section 2(2) of the Code and further lays down "when the law has provided for an appeal against the order rejecting the plaint the Court would not be justified in invoking its inherent jurisdiction under 151 C.P.C ……. . It is not competent for the Court to resort to S 151 C.P.C and recall the said order rejecting the plaint even though the grounds made out for non payment of Court-fee might be satisfactory or may be of an extra ordinary nature". Finally the judgment noticed the provision for filing of a fresh plaint under Order VII Rule 13.

In Kishorlal Vs Surajmal A.I.R 1956 Rajasthan 164 the view that order rejecting a plaint being a decree there is no power left in the Court to restore the plaint under Section 151 C.P.C has been upheld by Rajasthan High Court.

In Kederbhai Peerbhai Vs Husnabu Chandbhai A.I.R 1962 Gujarat 61, the Gujarat High Court held that rejection of plaint being a decree after making the said order

the Court becomes functus officio and the remedy for the plaintiff is appeal or review or fresh plaint under order VII Rule 13.

In Md.Yunus Vs Sugra Begum A.I.R 1955 Hyderabad, 156 a Division Bench of the Huderabad High Court considered the question and held that rejection of a plaint being a decree remedy is either appeal or review and cannot be amenable to inherent jurisdiction under Section 151 of the Code.

Cases from Patna High Court may now be considered. In Rameshwardhari Singh Vs Sadhu Saran A.I.R 1923 Patna 354 the question fell for consideration before a Division Bench. There having rejected a plaint for non-payment of deficit Court-fee the subordinate Judge restored the suit acting under Section 151 of the Code. On revision against the order restoring the suit the Court held :-

> "In my opinion, there was no power in the learned subordinate Judge to restore the suit under Section 151 of the Code. The order rejecting the plaint under Order 7, Rule 11(c) of the Code operated as a decree, and order 20, Rule 3 provides :
>
> *"that a judgment once signed shall not afterwards be altered or added to save as provided by section 152 or on review". There can be no doubt, in my opinion that once an order of the Court is perfected there is absolutely no power in that Court under its inherent jurisdiction either to alter, or add to, that order, save as provided by Section 152 or on review. The order passed by the learned subordinate Judgment accordingly be set aside".*

In A.I.R 1949 Patna 366 the question again arose directly and following A.I.R 1923 Patna 354, the same unequivocal answer was given that a plaint rejected for non payment of requisite Court-fee cannot be restored by taking recourse to the provisions of Section 151 of the Code. In a Full Bench decision of the Patna High Court the question arose in, connection with rejection of a memo of appeal for non payment of requisite Court-fee. In view of Section 107 of the Code the provision of order VII, Rule 11 applies as much to a memo of appeal as to a plaint, a view much later approved by the Supreme Court in Mahammad Mahibulla (1991) 4 SCC 529. The Full Bench of Patna High Court again relied on A.I.R 1923 Patna 354 and held in A.I.R 1955 Patna 370 (F.B) that in cases of rejection of a plaint or a memo of appeal for non-payment of requisite Court-fee application under Section 151 CPC is not competent. Para 2 and 3 of the Full Bench judgment at page 370 of the Report bring out the law point clearly.

Again in A.I.R 1956 Patna 20 the same question fell for decision and relying on A.I.R 1923 Patna 354 as also on A.I.R 1955 Patna 370 (F.B) it was held that when a plaint is rejected for non-payment of Court-fee there is no power to restore the suit on an application under Section 151 of the Code. It may however be mentioned that A.I.R 1956 Patna 20 reached the Supreme Court in A.I.R 1961 S.C 882 only on the question of non-extension under Section 148, 149 and / or 151 of the Code, of time to make good the deficit. The application for time to pay the deficit was filed before the

expiry of the time originally fixed but it was heard after the time originally fixed had expired and the order was that if the Court-fee was not paid within the time fixed the suit would “stand dismissed”. The Supreme Court in A.I.R 1961 S.C 882 has no occasion to deal with the question whether a plaint and / or a memo of appeal rejected for non-payment of court-fee can be restored in exercise of the inherent powers and as such has not dealt with the said question.

In A.I.R 1968 Patna 48 a suit was dismissed for default on non-payment of deficit Court-fee though the correct order should have been rejection of the plaint under order VII Rule 11 of the Code. A petition filed in the trial Court labeling the same as under order IX Rule 9 and Section 151 of the Code proved unsuccessful. But in the appeal the suit was restored. On these facts the High Court held that the order being appealable as a decree no application either under order IX Rule 9 or under section 151 is competent. Order restoring the suit was set aside.

At this stage it is necessary to mention that between the period from 12.2.1958 to 5.12.1973 , by virtue of Patna High Court amendment of order XLVII Rule 1 of the Code a review application was very much maintainable to seek restoration of a plaint rejected for non-payment of deficit Court-fee. A.I.R 1972 Patna 289 decided in 1970 is a decision where the Patna High Court, departing somewhat from the long line of decision from 1922 when A.I.R 1923 Patna 354 was decided to 1965, when A.I.R 1968 Patna 48 was decided, upheld the restoration of a plaint rejected for non-payment of Court-fee by the original Court by treating petition under Section 151 of the Code as one for review under the Patna amendment though without payment of the requisite Court-fee for a petition for review.

The question came to be considered by the Allahabad High Court in the following cases :-

(1) A.I.R 1935 Allahabad 985
(2) A.I.R 1939 Allahabad 452
(3) A.I.R 1954 Allahabad 719
(4) A.I.R 1957 Allahabad 825
(5) A.I.R 1981 Allahabad 15
(6) A.I.R 1995 Allahabad 225

In the first case noted above a novel concept based on the provisions of Order VII Rule 13 was developed. It was held that an application under section 151 of the Code accompanied by the deficit Court-fee if filed on a date within limitation of the original suit can be treated as a fresh plaint. It was further held that the Court-fee on the rejected plaint can be computed towards the deemed fresh plaint under Section 149 of the Code. Even though that will be doing some violence with the plain provisions of the court-fees Act as also that of Section 149 / 151 of the Code, this case was followed in the latter cases with the difference that gradually application filed beyond limitation and / or not accompanied by the deficit court-fee also were accepted to restore plaint rejected for non-payment of Court-fee. The second, the third and the fourth cases listed above all follow the first case and the net result was that application under Section 151 of the Code came to be held maintainable to restore plaints rejected for non-payment of Court-fee even without the conditions of the first case treating them as fresh plaints. In A.I.R 1981 Allahabad 15 a further development was made in that not even treatment as a fresh plaint

was mentioned. No reasons have been given in the judgment. Lastly in A.I.R 1995 Allahabad 225 the same view was reiterated. In all the above Allahabad cases that an order rejecting a plaint under the provision of Order VII of the Code is a decree and as such appealable under Section 96 of the Code was not considered.

In A.I.R 1944 Oudh 327 relying on A.I.R 1935 Allahabad 985 an application under Section 151 accompanied with the deficit Court-fee was treated as a fresh plaint and the rejected plaint was restored.

Cases from Calcutta High Court may now be read. The matter of rejection of plaint on non-payment of requisite Court-fee fell for consideration before a Division Bench of Calcutta High Court in A.I.R 1934 Calcutta 623. In that case the lower Court accepted a petition under Section 151 of the Code and restored a plaint rejected for non-payment of the deficit Court-fee. The Division Bench had this to say :-

> *"the order of 17th January 1933 no matter whether it was a decision rightly or wrongly given was an order of rejection of a plaint and an order of rejection of a plaint is a decree as defined in Section. 2 of the Code. If the plaintiff felt aggrieved by this order his remedy lay either by an application under O 47, R (1) or by filing an appeal against it. The plaintiff did not choose to take either of these two courses open to him under the Code. It is well settled that a Court cannot make use of the special provisions of S. 151 when the applicant has his remedy prescribed elsewhere in the Code and has neglected to avail himself of such a remedy. S 151 is therefore inapplicable to the present case and the order of the Subordinate Judge must therefore be vacated on that ground alone."*

The same view on the matter was reiterated by another Division Bench in A.I.R 1935 Calcutta 336 (2). But later on in A.I.R 1981 Calcutta 267 a Division Bench doubted the correctness of the view in A.I.R 1935 Calcutta 336(2) relying on a Full Bench decision of the same High Court which in fact was not on the specific question posed in this essay. The same Division Bench in A.I.R 1982 Calcutta 290 reiterated their own holding in A.I.R 1981 Calcutta 267. Unfortunately A.I.R 1934 Calcutta 623 quoted above was not placed before their Lordship sitting on the Division Bench in 1981 and 1982. In this essay the Full Bench Decision mentioned in these two cases will be considered later.

Keeping the cases from Gauhati High Court to the end , one may consider the view of the Orissa High Court on the matter at hand. The consistent uniform view of the Orissa High Court as reflected in (1) A.I.R 1964 Orissa 134 (2) A.I.R 1975 Orissa 178 (3) A.I.R 1989 Orissa 168 and (4) A.I.R 1990 Orissa 102 is that an order of rejection of a plaint for non-payment deficit Court-fee can very much be set aside on a petition under Section 151 of the Code. Indeed in the last of the above cases namely A.I.R 1990 Orissa 102 which is a Division Bench decision all the other three cases have been considered. The main reason for the decision seems to be that the remedy of appeal according to the Orissa High Court will not be adequate. Supreme Court Judgment like

A.I.R 1962 S.C 527, A.I.R 1964 SC 993, were considered as lending support to that view. It was also pointed out rather ignoring the provision for fresh suit contained in order VII Rule 13 that the Code does not provide for a remedy in the same Court. Though A.I.R 1923 Patna 354 and A.I.R 1935 Calcutta 336 (2) were placed before the Court they were not followed.

On the matter at hand there are four reported cases from Gauhati High Court. They are Atul Krishna Vs Bhownrilal A.I.R 1952 Assam 149 Santosh Das Vs Arjun Das (1984) 1 GLR 31 Usharani Bhadra Vs Subharani Bhawal (1989) 2 GLR 248 and Amalendu Sen Vs Suchitra Roy 2002 (2) GLT 473.

One interesting feature of these four cases is that the second case listed above is a Division Bench Judgment while the others are single Bench Judgments and the single Judge in the third case wrote the judgment in the Division Bench Judgment.

In Atul Krishna (Supra) relying on A.I.R 1934 Calcutta 623 and A.I.R 1935 Calcutta 336 (2) already noticed it was clearly laid down…… "he might either have brought a fresh suit or he could have appealed against that other, and he not having chosen to avail either of these legal remedies his application under S 151 Civil Procedure Code would not lie".

The validity of the holding in Atul Krishna (Supra) was considered by the Division Bench in Santosh Das (Supra). It is stated in the judgment of the Division Bench that because of "the conflicting decisions of this court" a learned single Judge made the reference to a Division Bench. This writer was unable to lay his hands on the order of reference nor on the other decisions of the High Court on the point. It also could not be known whether the conflict of decisions was within the High Court or of Atul Krishna (Supra) with decisions of other High Court. Be that as it may the Bench at first noticed general principles laid down by the Supreme Court in cases listed at serial (1), (2), (3) and (5), (6), (7) , (8) in the opening paragraph of this essay. In addition A.I.R 1976 S.C 1152 and A.I.R 1977 S.C 1384 were noticed. The main question posed at para 8 of the Judgment was :- 'whether express provisions of appeal can sound in all cases the death-knell of inherent power".

To answer the above question first reliance was placed on four Full Bench decisions and a Special Bench decision. These cases are namely (1) Madan Lal Vs Tripura Modern Bank A.I.R 1954 Assam 1(F.B), (2) Shyam Sundar Vs State of Assam A.I.R 1974 Gauhati54 (S.B), (3) Mahmmed Kassim Abdul Vs. Hajee Rahiman A.I.R 1950 T.C 100 (F.B), (4) Bimala Devi Vs Aghore Chandra A.I.R 1975 Calcutta 80 (F.B), (5) Bajrang Rai Vs Ismail Mian, A.I.R 1978 Patna 339 (F.B)

Mahmmed Kassim Abdul (Supra) at serial No. 3 may be read first. The paragraph from the said judgment quoting Mulla at paragraph 11 of Santosh Das (Supra) appears to have been quoted out of context. It will be worth while to quote fully from the Full Bench Judgment which is a case under Cochin Code of Civil Procedure and Rule 9 of order 36 of that Code is equivalent to Section. 151 of the Code of Civil Procedure 1908. In that case attachment before judgment was made absolute in M.P No. 890 of 23. The judgment proceeds as follows :

> *"…….. if the defendant No. 1 was aggrieved by the final order passed by the Court on M.P 890 of 23 the*

> *remedy open to him is to file an appeal against that order or to seek review of the same at the hands of the lower Court. He did not care to do either. He chose instead to file an application under Rule 9 of Order 36. Defendant No. 1 is clearly in competent to seek to get the final order passed on M.P. 890 OF 23 vacated by the Court in exercise of its inherent power. It is well established proposition that (inherent…….. not be invoked)."*

The portion within the bracket only is quoted in Santosh Das (Supra). Then again the judgment not only quoted the above from Mulla but also quoted the following :

> "*A Court cannot make use of the special provisions of the section where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it"*.

The above can hardly be said to lend support to the thesis that a remedy of appeal provided in the Code will not make approach under Section 151 incompetent. The portion underlined above would rather point to the contrary. As a matter of law the Full Bench held that approach under Section 151 in the face of the remedy of appeal would be not competent.

The decision in other four cases three Full Bench one Special Bench because of change of law have lost much of their relevance. Before going into the cases it may be stated that by the Explanation added to Section 141 of the Code by the Code of Civil Procedure (Amendment) Act 1976 effective from 1.2.1977 proceeding under order IX of the Code have been brought within the expression "Proceedings" in Section 141 of the Code. Similarly Rule 105 and 106 have been added to order XXI of the Code with effect from 1.2.1977. In consequence after 1.2.1977 an application under Order XXI Rule 90 dismissed for default as in Bimala Devi (Supra) and petition under order IX Rule 13 dismissed for default as in Madan Lal (Supra) Shyam Sundar (Supra) and Bajrang Rai (Supra) can be restored to file respectively under Rule 106 of order XXI and under Section 141 of the Code and the approach under Section. 151 of the Code will be definitely barred. In Santosh Das (Supra) the rejection of the plaint took place on 18.7.73 and as such the division Bench though deciding the case on 4.10.1983 probably did not find it necessary to take notice of the change in law since Full Bench cases relied on were decided.

In Bimala Devi (Supra) the Full Bench was considering the question whether despite the remedy of appeal provided under Order XLIII Rule 1(j) an application under Section. 151 of the Code is maintainable against an order dismissing an application under order XXI Rule 90 for default. Amongst various cases noticed by the Full Bench Madan Lal (Supra) also was considered. The Full Bench concluded that the remedy of appeal in the circumstances will be ineffective without any evidence and will not be such a "Specific provisions" of the Code dealing with a particular topic

exhaustively" as mentioned in excepts from Mulla earlier. Approach under Section. 151 of the Code in such circumstances were held competent.

Similarly in Madan Lal (Supra) and in Bajrang Rai (Supra) the question for consideration was whether despite the remedy of appeal having been provided in the Code against order dismissing for default of applications under order IX Rule 9 or order IX Rule 13, applications under Section. 151 are competent. Here also the principal reason for accepting the contention that inherent powers can be exercised in such situation is that remedy of appeal will be ineffective because the appellate Court will have no material to decide the sufficiency or otherwise of the causes of default. Amongst the learned Judges adorning the Full Benches in the above two cases His Lordship Deka J. expressed some reservations about the validity of the contention in the following words in Madan Lal (Supra) at para 49 of the judgment :

> *" This is undoubtedly an argument that has some force, but on the other hand, it can be said that the appellate Court might decide the case on affidavit or might even examine the witnesses or in a suitable case might send down the case to the lower Court for reccording of the evidence in the matter. This of course would be a lengthly process and might be a costlier remedy, but when the statute provides that an appeal lies against the order refusing to set aside an exparte decree,……."*

In Shyam Sundar (Supra) the Special Bench was dealing with a Civil Revision application against an order restoring to file a petition under IX Rule 13 dismissed for default on an approach under Section. 151 of the Code. Madan Lal (Supra) was cited to contend that against the order of dismissal for default in the circumstance an appeal is competent A.I.R 1970 SC 997 (Supra) was cited to contend that party having his remedy provided elsewhere in the Code and neglecting to avail himself of the same cannot maintain an application under Section. 151 of the code. The Special Bench then relied on a single Bench judgment of the High Court Jami Ram Medhi Vs Ramjan Ali, Civil Revision No. 44 of 1971 decided on 7.2.1974 and held that the remedy under Section. 151 of the Code cannot be availed of as a matter of law. But on facts on the basis of mistake commited by the Court amounting to abuse of process of the Court impugned order was sustained.

It may be emphasized that none of these cases nor the Supreme Court cases mentioned in Santosh Das (Supra) deal directly with the question which is the Sub-text of this article. These Full Bench and Special Bench cases deal with provisions for appeals against certain order under the Code vis-à-vis the provision of Section 151 of the Code. These cases had no occasion to consider the remedy of appeal against a decree within the meaning of Section 2(2) of the Code nor had any occasion to consider provisions of Order XX Rule 3 read with those of order VII Rule 12. It is submitted that these provisions contain the express provision in the Code whereby approach under Section 151 of the Code is barred in accordance with the statement of law from Mulla quoted in the beginning of this article. Holding in these cases, even if accepted to be correct, cannot be resorted to as a support to the thesis that despite the provision of appeal, review or a

fresh suit approach under Section. 151 of the Code, is the better approach to set aside an order of rejection of plaint under Order VII Rule 11 of the Code. There are some observations at para 15 of Santosh Das (Supra) regarding saving "time, money and energy of all" in an approach under Section 151 of the Code compared to that under the provision for appeal. These observations are answered by the following from A.I.R 1929 Madras 756 (F.B). " The resort to inherent powers may be justified in a case of gross injustice where the party has no other remedy. But here the party has a remedy by way of suit we should not be justified in laying down any General Principles that an ordinary Civil Court has inherent power to set aside its own order and to interfere in any case in which it thinks a failure of justice has occurred when the aggrieved party has another remedy by which it can be set aside, even though the remedy is not as summary or as cheap. Even his Lordship Deka J. in Madan Lal (Supra), as seen from the excerpt quoted earlier indicated as much.

It appears that the phrase "specific provisions which would meet the necessities of the case" from Nainsingh Vs Koonwarjee A.I.R 1970 S.C 997 at para 4 of the judgment has directly or indirectly influenced the observation about remedy of appeal being illusory and ineffective in Madan Lal (Supra), Bimala Devi(Supra), Bajrang Rai (Supra) and Santosh Das (Supra). It would seem that the Supreme Court itself has indicated what it meant by the "necessities of the case" in the sentence next following the sentence where the phrase occurs. It runs like this – "In other words the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same".

Upshot of all the above is that neither the Supreme Court cases mentioned in Santosh Das (Supra) nor the Full Bench cases lend support to the thesis that an order of rejection of plaint can be set aside on an approach under Section 151 of the Code.

The judgment in Santosh Das (Supra) dated 4.10.1983 was prepared by his Lordship B.L. Hansaria J. Some five and half years later on 20.7.1989 Hansaria J. sitting singly decided Usharani Bhadra (Supra) dealing with the same question but surprisingly none remembered Santosh Das (Supra) and it was not cited. In this case the Court did not follow A.I.R 1972 Patna 289 nor A.I.R 1975 Orissa 178 the correctness of which was doubted in the following words :-

> "……. In as much as Section 2(2) of the Code has specifically held that rejection of the plaint shall be deemed to be a "decree" and the express provision relating to appeal against the decree would militate against the view that in such a case also Section 151 could be invoked".

The above is in direct conflict with Santosh Das (Supra) and supports Atul Krishna (Supra) An opportunity to resolve the conflict presented itself in Amalendu Sen 2002 (2) GLT 473 decided on 24.5.2002. Both Santosh Das (Supra) and Usharani Bhadra (Supra) were cited. The Court followed Santosh Das (Supra).

Apart from the authorities noticed above the matter may be viewed from another angle. Unlike the appeal against Order of dismissal for default for which difficulties of the appellate Court have been pinpointed in the Full Bench cases mentioned in Santosh Das (Supra), there may not be any such difficulty in appeal against all orders of rejection of plaint. Rejection may be under one or the other of six Sub-

clauses of order VII, Rule 11. Rejection under order VII Rule 11(a) or Rule 11 (d) would usually be a pure question of law. Indeed in A.I.R 2000 Delhi 40 (D.B) a plaint rejected under order VII Rule 11(d) was restored in appeal on the holding that ingredients of order VII Rule 11 (d) were not satisfied. Similarly in A.I.R 1998 All 260 the High Court in second appeal restored a plaint rejected under order VII Rule 11(a). In those cases the question of appeal being an ineffective remedy did not arise because questions of law were involved. The point to be stressed is that six sub-clauses of Orders VII Rule 11 cannot in law be compartmentalized to say that for orders under some sub-clauses appeal is an effective remedy and for others it is not. It needs to be mentioned here that A.I.R 1981 Calcutta 267 and A.I.R 1982 Calcutta 290 doubted the correctness of A.I.R 1935 Calcutta 336(2) because of Bimala Devi (Supra) which actually is not to the point as indicated earlier.

The change of law, comprising the addition of the proviso to Order VII, Rule11, the addition of the Explanation to Section 141 and the addition of the words "not exceeding thirty days in total" in section 148 of the Code with effect from 1.2.1977 and 1.7.2002 respectively by the Code of Civil Procedure (Amendment) Act 1976 and 1999, coupled with the general anxiety of all concerned to rid the procedural law of the plague of multiplicity of procedures should also lead to an exclusive rather than inclusive interpretation of the inherent power as already evident from the various decisions of the Supreme Court listed in the beginning of this essay. It is felt that for too long the Courts at the cost of the bilateral character of the ends of justice, have pursued the ends of justice almost as an unilateral affair.

The thrust of this essay has been a statement favouring the view of the High Courts of Kerala, Karnataka, Rajathan, Gujarat, Hyderabad and Patna on the question of maintainability of an application under Section151 of the Code to set aside an order of rejection of a plaint under Order VII Rule 11. The writer also leans towards Atul Krishna (Supra) and Usharani Bhadra (Supra) and not Santosh Das (Supra) , though rendered by a Division Bench, of the Gauhati High Court. On reviewing the authorities from other High Courts and in view of the change of law and the necessity to cut down multiplicity of procedures a larger Bench of the Gauhati High Court may reconsider Santosh Das (Supra) on an appropriate occasion. This essay is ended with the hope that someday the question dealt with in this essay may fall directly before the Supreme Court so as to put a decisive end to the conflicting answers emanating from the High Courts.