

THE NATURE AND TRIAL OF MISCELLANEOUS PROCEEDINGS

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1. THE BEGINNING

Part XI of the Code of Civil Procedure (CPC hereinafter) 1908 with the heading "Miscellaneous" contains twenty-eight sections. Courts routinely exercise powers in the conduct of civil proceedings before it traceable to one or the other of the provisions contained in this part of CPC. But except for the provisions of section 151 CPC finding place in this part the Courts are hardly concerned about the niceties of these powers. Though not as frequently misconceived and misapplied by lawyers and Judges alike as section 151 is, section 141 occurring almost in the middle of part XI of the CPC during its existence in the Statute Book for nearly a century and a half has been as efficacious in inspiring divergent submissions and producing conflicting judicial opinions. Evolution of the law in section 141 CPC, the conflicting views on its interpretation, the attempt at resolution of the conflict and the ramifications of such attempts make interesting reading. This writing is the result of an amateur's dabbling in this interesting study of section 141 CPC which presently reads thus :-

" 141 MISCELLANEOUS PROCEEDINGS - THE PROCEDURE PROVIDED IN THIS CODE IN REGARD TO SUIT SHALL BE FOLLOWED, AS FAR AS IT CAN BE MADE APPLICABLE, IN ALL PROCEEDINGS IN ANY COURT OF CIVIL JURISDICTION.

EXPLANATION - IN THIS SECTION, THE EXPRESSION "PROCEEDINGS" INCLUDES PROCEEDINGS UNDER ORDER IX, BUT DOES NOT INCLUDE ANY PROCEEDING UNDER ARTICLE 226 OF THE CONSTITUTION."

2. The Legislative History

The CPC as a comprehensive legislation was enacted in five different years that is in 1859, 1861, 1877, 1882 and in 1908. These legislations will hereinafter be referred to as the CPC 1859, the CPC 1861, the CPC 1877, the CPC 1882 and the CPC 1908.

The CPC 1859 and 1861 were repealed by the CPC 1877 which in turn was repealed by CPC 1882. Finally the CPC 1908 became the law of Civil Procedure. Three major amendment made by the Parliament to CPC 1908 worth mentioning are by the CPC

(Amendment) Act 1976, the CPC (Amendment) Act 1999 and the CPC (Amendment) Act 2002. The latter two Amendment Acts came into force with effect from 01.07.2002 and at the present moment the law as to Civil Procedure is governed by the CPC 1908 as amended by the Amendment Act of 1999 and 2002.

In the CPC 1859 there was no provision like the provision of section 141 laying down the procedure for trial of Miscellaneous Proceedings. For the first time in section 38 of the CPC 1861 such a provision was introduced. The said provision came to be retained in section 647 of the CPC 1877 and the CPC 1882.

Section 647 of the CPC 1877 and the CPC 1882 read as follows: -

“The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction other than suits and appeals.”

To put an end to the difference of views among the High Courts as to whether a proceeding in execution is within section 647 as above an Explanation was added to the Section 647 by the CPC (Amendment) Act of 1892 reading as under :-

“Explanation - This section does not apply to applications for execution of decrees which are proceedings in suits.”

In the CPC 1908 section 647 was reenacted with the following modification. For the words “herein prescribed” in section 647 the words “ provided in this Code in regard to Suits” were substituted in section 141 in the CPC 1908. The words “ other than suits and appeals” and the Explanation added by the amendment of 1892 were deleted. The provision of section 141 so reenacted remained in the Statute Book till amended by the CPC (Amendment) Act 1976 whereby once again an Explanation that is the current one was inserted in the Section.

3. The Voice of Infallibility

Throughout its existence for over a century in the Statute Book in one form or other the word “Proceedings” in section 141 of the CPC has been a fertile source of conflicting voices from the Courts. Indeed the addition in 1892 then deletion in 1908 and again addition in different form of the Explanation to section 141 can be traced to a legislative attempt to resolve the conflicting views regarding the word “proceedings”, if not to define it, in the section.

On the 24th of November 1894 the Privy Council decided under CPC 1882 Thakur Prasad –Vs- Fakirullah 17 ALL 106 PC and observed as follows :-

“ Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits such as proceedings in probate, guardianships and so forth and do not include execution Their Lordships’ attention has been called to the recent Act VI of 1892 which would appear to have been passed in Order to avoid the disturbance of practice caused by the Allahabad rulings.....

Though Thakur Prasad (Supra) settled the meaning of the word “proceedings” in Section 647 (S. 141) of CPC by saying that proceedings “include original matters in the nature of suits” it spawned a fresh spate of conflicting voices from the High Courts mainly on the meaning, this time, of the word “original matters” in Thakur Prasad (Supra). Samples of controversy are (1) whether application under Order XXI Rules 89/90/91, 97 and 100 are original matters or are proceedings in execution (2) whether application under Order IX Rules 9 and 13 are “original matters. The reason is that the word “original” is capable of at least two shades of meanings. In its primary sense original would mean capable of coming into existence on its own and not derivative. A proceeding for probate or guardianship comes into existence on its own. They do not owe their birth to any other proceeding. They are original in its Primary Sense. In contrast a proceeding under the Rules 89/90 etc. of Order XXI and under Rules 9/13 of Order IX derive their birth from an execution proceeding and from a suit respectively. They are not original in the primary sense. Offshoots though these proceedings are they are independent of the execution proceeding in one case and of the suit in the other case. They are not stages of the proceeding or the suit from which they owe its birth. They are also original in this limited sense. Conflicting voices from the High Courts, therefore, rested on the interpretation of Thakur Prasad (Supra) centering round the meaning of the word “original” used there.

Whatever be the controversy Thakur Prasad (Supra) and its core “original matter” ruled for over seventy years nay even beyond.

4. The Voices from the Supreme Court

Two years after partition of India Aboobaker Abdul Rahman of Bombay was subjected to a proceeding first under the Administration of Evacuee Property Ordinance No.27 of 1949 and

subsequently under the Administration of Evacuee Property Act of 1950. During pendency of the appeal before the Custodian General Aboobaker Abdul Rahman died and the custodian issued notice to his son Ebrahim Aboobaker and daughter Hawabai Aboobaker as heirs and legal representatives of the deceased. Eventually the matter landed in the Supreme Court where the crucial question for decision arising before the Supreme Court was :

“Whether a person can be declared an evacuee after his death and whether the properties which vest in the heirs upon his death can be declared evacuee property?”

The Supreme Court answered the question in the negative on a detailed consideration of the provisions of the Administration of Evacuee Property Act 1950. What is relevant for the present purpose is the following observation: -

“The matter may be looked at from another point of view. Section 141, CPC which makes the procedure of the Court in regard to suits applicable in all proceedings in any Court of Civil Jurisdiction does not apply, as the Custodian is not a Court, though the proceedings held by him are of a quasi-judicial nature. The provisions of the Code relating to substitution are, therefore inapplicable and there is no other provision in the Act for the heirs to be substituted in place of the deceased so as to continue proceedings against them.”

This decision of the Supreme Court dated the 10th April 1953 can be read in Ebrahim Aboobaker and another Vs Tek Chand Dolwani A.I.R 1953 S.C. 298. Apart from emphasizing the primacy of the Act under which the proceeding is instituted as also the fact that the proceeding must be in Court this case does not say much about the nature of the proceeding.

On the 9th of January 1962 the Supreme Court had to consider the question whether after the arbitrator filed the Award the parties can compromise and the Court can pass a decree in terms of the Award as modified by the compromise. The Supreme Court took the cue from Hemant Kumari Devi Vs Midnapur Zamindari Co. A.I.R 1919 P.C. 79 and spoke thus: -

*“ The power to record such an agreement and to make it a part of the decree, whether by including it in the operative portion or in the schedule to the decree, in our opinion, will follow from the **Code** of Civil Procedure, by*

Section 41 of the Arbitration Act and also Section 141 of the Code.”

Thus in this decision reported in Munshi Ram Vs Banwari Lal A.I.R 1962 S.C. 903 the Supreme Court applied Order XXIII Rule 3 in a proceeding in the Court in the light of the provisions of Section 141 of CPC 1908. It may however be mentioned that the prescription in Hemant Kumari (Supra) as regards the form of the decree in a compromise has lost its validity because of change in law made by the CPC (Amendment) Act 1976. Since 01.02.1977 a compromise may go beyond the subject matter of the suit.

Then on the 27th of April 1962 was decided the case reported in Dokku Bhushayya Vs Katragadda Ramkrishnayya, A.I.R 1962 S.C. 1886 where the holding in Thakur Prasad (Supra) was reiterated and in the process some of the conflicts arising in the High Court in the interpretation of Thakur Prasad (Supra) were dispelled. A brief of the facts in that case is the following. A guardian of a minor filed an application in an execution case under Order XXI Rule 90 CPC to set aside a sale. Eventually the guardian filed a memo informing the Court that the matter had been adjusted with the auction purchaser and the application to set aside the sale is to be treated as withdrawn. The sale thereupon was confirmed. The minor Dokku Bhushayya on attaining majority filed a suit to declare the order confirming the sale as void and to direct the application for setting aside the sale to be heard on merits. The ground pleaded in the suit was that the guardian acted without the leave of the Court to withdraw the application under Order XXI Rule 90 and thus violated the mandatory provisions of Order XXXII Rule 7 and as such the confirmation of the sale on a compromise is invalid in toto. The question thus was whether an application under Order XXI Rule 90 was a proceeding within section 141 and as such would attract the provision of Order XXXII Rule 7. The Supreme Court held that execution proceedings were a continuation of the suit and the application for setting aside the sale is a proceeding in execution and as such Section 141 being applicable only to original proceedings is not applicable. Order XXXII rule 7 thus was held inapplicable too. In this case another dimension to the meaning of the word proceeding has been added. To be a proceeding attracting Section 141 the proceeding / application must not be a stage / continuation of a suit and must be original in that sense even though it may have its origin in a suit. This explains Thakur Prasad (Supra) but does not depart from its core.

Next on the 26th of February 1965 was decided Nawab Usman Ali Khan Vs Sagar Mal A.I.R 1965 S.C. 1798, where one of the contentions urged before the Supreme Court was whether the

appellant being a Ruler of a former Indian State can seek cover under the provisions of Section 86/87 B in a proceeding under Section 14/17 of the Arbitration Act by virtue of the provision of Section 141 of the CPC. The provisions of 86/87 B of the CPC say that a suit against a person like the appellant will be incompetent without the consent of the Central Govt. It was held that by virtue of section 141 only the procedure provided for suits in the CPC and not the substantive rights in favour of the appellant under Section 86/87 B can be applied in the proceedings under the Arbitration Act. Thus purely procedural part of the CPC and not the part creating substantive right can only apply in a miscellaneous Civil Proceedings under Section 141.

On the 5th of May 1966 the Supreme Court decided Ram Chandra Agarwal Vs State of Uttar Pradesh, A.I.R. 1966 S.C. 1888. What may have been implicit in some earlier Judgments has been made explicit in Ram Chandra (Supra). Without mentioning Thakur Prasad (Supra) the Supreme Court in this Judgment departed from Thakur Prasad (Supra). The following words are path breaking: -

“ Similarly recently this Court has held in Munshi Ram Vs Banwari Lal A.I.R. 1962 S.C. 903 that under S.41 of the Arbitration Act and also under S.141, C.P.C. it was competent to the Court before which an Award made by an arbitration tribunal is filed for passing a decree in terms thereof to permit parties to compromise their dispute under Order XXIII, Rule 3 C.P.C. Though there is no discussion, this Court has acted upon the view that the expression “Civil Proceeding” in S. 141 is not necessarily confined to an original. Proceeding like a suit or an application for appointment of a guardian etc. but it applies also to a proceeding which is not an original proceeding.” (Underlining supplied for emphasis)

In that case a reference to Civil Court under the provisions of Section 146 Cr. P.C. 1898 (now repealed) was transferred by the District Judge under section 24 of CPC. One of the contention urged before the Supreme Court was that since the reference under Section 146 Cr. P.C. arising out of a proceeding under Section 145 Cr.P.C. is not an original proceeding section 141 CPC as well as Section 24 CPC cannot be applied and the transfer and the subsequent decision on the reference were invalid. Rejecting the contention Supreme Court held that the expression civil proceeding is not necessarily confined to an original proceeding only. The Supreme Court also implied that the proceeding dealt with by the Supreme Court in Munshi Ram also not original

proceeding because it owed its birth to a proceeding before the Arbitrator.

On the 17th of September 1974 the Supreme Court was called upon to decide the extent of applicability of the provisions of the CPC to a petition under Article 226 of the Constitution of India in Babubhai Muljibhai Patel Vs Nandlal Khodidas Barot, A.I.R. 1974 S.C. 2105. In that connection the Supreme Court spoke thus: -

“Section 141 of the Code, to which reference has been made, makes it clear that provision of the code in regard to suits shall be followed in all proceedings in any Court of Civil Jurisdiction as far as it can be made applicable. The words “ as far as it can be made applicable” make it clear that, in applying the various provisions of the Code to proceedings other than those of suit the Court must take into account the nature of those proceedings and the relief sought.”

The Supreme Court further observed that the object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties and then concluded thus: - **“It is plain that if the procedure of a suit has also to be adhered to in the case of writ petition, the entire purpose of having a quick and inexpensive remedy will be defeated.”**

The implication of this judgment is that merely because writ petition is an original civil proceeding procedure in regard to suits cannot be applied to writ petitions. The main holding in that case however is that merely because disputed question of facts may be involved the High Court may not in all cases relegate an aggrieved party to a Civil Suit.

On the 6th February, 2001 the Supreme Court decided Union of India and others Vs Manager M/S Jain and Associates, A.I.R. 2001 S.C. 809. The crucial question before the Supreme Court was whether the provisions of Order IX Rule 13 of the CPC can be applied to a decree passed on an Award under Section 17 of the Arbitration Act, 1940 without any objections having been filed under section 30/33 of the Act. The Full Bench of the Calcutta High Court answered the question in the negative. The Supreme Court held thus :-

“ In our view, as discussed above, the provisions of CPC are specifically made applicable and there is no reason to hold that Order 9 Rule 13 would not be applicable in a case where Judgment is pronounced under Section 17 of the Act in the absence of objection application rendered by the party objecting to the Award. For all

purposes such decree is exparte for the party objecting to the Award.”

The Supreme Court considered the provisions of Section 141 of the CPC and Section 41 of the Act and further held :-

*“ Hence, in arbitration proceedings even if the suit is not filed the procedure provided in CPC is applicable and there is no reason to hold that as no party is described as plaintiff or defendant, Order 9 would not be applicable. **Even if the nomenclature of plaintiff or defendant is required to be taken into consideration, the party who seeks decree in terms of Award can be held to be plaintiff and the party who objected to such Award can be treated as defendant. If the contention that for application of CPC there must be suit, plaint, plaintiff, defendant or written statement is accepted, the provisions of Section 41 of the Act and Section 141 CPC would be nugatory.**” (Underlining supplied for emphasis)*

These voices from the Supreme Court as regards the nature of the Civil Proceedings within Section 141 CPC and the extent of the application of the Procedure in regard to suit in such proceedings may now be summarized. Firstly, these proceedings may be original in the primary sense that is originating by itself. Examples of this will be petitions for probate, guardianship etc. These are not derived from any other legal proceeding and are independent. Secondly, these proceedings may be original in the secondary sense that is they may be derived from another legal proceeding but are independent therefrom and are not a stage of another pending proceeding from which it owes its origin. Examples of these will be proceedings under Order IX CPC. These proceedings are born from a dismissal of a suit or from passing of an exparte decree in a suit. Born thus these proceedings are independent of the suit and are not a stage of the suit. Thirdly, only the procedural portion and not the portion enacting substantive rights in the procedure in regard to suits will apply to proceedings within Section 141 CPC. Fourthly, depending on the nature of the proceeding and the relief-sought whole of the procedure in regard to suits may not be applied or may be wholly inapplicable. Where it is wholly inapplicable, such a proceedings will not attract Section 141 CPC even though the proceeding is an original Civil Proceeding in a Civil Court. Examples will be a petition under Article 226 of the Constitution of India , Fifthly, the proceedings / application must be instituted in a Civil Court and not in a Tribunal or Authority setup under any Law. The amendment of CPC by the CPC (amendment) Act 1976 incorporating the explanation including

proceedings under Order IX CPC and excluding a proceeding under Article 226 of the Constitution of India in and from the expression “proceedings” in Section 141 CPC is a Legislative Confirmation of some of the judicial interpretation summarized above. However, it must be remembered that explanation in so far it relates to proceedings under Order IX is only inclusive that is it does not exhaust the categories of proceedings which are certainly varied. Applying the summary above apart from the two positives mentioned in the firstly and the secondly above a lot of negatives that is which are not proceedings within 141 CPC may be enumerated. All interlocutory applications such as application for injunction, attachment before Judgement, receiver substitution of legal representatives, amendment will not attract section 141 CPC for the simple reason that they are a stage in the pending suit. Execution applications and application in execution proceeding are out since 1894. Enumeration can only be inclusive and not exhaustive. One may now turn to the voices from the High Courts.

5. The Voices from the High Courts

There is no surprise that in the precedent bound legal system such as ours the High Courts would speak under the shadow of Thakur Prasad (Supra) whenever the question of interpreting Section 141 would arise in a case. Even so, there are stray instances in High Courts of Calcutta, Madras and Madhya Bharat where even before the Supreme Court decided the four cases mentioned in paragraph 4 of this writing in the sixties Thakur Prasad (Supra) was not followed. Surprise is that even after the decision of the Supreme Court in Munshi Ram (Supra), Dokku Bushayya (Supra) and Ram Chandra (Supra) many High Courts failed to shake off the shackles of Thakur Prasad (Supra). Reason for the overwhelming influence of Thakur Prasad (Supra) seems to be that the Supreme Court cases of the sixties except Dokku Bhushayya (Supra) referred to above did not say anything about Thakur Prasad (Supra). Only by implication the Thakur Prasad thesis of “proceedings” in Section 141 meaning original proceedings only was overthrown. Finally only through legislative compulsion of CPC (Amendment) Act 1976 the law emerged from the shadow of Thakur Prasad (Supra).

One area seems still to suffer. To illustrate this further one may take a closer look at the application under Section 115 of the CPC. There are several Full Bench decisions dealing with the question whether a proceeding under Section 115 CPC is a proceeding within Section 141 CPC. Applying Thakur Prasad (Supra) these Full Benches unanimously held that to a Civil Revisional application Section 141 CPC cannot be applied. AIR 1949 Lahore 186(FB) decided on 06.07.1948 explicitly relied on Thakur Prasad (Supra) and also added other reasons for holding that Section 141 CPC does not apply to petitions for revision. Next A.I.R 1953 Rajasthan 169 (FB) decided on 05.01.1953 without mentioning Thakur

Prasad (Supra) holds that Section 141 CPC does not apply to cases of Civil Revision “as it applies only to cases of proceedings of original nature”. The crucial question raised in these two cases were what would happen if the petitioner in a Civil Revision Petition dies. Because of the view that Section 141 CPC is inapplicable logically Order XXII CPC could not be applied and yet it was held that substitution of the legal representatives has to be made in the Civil Revision. Power to do so was assumed in exercise of some sort of inherent power to do justice. Section 151 CPC was not mentioned in these judgments. These two Judgment held that time for substitution is within the discretion of the Court as the Limitation Act did not prescribe any period for this. Article 181 of the Limitation Act 1908 was also not considered as a possible alternative. On 19.05.1972 came the Full Bench decision of the Allahabad High Court reported in A.I.R. 1972 Allahabad 504 where the same question arose. It appears that on the basis of the doctrine of stare deciss within the High Court on this question without any further discussion it was assumed that Order XXII CPC was not applicable. No mention at all of Section 141 CPC was made. Substitution in the case of a party dying in a Civil Revision was held to be under Section 151 CPC and Limitation for substitution was held to be three years under Article 137. It is surprising that Learned Counsels arguing the case did not place the Supreme Court Cases of 1962 and 1966 indicated in para 4 of this writing to persuade the Court to take a different view in the light of the said decisions of the Supreme Court. If the summary of the law indicated in para 4 is correct, Civil Revision cannot but be a civil proceeding within Section 141 CPC. A Civil Revision is born out of a case decided in a suit. It is not a stage in the suit. It is not an interlocutory application in a pending suit. Having been born as an offshoot it is independent of the suit. It is an original proceeding in the secondary sense. Dokku Bushayya (Supra) and Ram Chandra Agarwal (Supra) support the view that Civil Revision is a Civil proceeding within Section 141 CPC. If that be so procedure for substitution, instead of riding the unbridled horse of inherent power, can be found under XXII CPC.

Leaving aside the question of limitation for the present another area of conflict may be considered. Application for restoration of a suit dismissed for default or application for setting aside an exparte decree are the staple of this area of controversy. Are they proceedings within Section 141 CPC ? If one is to go by Thakur Prasad (Supra) they are not. Even before 01.02.1977 when the current explanation to Section 141 CPC came into force Madhya Pradesh High Court in a Full Bench decision A.I.R 1976 M.P. 136 dated 05.02.1976 applied Munshi Ram (Supra) and Ram Chandra Agarwal (Supra) from the Supreme Court and unequivocally held as Follows :- when an application under Order IX Rule 9 is dismissed for default, in view of Section 141 CPC an application lies for its restoration under Order IX Rule 9. No question of a party dying in the proceeding arose therefore question as regards substitution and limitation did not fall for answer in that case. But later a Division

Bench of the same High Court in a Judgment delivered on 02.08.1979, that is well after the current Explanation to Section 141CPC came into force making proceedings under Order IX proceedings within Section 141 CPC as a matter of law, had to answer such a question. The Judgment reported in A.I.R 1980 M.P. 12 seems to waver between saying that the penal provision in Order XXII that is abatement would not apply then saying that it would apply but after three years of the death under Article 137 of the Limitation Act. Interestingly the Judgment did not notice the Explanation to Section 141 CPC but seems to suggest that procedure in regard to suits to a proceeding under Order IX is to be applied to prevent an injustice. It seems that a mix up of substitution dealt by the CPC with limitation for substitution dealt by the Limitation Act has resulted in the contradiction in the Judgment.

Cases where the question of limitation for substitution of heirs upon death of a party in a proceeding within Section 141 CPC arises are rare. The reason is that lawyers and Judges alike assume that substitution had to be made within ninety days of the death and applications for substitution are normally filed within the said period by Lawyers making the task of the Judge easier. Similarly, if a proceeding is dismissed for default restoration application are also filed within thirty days of the date of dismissal. This important question of applicability or otherwise of Article 120 and Article 122 of the Limitation Act 1963 respectively dealing with substitution in and restoration of a proceeding has been discussed in great detail in three cases apart from the Full Bench of the Madhya Pradesh High Court already indicated. These cases are :-

1. *Sushila Bala Roy -Vs- Madhuri Chaudhury* (1986) 90 CWN 363.
2. *Mst. Nurnahar Bewa and another -Vs- Rabindra Nath Dev and others* A.I.R 1988 Calcutta 358 (SB)
3. *Lilawati Gupta and others -Vs- Union of India and another* 2004 (2) GLT 77.

The first and the second Judgment noted above of the Calcutta High Court are by the same Judge sitting Singly in the first case and presiding over the Special Bench of three Judges in the second case. The third Judgment is by a Single Judge of the Gauhati High Court and having been delivered on 31.01.2004 is the latest, on the question, known to the Writer.

In *Sushila Bala Roy* (Supra) facts necessary for the present purpose are these. *Madhuri Choudhury* as plaintiff obtained an *exparte* decree against *Sushila Bala Roy* and *Kumudini Debya* as defendants, whereupon they filed an application under Order IX Rule 13 to set aside the *exparte* decree. During pendency of the proceeding under Order IX Rule 13 *Kumudini* died. An application under Order XXII Rule 9 to set aside the abatement of the proceeding and to substitute the legal representatives was filed in the proceeding under Order IX Rule 13 within one year of the date of death of *Kumudini* but well beyond the

ninety and sixty day under Article 120 and Article 121 of the Limitation Act.

It was contended before the High Court (1) that the Limitation Act has to be strictly construed and the word "defendant" in the relevant Article cannot be expanded to include a "notional" defendant like heirs of Kumudini in the proceeding and (2) that the Division Bench Judgment in Manindra Kumar Bose -Vs- Santi Rani Biswas A.I.R. 1951 Calcutta 518 held as much and applied the three year Limitation of the residuary Article 181 (present Article 137). The Single Bench felt bound by the Division Bench and accepted both the above contentions. It needs however to be pointed out that while the first contention is well founded on Manindra Kumar Bose (Supra) the second contention is not correct. In Manindra Kumar Bose (Supra) the death of a legal representative sought to be substituted during the pendency of the petition for substitution triggered another petition for substitution. It was held that this second petition is really a petition for amendment of the original petition for substitution and for such a petition of amendment the limitation is governed by Article 181 corresponding to article 137 of the Limitation Act 1963.

Two points falling for determination before the Special Bench of three Judges in Nurnahar Bewa (Supra) were (1) the maintainability of an application under Order IX Rule 4 or 9 to restore an application under Order IX Rule 4, 9 or 13 dismissed for default and (2) if maintainable the limitation for such an application for restoration.

To determine the maintainability or otherwise the entire gamut of the law from Thakur Prasad (Supra), Ram Chandra (Supra) to the CPC (Amendment) Act of 1976 was considered and an application to restore a proceeding under Order IX dismissed for default was held maintainable. On the second point reliance was placed again on Manindra Kumar Bose (Supra) and the basis of the first contention in Manindra Kumar Bose (Supra) that is the requirement of strict construction of the law of limitation was traced to a 1873 decision of the Privy Council reported in Luchmee Buxsh Roy -Vs- Ranjit Ram Pandey (1873) 20 Suth WR 375. Answer to the question of limitation, in said circumstances, had to be that the thirty day limitation under Article 122 does not apply and only the three year limitation under the residuary Article 137 governs the matter of restoration of a proceeding dismissed for default.

The most noteworthy feature of this case is that for the first time since 13.02.1951 when Manindra Kumar Bose (Supra) was decided until 12.05.1988 the date of Nurnahar (Supra) the prejudicial and irrational nature of such an interpretation on the question of limitation was noticed by the Special Bench but the Special Bench felt unable to shake off the shackles of Luchmee Buxsh Roy (Supra). Thus what Thakur Prasad (Supra) did regarding the meaning of the provision of Section 141 CPC for over seventy years Luchmee Buxsh Roy (Supra) is

continuing in the same way for over fifty years till date as regards the interpretation of an offshoot of the same provision.

Lilawati (Supra) the latest case on the question at hand arose out of a petition under Section 30 of the Arbitration Act 1940. The petitioner Sri K.L. Gupta died during pendency of the application for setting aside the award of the Arbitrator. Lilawati Gupta the widow of the petitioner in the main proceeding under Section 30/33 of the Arbitration Act and her sons and daughters filed an application for substitution of their names as legal representative of Sri K.L. Gupta deceased. Since this application for substitution was well beyond the 90 days period of the date and as such is in breach of the provision of Article 120 of the Limitation Act the original proceeding was dismissed on abatement after rejecting the petition for substitution. On these facts amongst others the law for the present purpose was summarized thus at para 29 of the Judgment :-

“ What follows from the above discussion is that while for a suit or an appeal, the limitation period for making an application for substitution is three months from the date, when the right to make such application accrues, the period of limitation for making an application for substitution in a Civil Miscellaneous Proceedings shall be, in terms of Article 137, three years from the date, when the right to apply for substitution accrues.”

Thus in these cases the two High Courts reached the same conclusion on the question of limitation through the same route of strict construction of the law of limitation. The enormity of this conclusion can be best illustrated with reference to a suit. If in a suit between A the plaintiff and B the defendant either of them dies the respective heirs and legal representatives of the parties have to be substituted within ninety days of the death under Article 120 of the Limitation Act. If, however A dies after instituting a proceeding under Order IX Rule 9 to set aside a dismissal for default suffered in the suit by him his heirs gets three years under Article 137 of the Limitation Act to get substituted and set aside the dismissal. If B suffers an exparte decree and initiates a proceeding under Order IX Rule 13 and then dies his heirs get three years to get substituted and continue the proceeding and get the exparte decree set aside whereas B himself gets only thirty days to initiate the proceeding to set aside the exparte decree within thirty days under Article 123. Thus the suit or the resultant exparte decree may remain pending without finality for three years as a matter of law. These irrational, inequitable and prejudicial consequence flows directly from the strict that is literal construction of the relevant Articles of the Limitation Act. The Special Bench of the Calcutta High Court as indicated earlier was alive to these consequences but felt powerless to do anything in the matter in the teeth of Luchmee Buxsh Roy (Supra) and the Rule of literal construction and

had suggested the Legislative way of amendments of the relevant articles. Until the Legislature amends cannot the Judiciary find a way to remedy the unjust and absurd situation?

6. The Signposts on the Way

(a) In the three cases mentioned in para 5 of this writing the High Courts adopted the primary rule of literal or strict construction in reaching the conclusion it did as regards the question of limitation arising there. The High Courts, it appears, were not persuaded to consider the limits of strict construction. Statutory limits of strict construction are imposed by the Limitation Act 1908/1963 itself. The word "plaintiff" and "defendant" have been defined by the inclusive definition in Section 2 of both the above Acts. The definitions have been further expanded in the Limitation Act 1963. These definitions wherever necessary and applicable have to be read into the Articles of the Limitation Act. These definitions in substance include the predecessors of the plaintiff and the defendant but do not include their successors. Even so, in the matter of substitution of legal representative of a party to a proceeding the construction may lead, particularly where the parties are governed by Mohammedan law, to a situation where for one legal representative the limitation may be ninety days because he is a plaintiff or a defendant within the inclusive definition and for another legal representative it will be three years as held by the three cases because he cannot be accommodated within the first and the third column of Article 120. Thus though the definitions do not solve the problem they on the principle of strict construction without regard to the consequences, may lead to further complications.

(b) Luchmee Buxsh Roy (Supra) decided on the 3rd July 1873 relates to interpretation of Section 1 clause 15 of the Limitation Act 1859. In 1859, like the CPC, for the first time a comprehensive law of limitation was enacted in India. There were no Articles and no columns in Articles to interpret in that Act unlike the Limitation Act 1963. The point arising for decision before the Privy Council there was whether a Written Statement not signed by the party but signed and filed by a Mooktear on the authority of a Mooktearnamah signed by the party can be interpreted to be an acknowledgement in writing signed by the party within Section 1 clause 15 of the Limitation Act 1859. A plea for equitable construction was urged on those facts and was rebuffed by the Privy Council. No question of equitable construction arose with regard to period of limitation or the starting point of limitation. The distinction from the facts of the problem at hand and the facts

there is obvious. On top of it that was a case decided in the Nineteenth Century during the heyday of the rule of literal construction. Perhaps *M/S Jain and Associates (Supra)* provides a brighter signpost on the way to a construction with regard to consequences.

- (c) It may be gathered from the statement of object and reasons of the Limitation Act 1908 that legislation on limitation is necessitated by recommendations of amendments to the Code of Civil Procedure. Limitation Act 1963 was based on the recommendation of the Law Commission in its third Report dated 27th of July 1956 when *Thakur Prasad (Supra)* ruled. The time for amendment suggested by the Special Bench in *Nurnahar (Supra)* passed in 1976 when Section 141 CPC as at present came into existence through CPC (Amendment Act) 1976. But one can read cases referred to in *Max Well* on the interpretation of statutes twelfth edition, 1976 and in principles of statutory interpretation by Justice G.P. Singh sixth Edition 1996 where the meaning of words were extended to new things not in existence at the time of the legislation to sub-serve the broad object of the legislation and to avoid absurd consequences. This was done in those cases anticipating the intention of legislature, which was kept at the core of the interpretative process.
- (d) In paragraph 5 of this writing it has been shown that an application for revision under Section 115 CPC would be a proceeding within Section 141 CPC. For the same reason an application for review will also be a proceeding within Section 141 CPC. These two applications have been specifically mentioned along with a suit or appeal in Article 122 of the Limitation Act. It cannot be sound reasoning at all to say that for a proceeding under Order IX Rule 9 dismissed for default the period of limitation to restore it by filing an application under Order IX Rule 9 is three years but to restore an application for review or revision dismissed for default it is thirty days. This would be the result if *Nurnahar (Supra)* is to rule the matter. The maxim *Expressio unius exclusio alterius* is not available to say that since two proceedings have been expressly mentioned other proceedings are automatically excluded because it may be applied to several existing categories and categories like proceedings under Order IX Rule 9 came into existence only in 1966 through interpretation. At any rate the maxim itself had been described as “a valuable servant but a dangerous master to follow in the construction of statutes or documents.” This is from *Maxwell on the Interpretation of Statutes* twelfth edition.

(e) In AIR 1997 Supreme Court 2440 the Supreme Court dealing with a special leave petition where the petitioner died during the pendency of the petition applied ninety days limitation Under Article 120 and not three years limitation under the residuary Article even though death there was not of any plaintiff, defendant, appellant or respondent, the categories mentioned in Article 120. It may be mentioned here that under Order XVI Rule II of the Supreme Court Rules 1966 only after grant of special leave the petition is registered as an appeal and the petitioner becomes an appellant and the Rules under Order XV of the Supreme Court Rules 1966 become applicable.

(f) The interpretation in the three cases flies in the face of the constitutional requirement of speedy trial.

The writer has only “ stirred these points, which wiser heads may in time settle”

7. The END

No better end to this writing can be thought of than the following from Lord Denning’s delightful Book, “ The Discipline of Law” at Page 15 :

“ A voice from the past –

.....
..... I have read that passage at large because I wish to repudiate it. It sounds to me like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach”..... In all cases now in the interpretation of statutes we adopt such a construction as will “promote the general legislative purpose” underlying the provision. It is no longer necessary for the judges to wring their hands and say ; “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust

situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

Until the Legislature intervenes in the long run or the Judiciary does a Denning in the matter, hopefully in the shorter run, the kink in the law regarding limitation indicated in this Writing will continue.