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sought for must be granted.

We therefore allow the appeal, set aside the order of labour court and grant the application of the appellant-bank dated December 27, 1961 and approve the proposed action. In the circumstances we pass no order as to costs.

Appeal allowed.

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August 14

MAJOR S. S. KHANNA

v.

BRIG. F.J. DILLON

(A.K. SARKAR, M. HIDAYATULLAH AND J.C. SHAH, JJ.)

Civil Procedure—Revisional jurisdiction of High Court—Meaning of "case" in s. 115 of the Code of Civil Procedure—Separate trial of issues of law and issues of fact—Code of Civil Procedure, 1908 (*Act* 5 *of* 1908), *s.* 115, *O.* 14, *r.* 2.

The appellant and the respondent entered into a partnership to do business as Contruction Engineers but in February 1956 they agreed to dissolve it. It was agreed that the respondent was to take over all the assets and liabilities of the partnership and keep the appellant indemnified from all liability. Later on, a suit was filed by the appellant for dissolution of partnership and rendition of accounts. That suit ended in a compromise which provided that all realisations of the old partnership would be converted into cash and placed in joint account in the name of the two partners before being paid towards the liabilities of the partnership.

The respondent filed two suits against the appellant for recovery of certain amounts on the allegation that the appellant had taken that amount as loan. The defence of the appellant was that as the money was still in the joint name of the two partners and he had taken the money from the joint account, suits between the two partners were not maintainable.

In trying preliminary issues raised in the suits the trial Judge held that the suits were not maintainable, but instead of dismissing the suits there and then, he set them down for a future date. Against the findings of the trial Judge, revision petitions were filed in the High Court under s. 115 of the Code of Civil Procedure. The High Court set aside the orders passed by the Trial Judge and held that the suits could not be held as not maintainable. The appellant appealed by special leave.

The appellant challenged the order of the High Court on the ground that the order of the trial Judge did not amount to

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"a case which has been decided" within the meaning of s. 115 of Code of Civil Procedure, that the decrees which may be passed in the suits being subject to appeal to the High Court, the power of the High Court was by the express terms of s. 115 excluded, and that the orders of the trial Judge did not fall within any of the three clauses (a), (b) and (c) of s. 115. Rejecting the contentions of the appellant,

Held :The High Court was right in setting aside the order passed by the trial Judge and in holding that without investigation as to the respective claims made by the parties by their pleadings on the matters in dispute, the suits could not be held as not maintainable. The decision of the trial Judge affected the rights and obligations of the parties directly. It was the decision on an issue relating to the jurisdiction of the court to entertain the suit filed by the respondent. The decision attracted cl. (c) of s. 115 of the Code of Civil Procedure.

Per *Sarkar and Shah, JJ.*—The expression "case" is a word of comprehensive import. It includes civil proceedings other than suits and is not restricted by anything contained in s. 115 to the entirety of the proceedings in a civil court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding would be to impose an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice.

The High Court is not obliged to exercise its jurisdiction when a case is decided by a subordinate court and the conditions in cls. (a), (b) or (c) of s. 115 are satisfied. Exercise of the jurisdiction is discretionary and the High Court is not bound to interfere merely because the conditions are satisfied. The interlocutory character of the order, existence of another remedy to the aggrieved party by way of appeal from the ultimate order or decree in the proceeding or by a suit, and the general equities of the case being served by the order made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction.

Revisional jurisdiction of the High Court may be exercised irrespective of the question whether an appeal lies thereto from the ultimate decree or order passed in the suit or not. The expression "in which no appeal lies thereto" does not mean that it excludes the exercise of the revisional jurisdiction when an appeal may be competent to the High Court from the final order. The use of the word "in" is not intended to distinguish orders passed in proceedings not subject to appeal from the final adjudication, from those from which no appeal lies. If an appeal lies against the adjudication directly to the High Court or to another court from the decision of which an apeal lies to the High Court,

it has no power to exercise its revisional jurisdiction against the adjudication, but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded.

Under Or. 14, r. 2, where issues both of law and fact arise in the same suit and the court is of the opinion that the case or part thereof could be disposed of on the issues of law only, it shall try those issues first, and for that purpose, may, if it thinks fit, postpone settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code of Civil Procedure confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally, all issues in the suit should be tried by the Court; not to do so especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit.

Per *Hidayatullah, J.*—A decision of the subordinate Court is amenable to the revisional jurisdiction of the High Court unless that jurisdiction is clearly barred by a special law or an appeal lies therefrom. The expression "in which no appeal lies" does not speak of the appeal "under the Code". The expression is a general one and applies to every decision of a court subordinate to the High Court in which no appeal lies, whether under the Code or otherwise.

The decision of the trial Judge was erroneous because he denied himself the jurisdiction of holding that the suits were not maintainable. The fact that he did not dismiss the suits and did not draw up decrees for that purpose, was itself an exercise of jurisdiction with material irregularity, if not also illegality. In so far as the parties were concerned, the suits were no longer live suits as the decision had put an end to them.

The word "case" in s. 115 does not mean a concluded suit or proceeding but each decision which terminates a part of the controversy involving a matter of jurisdiction. Where no question of jurisdiction is involved, the court's decision cannot be impugned under s. 115 because the court has jurisdiction to decide wrongly as well as rightly.

Balakrishna Udayar v. *Vasudeva Aiyar,* L.R. 44 I.A. 261, *Ryots of Garabandho* v. *Zamindar of Parlakimedi,* L.R. 70 I.A. 129; *Budhulal* v. *Mewa Ram,* I.L.R. 43, All. 564 (F.B.); *Purohit Swarupnaraian* v. *Gopinath,* I.L.R. (1933) Raj. 483(F.B.), *Pyarchand* v. *Dungar Singh,* I.L.R. (1953) Raj. 608 and *Rex* v. *Nat Bell Liquors Ltd.,* [1922] 2 A.C. 128, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 320 of 1963.

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Major S. S. Khanna v. *Brig. F. J. Dillon*

Appeal by special leave from the judgment and order dated October 26, 1962, of the Punjab High Court at Delhi in Civil Revision Nos. 525 and 526-D of 1960.

N.C. Chatterjee, M.K. Ramamurthy, R.K. Garg, S.C. Agarwal and *D.P. Singh,* for the appellant (in both the appeals).

A.V. Viswanatha Sastri, Bakshi Shiv Charan Singh and *S.N. Anand,* for the respondent (in both the appeals).

August 14, 1963. The Judgment of A.K. Sarkar and J.C. Shah, JJ., was delivered by Shah, J. M. Hidayatullah, J. delivered a separate Opinion.

Shah, J.

SHAH, J.—Brig. F.J. Dillon and Major S.S. Khanna—hereinafter called 'Dillon' and 'Khanna' respectively—carried on business in partnership as Construction Engineers. They agreed to dissolve the partnership with effect from February 15, 1956. By the deed of dissolution it was agreed that Dillon was to take over all the assets and properties of the partnership as absolute owner and to pay all the debts and to discharge all the liabilities of the partnership and to keep Khanna indemnified against all demands and claims in relation to the partnership business.

But the deed did not terminate the disputes between the partners, and Khanna commenced an action against Dillon in the Court of the Subordinate Judge, 1st Class, Delhi "for dissolution of the partnership and rendition of accounts". On January 12, 1957, the parties arrived at a compromise (which was incorporated into a decree of the Court) confirming the earlier dissolution of the partnership, subject to a scheme of winding up, under which all outstandings realised from the debtors of the firm and the sale proceeds of certain assets were to go into a banking account to be opened in the joint names of Dillon and Khanna and were to be applied in the first instance to meet the liabilities of the dissolved firm, and the balance in that joint account was to belong to Dillon. Some outstandings of the dissolved partnership were collected by Dillon and were deposited in the joint account of Dillon and Khanna.

Dillon filed a suit in the Court of the Subordinate Judge at Delhi for a decree for Rs. 54,250.00 with future

interest alleging that between the months of May 1957 and November 1957 he had, at the request of Khanna, advanced in three sums an aggregate amount of Rs. 46,000.00 as short-term loans which Khanna had promised to but had failed to repay. Khanna pleaded that he did not borrow any loans from Dillon, and that the amounts claimed in the action being advanced, even on the plea of Dillon. out of joint funds belonging to the two partners, action for recovery of those amounts was in law not maintainable.

Out of the issues raised by the Trial Court in the suit, the third issue *viz* :

> "Whether this suit is not maintainable and the plaintiff is not entitled to institute this suit, as alleged in paras Nos. 15, 16, 17, 18 of the written statement",

was at the request of Khanna tried as a preliminray issue, and it was held that the suit being by a partner against another partner of a dissolved firm which was in the process of winding up, and in respect of advances from the partnership assets, was not maintainable.

The High Court of Punjab in exercise of its revisional jurisdiction set aside the order, and directed that the suit be heard and disposed of according to law.

With special leave this appeal is preferred by Khanna.

The jurisdiction of the High Court to set aside the order in exercise of the power under s. 115 Code of Civil Procedure is challenged by Khanna on three grounds :—

(i) that the order did not amount to "a case which has been decided" within the meaning of s. 115 Code of Civil Procedure ;

(ii) that the decree which may be passed in the suit being subject to appeal to the High Court, the power of the High Court was by the express terms of s. 115 excluded ; and

(iii) that the order did not fall within any of the three clauses (a), (b) and (c) of s. 115.

The validity of the argument turns upon the true meaning of s. 115 Code of Civil Procedure, which provides :

> "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

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(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

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

the High Court may make such order in the case as it thinks fit."

The section consists of two parts: the first, prescribes the conditions in which jurisdiction of the High Court arises *i.e.* there is a case decided by a subordinate Court in which no appeal lies to the High Court; the second, sets out the circumstances in which the jurisdiction may be exercised. But the power of the High Court is exercisable in respect of "any case which has been decided". The expression "case" is not defined in the Code, nor in the General Clauses Act. It is undoubtedly not restricted to a litigation in the nature of a suit in a Civil Court: *Balakrishna Udayar* v. *Vasudeva Aiyar*(1); it includes a proceeding in a Civil Court in which the jurisdiction of the Court is invoked for the determination of some claim or right legally enforceable. On the question whether an order of a Court which does not finally dispose of the suit or proceeding amount to a "case which has been decided", there has arisen a serious conflict of opinion in the High Courts in India, and the question has not been directly considered by this Court. One view which is accepted by a majority of the High Courts is that the expression "case" includes an interlocutory proceeding relating to the rights and obligations of the parties, and the expression "record of any case" includes so much of the proceeding as relates to the order disposing of the interlocutory proceeding. The High Court has therefore power to rectify an order of a Subordinate Court at any stage of a suit or proceeding even if there be another remedy open to the party aggrieved *i.e.* by reserving his right to file an appeal against the ultimate decision, and making the illegality in the order a ground of that appeal. The other view is that the expression "case" does not include an issue or a part of a suit or proceeding and therefore the order on an issue or a part of

(1) L.R. 44 I.A. 261.

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a suit or proceeding is not a "case which has been decided", and the High Court has no power in exercise of its revisional jurisdiction, to correct an error in an interlocutory order.

An analysis of the cases decided by the High Courts—their number is legion—would serve no useful purpose. In every High Court from time to time opinion has fluctuated. The meaning of the expression "case" must be sought in the nature of the jurisdiction conferred by s. 115, and the purpose for which the High Courts were invested with it.

By their constitution the High Courts of Calcutta, Madras and Bombay were within Presidency towns, as successors to the respective Supreme Courts competent to issue writs of *certiorari, mandamus* and *prohibition.* This was so because the jurisdiction of the Courts of King's Bench and Chancery in England to issue those writs was conferred upon the three Supreme Courts. But exercise of this jurisdiction which was established by Charters of the British Crown, was (except as to British subjects and servants of the Company) restricted. The jurisdiction did not ordinarily extend to the territories beyond the Presidency towns: *Ryots of Garabandho* v. *Zamindar of Parlakimedi*(1). The appellate Courts, called the *Sudder Adalats,* which exercised appellate powers over the East India Company's Courts in the *mofussil* of the three Presidencies were not the Courts of the King of England: they were the creatures of Regulations, and did not administer the law of England. These Courts had no power to issue any of the prerogative writs—except probably the writ of *habeas corpus.* But the power to superintend the exercise of jurisdiction by the *mofussil* Courts was found essential to the proper functioning of the *Sudder* Courts, and the *Sudder* Courts were accordingly invested by express legislative enactments with authority to rectify orders of the *mofussil* Courts subordinate thereto. Bombay Regulation II of 1827 of Ch. 1 s. 5(2) authorised the *Sudder* Court at Bombay to call for the proceedings of any subordinate civil court and to issue such orders thereon as the case may require. No Regulation was however enacted elsewhere conferring revisional jurisdic-

(1) L.R. 70 I.A. 129.

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tion upon the Supreme Court or the *Sudder* Court in respect of adjudication by subordinate courts. The Code of 1859 contained no provision for the exercise of revisional powers by the *Sudder* Courts, but by s. 35 of Act XXIII of 1861 the *Sudder* Courts were invested with the power to call for the record of any case decided in appeal by the subordinate courts and in which no further appeal lay, when it appeared that a subordinate court had exercised jurisdiction not vested in it by law. With the setting up of the High Courts in the Presidency towns of Calcutta, Madras and Bombay power of superintendence was conferred by s. 15 by the Charter Act (24 & 25 Vict. Ch. 104) upon the High Courts over subordinate Courts. By s. 622 of the Code of 1877 revisional jurisdiction of the High Court was defined, and made exercisable in the conditions set out in cls. (a) & (b) of the present s. 115. Clause (c) was added by the Amending Act XII of 1879. This jurisdiction was exercisable *suo motu* as well as on application to the High Court. It was conferred in the widest terms. The jurisdiction was supervisory and visitorial and was complementary to the powers conferred by cl. 15 of the Charter Act, 1861, and the subsequent Constitution Acts, and was conceived in the interest of maintaining effective control over Courts subordinate to the High Courts. It had to be so conferred because in the historical evolution of the powers of the diverse High Courts supervisory jurisdiction to issue writs of *certiorari*, and prohibition could not be effectively made in respect of the *mofussil* Courts.

The necessity arising out of the peculiar circumstances to invest the High Courts with the powers to rectify errors committed by subordinate Courts in the exercise of their jurisdiction and the consequent investiture of power are indicative of the extent of that power. The power being one of superintendence and visitorial and vested because the supervisory jurisdiction to issue writs of *certiorari* and prohibition over subordinate Courts in the *mofussil* could not be exercised, it would be reasonable to hold that it was intended in the absence of any overriding reasons disclosed by the statute (and none such appears on an examination of the statute) to be analogous with the jurisdiction to issue the high prerogative writs and the

power of supervision under the Charter Act and its successor provisions in the Constitution Acts.

The expression "case" is a word of comprehensive import: it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression "case" as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in perpetration of gross injustice.

It may be observed that the majority view of the High Court of Allahabad in *Buddhulal* v. *Mewa Ram*(1) founded upon the supposition that even though the word "case" has a wide signification the jurisdiction of the High Court can only be invoked from an order in a suit, where the suit and not a part of it is decided, proceeded upon the fallacy that because the expression "case" includes a suit, in defining the limits of the jurisdiction conferred upon the High Court the expression "suit" should be substituted in the section when the order sought to be revised is an order passed in a suit. The expression "case" includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for equating it with a suit alone.

That is not to say that the High Court is obliged to exercise its jurisdiction when a case is decided by a subordinate Court and the conditions in cls. (a), (b) or (c) are satisfied. Exercise of the jurisdiction is discretionary: the High Court is not bound to interfere merely because the conditions are satisfied. The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal from the ultimate order of decree in the proceeding or by a suit, and the general equities of the case being served by the order made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exer-

(1) I.L.R. 43 All. 564 (F.B.)

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cise its jurisdiction.

The Subordinate Judge in the present case held by an interlocutory order that the suit filed by Dillon for recovery of the amounts advanced to Khanna was not maintainable. That was manifestly a decision having a direct bearing on the rights of Dillon to a decree for recovery of the loan alleged to have been advanced by him, which he says Khanna agreed to repay, and if the expression "case" includes a part of the case, the order of the Subordinate Judge must be regarded as a "case which has been decided".

The next question which falls to be determined is whether the High Court has power to set aside an order which does not finally dispose of the suit, and when from the decree or from the final order passed in the proceeding an appeal is competent. Relying upon the use of the expression "in which no appeal lies thereto" in s. 115 Code of Civil Procedure it was urged that the High Court's jurisdiction to entertain a petition in revision could be exercised only if no appeal lay from the final order passed in the proceeding. But once it is granted that the expression "case" includes a part of a case, there is no escape from the conclusion that revisional jurisdiction of the High Court may be exercised irrespective of the question whether appeal lies from the ultimate decree or order passed in the suit. Any other view would impute to the Legislature an intention to restrict the exercise of this salutary jurisdiction to those comparatively unimportant suits and proceedings in which the appellate jurisdiction of the High Courts is excluded for reasons of public policy. Nor is the expression "in which no appeal lies thereto" susceptible of the interpretation that it excludes the exercise of the revisional jurisdiction when an appeal may be competent from the final order. The use of the word "in" is not intended to distinguish orders passed in proceedings not subject to appeal from the final adjudication, from those from which no appeal lies. If an appeal lies against the adjudication directly to the High Court, or to another Court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court directly or indirectly, exer-

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cise of the revisional jurisdiction by the High Court would not be deemed excluded. The judgment of the Rajasthan High Court in *Purohit Swarupnarain* v. *Gopinath and another*(1) on which strong reliance was placed by the appellant does not, in our judgment, correctly interpret s. 115 of the Code. In that case the Court relying upon an earlier judgment of a Division Bench *Pyarchand and others* v. *Dungar Singh*(2) held that "where it is open to a party to raise a ground of appeal under s. 105 of the Code from the final decree or order, with respect to any order which has been passed during the pendency of a suit, it should be held that an appeal in that case lies to the High Court within the meaning of the term 'in which no appeal lies thereto' appearing in s. 115 Civil Procedure Code", and the exercise of revisional jurisdiction of the High Court is excluded. It was observed in that case that the use of the word "in" instead of the word "from" in s. 115 Code of Civil Procedure indicated an intention that if the order in question was one which could come for consideration before the High Court in any form in an appeal that may reach the High Court in the suit or proceeding in which the order was passed, the High Court has no revisional jurisdiction. But the argument is wholly inconclusive, if it be granted that the word "case" includes a part of case. Again on the footing that the use of the expression "in" and not "from" indicates some discernible legislative intent, it must be remembered that the word "in" has several meanings—as a preposition and as an adverb. The use of the preposition "from"—in the sense of a source or point of commencement or distinction—would not in the context of the clause, yield to greater clarity, because the relation established thereby would be between "case" and appeal, and not "decided" and appeal. If the use of the expression "in" is inappropriate to express the meaning that the orders not appealable to the High Court were subject to the revisional jurisdiction, the substitution of "from" for "in" does not conduce to greater lucidity.

In considering whether the revisional jurisdiction of

(1) I.L.R. [1953] Raj. 483 F.B.
(2) I.L.R. [1953] Raj. 608.

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the High Court was intended to cover decisions, which did not dispose of the suit or proceeding, possibility of delay arising in the disposal of some cases bacause of investigation commenced by the High Court is not, in our judgment, a sound ground for presuming that the jurisdiction was to be limited to those matters which were finally disposed of.

For the effective exercise of its superintending and visitorial powers, revisional jurisdiction is conferred upon the High Court and it would be putting an unwarranted restriction upon the jurisdiction of the High Court to restrict it to those cases only where no appeal would reach the High Court from the final order passed in the proceeding. We are therefore unable to agree with the view which prevailed with the Rajasthan High Court that there is a restriction placed upon the power of the High Court in the exercise of the revisional jurisdiction as would limit the exercise of that power only to cases where no appeal is competent from the final order passed in the suit or proceeding.

The third question may now be dealt with. By the order passed by the Court of First Instance on the third issue it was held that the suit filed by Dillon was not maintainable. That decision, in our judgment, affected the rights and obligations of the parties directly. It was a decision on an issue relating to the jurisdiction of the Court to entertain the suit filed by Dillon. In any event the decision of the Court clearly attracted cl. (c) of s. 115 Code of Civil Procedure, for the Court in deciding that "the suit was not maintainable as alleged in paragraphs 15, 16, 17 and 18 of the written statement" purported to decide what in substance was an issue of fact without a trial of the suit on evidence. Dillon alleged in his plaint that at the request of Khanna, he had advanced diverse loans (from the funds lying in deposit in the joint account) and that the latter had agreed to repay the loans. The cause of action for the suit was therefore the loan advanced in consideration of a promise to repay the amount of the loan, and failure to repay the loan. By his written statement Khanna had pleaded in paragraph 15 that Dillon had not advanced any money to him and that Dillon had not claimed the amount for himself and there-

fore he was not entitled to file a suit for recovery of the amounts. By paragraph 16 he pleaded that Dillon having admitted in the plaint that the amounts in suit were to be paid back to the joint account he was not entitled to file the suit. By paragraph 17 it was pleaded that a suit by one joint owner against the other joint owner for recovery of the Joint Fund or any item of the joint fund was not maintainable and by paragraph 18 he pleaded that Dillon could not institute a suit against him because the amount was not repayable. All these contentions raised substantial issues of fact which had to be decided on evidence, and Dillon could not be non-suited on the assumption that the pleas raised were correct. At the threshold of the trial two problems had to be faced :

(1) Whether in a suit to enforce an agreement *to repay* an amount advanced in consideration of a promise to repay the same, the question as to the ownership of the fund out of which the amount was advanced is material ; and

(2) if the answer is in the affirmative, whether the fund in fact belonged jointly to Dillon and Khanna.

The Judge of the Court of First Instance unfortunately assumed without a trial an affirmative answer to both these questions. Under O. 14 r. 2, Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court ; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lop-sided trial of the suit.

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We are at this stage not expressing any opinion on the question whether the allegations made by Dillon and Khanna are true; we are only concerned to point out that what was regarded as an issue of law as to maintainability of the suit could only be determined after several questions of fact in dispute between the parties were determined. In proceeding to decide the third issue merely on the pleadings and on the assumption that the allegations made by the defendant in his written statement were true and those made by the plaintiff were not true, and on that footing treating the joint account as of the common ownership of the two partners, the trial Judge acted illegally and with material irregularity in the exercise of his jurisdiction.

The High Court was therefore right in setting aside the order passed by the Trial Court and in holding that without investigation as to the respective claims made by the parties by their pleadings on the matters in dispute the suit could not be held not maintainable.

The appeal therefore fails and is dismissed with costs. There will be one hearing fee for this appeal and also C.A. 321 of 1963.

Hidayatullah J.

HIDAYATULLAH J.—I have had the advantage of persuing the judgment of my learned brother Shah, J. I agree with him that these appeals should be dismissed with costs, but I propose to give my reasons in brief in a separate judgment. The facts have been stated in detail by my learned brother and I need not repeat them. For the purpose of my judgment I shall mention only the essential facts.

Khanna (the appellant) and Dillon (the respondent) entered into a partnership to do business but in February 1956, they agreed to dissolve it. A deed was drawn up and it was agreed that Dillon was to take over all the assets and liabilities of the partnership keeping Khanna indemnified from all liability. Later, a suit was filed for the dissolution of the partnership and rendition of accounts but it ended in a compromise. The compromise nearly reaffirmed the terms of the earlier deed, but included a condition that all realizations of the old partnership would be converted into cash and placed in a joint account in the name of the two partners before being paid towards

liabilities of the partnership.

These appeals arise out of two suits which were filed by Dillon against Khanna for recovery of certain amounts aggregating to Rs. 46,000/- and interest which amounts Khanna allegedly obtained as loan from the joint account. Khanna countered the suits by contending that as the money was still in the joint names of the two partners, the suits between partners were not maintainable. This plea led to an issue in each suit which substantially read as follows :

> "Whether the suit is not maintainable and the plaintiff is not entitled to institute as alleged in paragraphs Nos. 15, 16, 17 and 18 of the written statement."

These issues were tried as preliminary and the decision of the trial judge was in favour of Khanna in both the suits. The trial Judge held that the suits were not maintainable, but, instead of dismissing the suits there and then, he set them down for a future date. Revision applications under s. 115 of the Code of Civil Procedure were filed in the High Court by Dillon and were allowed, and the present appeals have been filed by Khanna by special leave against the orders of the High Court.

The short question that arises in this case is whether the High Court was right in exercising its jurisdiction under s. 115 of the Code of Civil Procedure. Strong reliance was placed before us upon two decisions of the Rajasthan High Court reported in *Purohit Swarupnarain* v. *Gopinath and another*(1) and *Pyarchand and others* v. *Dungar Singh*(2) in which it was held that the jurisdiction under s. 115 of the Code of Civil Procedure can only be exercised in a case in which no appeal lies to the High Court either directly or indirectly after other appeals. It was contended that in the present cases appeals would have lain to the High Court directly from the decrees, because both involved large amounts and were tried on the regular side and that s. 115 could not be invoked. This has led to a discussion as to the jurisdiction of the High Court created by s. 115 of the Code of Civil Procedure.

The Trial Judge concluded that the suits were for contribution between partners of a dissolved firm which was in the process of winding up and that not being suits for

(1) I.L.R. [1953] Raj. 483 F.B. (2) I.L.R. [1953] Raj. 608.

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general accounts, were not maintainable. There can be no doubt that by this decision, if it was erroneous, the trial Judge denied to himself a jurisdiction to try the suits. Further it is plain that the suits, in so far as the trial judge was concerned, were also over notwithstanding the fact that he had fixed them on a subsequent date "for further proceedings." The High Court was of the opinion that the suits were plainly to recover the amounts borrowed by Khanna from the joint account. The High Court was right in this. Under the compromise, Dillon was required to recover the assests, convert them into cash and put them into a joint account not only on behalf of himself but under a power of attorney from Khanna also on the latter's behalf, but the cash was at the disposal of Dillon provided he applied it first in liquidation of the joint liability. Khanna had no share in it except to see that the liabilities were first discharged. A borrowing from this joint account must be regarded as a loan given by Dhillon to Khanna and the suits were, therefore, not for contribution but for recovery of loans advanced from the joint account. The High Court was also right in holding that the trial judge had no jurisdiction to keep the suits pending before himself for "further proceedings" when he had held them to be not maintainable. The decision of the trial judge being erroneous and that of the High Court right, the only question is whether the High Court properly exercised its jurisdiction under s. 115 of the Code of Civil Procedure to correct the error.

Section 115 of the Code of Civil Procedure reads as follows :

> "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—
> (a) to have exercised a jurisdiction not vested in it by law, or
> (b) to have failed to exercise of its jurisdiction so vested, or
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
>
> the High Court may make such order in the case as it thinks fit".

The power which this Section confers is clearly of the nature of a proceeding on a writ of *Certiorari*. But it differs from that power in many ways. *Certiorari* has many different forms which may be classified as follows :

(1) *Certiorari* to remove for trial ;
(2) *Certiorari* for Judgment or indictment;
(3) *Certiorari* to quash;
(4) *Certiorari* for purposes of execution or coercive process;
(5) *Certiorari* to remove orders etc., on case stated;
(6) *Certiorari* to remove Depositions for Bail; and
(7) *Certiorari* to remove Record for use as evidence.

In English Common Law *Certiorari* to quash issues in a completed case and the Common Law is now crystallised by Order 58 of the Rules of the Supreme Court. In America *Certiorari* has been differently understood and is a means of review. That arises from the Special Appellate jurisdiction of the United States Supreme Court created by Statute (See U.S.C.A. Tit. 28, para 1254) and from the fact that the Supreme Court must of necessity exercise this power as a part of its appellate jurisdiction.

This supervisory power of the High Court under the English Law is not to be confused with visitorial power of the High Court exercisable by the writ of *Mandamus*. *Mandamus* issues to Courts only when justice is delayed and is a command to them to hear and dispose of the case. There is also the writ of Prohibition which issues to a Court to stop it from taking upon itself to examine a cause and to decide it without legal authority. The writ of *Mandamus* was evolved much later than the writ of *Certiorari* and by *Mandamus* the Courts were not directed to give any particular judgment but merely to give Judgment. An erroneous Judgment could be set aside on appeal or quashed by *Certiorari*. Prohibition lay to prevent assumption of jurisdiction but only before an order was passed. *Certiorari* to quash lay in a completed case on a question of jurisdiction and an error of law apparent on the face of the record. As Lord Sumner observed in *Rex* v. *Nat Bell Liquors Ltd.*(1) :

"Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound

(1) [1922] 2 A.C. 128, 156.

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not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".

From the above discussion it is apparent that interference with a case before an inferior Court by Prerogative writs could take place under the English Law:

(a) by stopping proceedings before the case was decided by a writ of Prohibition;

(b) ordering the trial of a case and the delivery of Judgment by *Mandamus.*

(c) quashing an order in a completed case for want of jurisdiction or for an error of law apparent on the face of the record.

The power given by s. 115 of the Code is clearly limited to the keeping of the subordinate courts within the bounds of their jurisdiction. It does not comprehend the power exercisable under the writs of Prohibition or *Mandamus.* It is also not a full power of *Certiorari* in as much as it arises only in a case of jurisdiction and not in a case of error. It has been ruled by the judicial Committee and also by this Court that the section is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists or an assumption of jurisdiction where none exists and lastly acting with illegality or material irregularity. Where there is no question of jurisdiction in this manner the decision cannot be corrected for it has also been ruled that a Court has jurisdiction to decide wrongly as well as rightly. But once a flaw of jurisdiction is found the High Court need not quash and remit as is the practice in English Law under the writ of *Certiorari* but pass such order as it thinks fit.

Judged from this angle, the decision of the trial Judge being erroneous for the reasons pointed out by my learned brother Shah, J., the trial judge was clearly denying a jurisdiction by holding that the suits were not maintainable. The only question is whether these can be said to be "cases" "decided" by the Subordinate Judge and whether

the suits answer the description "in which no appeal lies", It may be noticed that the last phrase does not speak of an appeal 'under the Code'. The description therefore is a general one and applies to every decision of a court subordinate to the High Court in which no appeal lies, whether under the Code or otherwise. A decision of the Subordinate Court is therefore amenable to the revisional jurisdiction of the High Court unless that jurisdiction is clearly barred by a special law or an appeal lies therefrom.

The decision in this case was clearly one which put an end to the suits and the fact that the Subordinate Judge still kept the suits pending before himself for 'further proceedings' for reasons not very clear did not alter the nature of the decision. Indeed as the High Court also pointed out, the fact that the Subordinate Judge did not dismiss the suits and did not draw up decrees for that purpose, is itself an exercise of jurisdiction with material irregularity if not also illegality. In so far as the parties were concerned the suits were no longer live suits since the decision, such as it was, had put an end to them.

It is however contended on the authority of the two decisions of the Rajasthan High Court that the words 'in which no appeal lies' indicate a case in which no appeal lies to the High Court from the final determination either directly or ultimately and it is pointed out that in these suits there would ultimately have been decrees of dismissal which would have been appealable. It is thus urged that the power under s. 115 of the Code of Civil Procedure could not rightly be invoked. The opinion of the Rajasthan High Court has not been accepted in the other High Courts and it has been held in a very large number of cases that the words 'case decided' and the pharse "in which no appeal lies" refer not only to the final decision but are wide enough to include certain interlocutory orders involving jurisdiction and from which no appeal lies under the Code or otherwise. The words "record of any case..... decided" in this context refer to the record of the proceedings leading upto a decision in which there is an assumption of unwarranted jurisdiction or a denial of an existing one or a material irregularity or illegality in the exercise of jurisdiction. Where, however, an appeal lies from the final determination to itself or to another court, the High Court

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in the exercise of its discretion may decline to interfere at the interlocutory stage unless interference at the earlier stage tends to prevent irreparable injury or is otherwise manifestly just and expedient. Since decisions in most cases tried by the Subordinate Courts are subject to one or more appeals and one such appeal is to the High Court, and where there is no appeal there are special provisions giving even wider powers of interference to the High Court by way of revision than those under s. 115, the interpretation put by the Rajasthan High Court on the section of the Code would make the power available in a remarkably small number of cases. This general power as shown above was intended to be used otherwise and the word 'case' does not mean a concluded suit or proceeding but each decision which terminates a part of the controversy involving a matter of jurisdiction. Where no question of jurisdiction is involved the Court's decision cannot be impugned under s. 115 for it has been said repeatedly a Court has jurisdiction to decide wrongly as well as rightly.

In my opinion, the construction generally accepted in the High Courts is more in keeping with the letter and spirit of the section considered as a whole than the view accepted in the two cited cases. As I pointed out earlier, the section confers a power analogous to the power to issue a writ of *Certiorari* but only with a view to keeping Subordinate Courts within the bounds of their jurisdiction. This power is exercisable in respect of all orders involving jurisdiction in which no appeal lies to the High Court. The present cases answer the description as the Orders of the Subordinate Judge were erroneous in denying a jurisdiction and no appeal lay to the High Court against them. Even otherwise, the trial judge was in error in not dismissing the suits. His decision that the suits were not maintainable and yet keeping them pending was itself an exercise of jurisdiction with a material irregularity. If the trial judge had dismissed the suits and passed decrees there would undoubtedly have been appeals and no revision would have lain. But the order actually passed by him was not a decree nor even an order made appealable by s. 104 of the Code. Involving as it did a clear question of jurisdiction it was revisable and the High Court was within its rights in correcting it by the exercise

of its powers under s. 115 of the Code.

The appeals must therefore fail and I agree with the order proposed by my learned brother Shah, J.

Appeals dismissed.

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ALUMINIUM CORPORATION

v.

THEIR WORKMEN AND ORS.

(P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.)

Industrial Dispute—Award of bonus—Full Bench Formula—Allowance under rehabilitation charges—Burden of proof—Evidentiary value of statements in balance sheets.

The appellant is a manufacturer of aluminium, having two factories one near Asansol and another in Asansol. A dispute having arisen between the appellant and the respondent on the question of bonus for the year 1957-58 it was referred to the Industrial Tribunal by the Government of West Bengal. A similar dispute arose between the appellant and its workmen in the second factory and this also was referred to the same tribunal. In the second dispute the parties submitted joint petitions before the tribunal agreeing to abide by the award on the bonus question in the first dispute and requesting that similar award be made in the second dispute also. In the first dispute the Tribunal awarded a bonus equivalent to three months basic wages inclusive of the amount that had already been paid by the company voluntarily. An award was made in the second dispute also in similar terms. In determining the amount of available surplus the Tribunal applied the rules embodied in the Full Bench Formula which was approved by this Court in *Associated Cement Co. Ltd.* v. *Its workmen,* [1959] S.C.R. 925, and allowed Rs. 43 lacs as return on reserve used as working capital and allowed nothing under the head rehabilitation charge. The appellant appealed against both the awards by way of special leave granted by this Court.

On behalf of the appellant it was contended that there was no justification in rejecting the claim under the head rehabilitation charge. It was urged that the balance sheet of the company would by itself show what part of reserve was used as working capital and a correct way of reaching at the figure of reserve