M. RAMNARAIN PRIVATE LTD. AND ANR.

v.

STATE TRADING CORPORATION OF INDIA LTD.

May 5, 1983

[P. N. BHAGWATI, R. S. PATHAK AND AMARENDRA NATH SEN, JJ.]

Code of Civil Procedure, 1908—Order 20 r. 11—As amended in 1976—Interpretation of—Direction regarding payment of decretal amount—An order—Till incorporated in Decree—No appeal lies against that order—Appeal lies against decree containing such direction—Order not 'judgment' within clause 15 of Letters Patent.

Code of Civil Procedure, Order 41, r. 1—Interpretation of—Filing copy of decree with memorandum of appeal mandatory—Appeal filed without decree invalid—Filing or withdrawal of incompetent appeal—No bar to file proper appeal against decree.

Code of Civil Procedure, Order 2, r. 2—Interpretation of—Not applicable to appeals.

Code of Civil Procedure, Order 20, r. 11, Order 2, r. 2 and Order 23, r. 1—Interpretation of—Do not deal with right of appeal or extinguishment thereof—Do not confer or deprive right of appeal. Right to appeal—Creation of statute—May be lost by law or conduct of appellant or appellant may disentitle himself to enforce right of appeal—Prayer regarding payment of decretal amount does not deprive a party of his right to file an appeal against the decree—Mistaken advice of lawyer does not deprive appellant of his right of appeal.

The respondent, as plaintiff, filed a suit against the appellant, as defendant, in the Original side of the Bombay High Court for the enforcement of its claim for a large amount of over Rs. 40 lakhs. The appellant not only contested the claim but also made a counter-claim. The appellant made a request that in the event of a decree being passed against them, they may be allowed to pay the decretal amount in instalments. A single Judge dismissed the counter-claim and passed a decree in favour of respondent and allowed the decretal amount to be paid in instalments. Delivery of Judgment which commenced on 12th December 1980 was concluded on 16th December 1980, upon which the advocates for the appellant addressed a letter to the Prothonotary and Senior Master, High Court, requesting that the accompanying memorandum of appeal be taken on file. This appeal which was numbered 36 of 1981

was filed on 20th January, 1981. The appeal was directed against the order in respect of instalments. On 21st January 1981, when the matter was called for admission before a Division Bench the appellant asked for leave to withdraw the appeal and the appeal was allowed to be withdrawn. A week after the withdrawal of appeal No. 36 the appellant filed an appeal against the judgment taking grounds relating to the merits of the case and also the direction as to instalments. This appeal was numbered 44 of 1981. After this appeal was heard on merits for a few days, the repondent raised a preliminary objection that because the appellant had earlier filed appeal No. 36 against the provision regarding instalments and which had been withdrawn, the present appeal No. 44 was not maintainable. The Division Bench upheld the preliminary objection and dismissed appeal No. 44 on the ground that the appellant had by filing appeal no. 36 against the provision relating to instalments abandoned its right to challenge the decree on merits.

The appellant contended in this Court that the filing of earlier appeal No. 36 or the withdrawal thereof does not affect the right of appellant to prefer appeal no. 44 against the decree on merits. Appeal No. 36 was filed against the order of the High Court passed under Order 20, r. 11 of the Code of Civil Procedure in regard to instalments only and not against the decree. Appeal No. 36 had been filed soon after the judgment had been pronounced and long before the decree incorporating the order regarding instalments had been drawn up. Appeal No. 36 must be considered to be an appeal against the order and not against the decree. The right to prefer an appeal is a creature of statute. The order regarding instalments is not appealable under C.P.C. and such an order cannot also be considered to be a 'Judgment' within the meaning of clause 15 of the Letters Patent. Appeal No. 36 which was against the order regarding instalments was incompetent and was therefore no appeal in the eye of law and for all legal purposes was *non-est*. Even if appeal No. 36 has to be considered an appeal against the decree in view of amended provision of Order 20, r. 11 of C.P.C., the said appeal still must be held to be incompetent and no appeal in the eye of law as the appeal was filed without a certified copy of the decree and was even withdrawn before a certified copy of the decree could be filed. Appeal No. 44 filed against the decree in terms of the provisions contained in the Original Side Rules of Bombay High Court becomes a proper and competent appeal as the earlier appeal No. 36 was not a valid appeal in the eye of law. The provisions of Order 2, r. 2 and Order 23, r. 1 of C.P.C. do not in any way affect the maintainability and the merits of appeal no. 44 as the cause of action and the subject matter of appeal No. 44 are entirely different from the cause of action and the subject matter of appeal No. 36. The appellant did not waive his statutory right to file the appeal. The appellant by his conduct has also not disentitled himself to file Appeal No. 44. Appeal no. 36 was filed on the advice of lawyer under mistaken belief; mistaken advice of a lawyer cannot be the foundation of a plea of estoppel. No prejudice has been caused to the respondent by filing and withdrawal of appeal No. 36 by the appellant.

The respondent contended that in view of the amended provisions of Order 20, r. 11, the order regarding instalments which is required to be incorporated in the decree necessarily forms a part of the decree. In view of the

provisions contained in Order 2, r. 2 and Order 23, r. 1 of C.P.C. it was open to the appellant to prefer an appeal against the decree or to appeal against any part thereof. The appellant preferred to file appeal No. 36 only against the part of the decree relating to instalments and not against the decree as a whole. The filing of appeal restricted to the directions as to the instalments bars a subsequent appeal against the decree on merits. The appellant having obtained a benefit or advantage under the decree to the prejudice of respondent cannot now question the correctness of the decree passed.

Allowing the appeal,

HELD : The provisions of Order 20, r. 11, Order 41, r. 1 Order 5, r. 2 and Order 23, r. 1 of the Code of Civil Procedure do not deprive the appellant of his right to file appeal No. 44. [54 D]

The right to prefer an appeal is a right created by statute. A right of appeal may be lost to a party in appropriate cases by the provisions of law and also by the conduct of the party. The law of limitation may deprive the party of the right he may enjoy to prefer an appeal. Also in appropriate cases a party may be held to have become disentitled from enforcing the right to appeal which he may otherwise have. [46 A-C]

In the instant case the defendant-appellant did have a right of appeal against the decree by virtue of the provisions of s. 96 read with Order 41 of Civil Procedure. The appeal has been filed within the period of limitation, The law of limitation, therefore, does not defeat the right of the appellant to file an appeal. [46 C-D]

Order 20, r. 11 makes provisions for postponment of payment of money decree and of its payment in instalments and lays down the procedure for directing payment of a money decree in instalments. The amendment introduced in 1976 to Order 20, r. 11 requires that any provision directing the payment of the amount decreed shall be postponed or shall be made by instalments may be incorporated in the decree. The direction regarding payment of the decretal amount is an independent order which is required to be incorporated in the decree and it can only be incorporated in the decree when the decree is drawn up. It retains the character of an order till it is so incorporated in the decree. The rules of the Original Side of the Bombay High Court make necessary provisions as to the drawing up of a decree. In view of procedure laid down in the rules for the drawing up of a deeree, there is bound to be a time lag between the judgment and the drawing up of a decree, in which the order regarding instalment is to be incorporated. Appeal against any provision granting instalments or refusing to grant instalments will not be competent if the direction granting or refusing to grant instalments is considered to be an order. Such an order is not appealable under the Code. Such an order will also not be a 'judgment' within the meaning of clause 15 of the Letters Patent and will not be appealable as such if however, the direction with regard to instalments is considered to be a part of the decree, an appeal will undoubtedly lie as an appeal from a decree.

[47 D-E, 41 G-H, 41 C-D, 47 F-H]

The provisions of Order 20, r. 11 do not deprive the appellant in the instant case of his right to prefer an appeal against the decree. The earlier appeal No. 36 of 1981 had been filed long before the decree in which the order regarding instalments under Order 20, r.11 of the Code was to be incorporated had been drawn up. As at the time of filing the earlier appeal No. 36 the order regarding instalments had not been incorporated in the decree, the order retained its character of an order. The earlier appeal No. 36 at the time when it was filed, should therefore be regarded as an appeal against an order. The precipe filed for the drawing up of the order, the letter to the Prothonotary and Senior Master of the High Court by the Advocates for the appellant, the memorandum of appeal filed and the amount of stamp furnished on the memorandum are facts which go to indicate that the earlier appeal had been filed against the order regarding instalments treating the same to be an order. The appeal No. 36 must therefore be held to be incompetent. If the earlier appeal No. 36 were to be considered to be an appeal against the decree, the appeal would still be incompetent, because the appellant had furnished the amount of stamp necessary for preferring an appeal against the order and the requisite stamp in respect of an appeal against a decree had not been affixed.

[46 E, 48 D-E, 48 H, 49 A-B, 48 B, 43 D-C]

Under Order. 41, r.1, every appeal has to be preferred in the from of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as it appoints in that behalf, and has to be accompanied by a copy of the decree appealed from, and of the judgment on which it is founded. Rule 1 empowers the appellate court to dispense with the filing of the judgment but there is no jurisdiction in the appellate court to dispense with the filing of the decree. The requirement that the decree should be filed alongwith the memorndum of appeal is mandatory and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent. So long as the certified copy of the decree is not filed there is no valid appeal in the eye of law. Though by virtue of the provisions of the Original Side Rules of the Bombay High Court the earlier appeal could be permitted to be filed without a certified copy of the decree or order, the appeal would not be valid and competent unless the further requirement of filing the certified copy had been complied with. [49 G-H, 50 A, 53 C, 49 F, 52 F]

In the instant case, at the time when the earlier appeal No. 36 had been withdrawn, the certified copy of the decree had not been filed. The said appeal without the certified copy of the decree remained an incompetent appeal. The withdrawal of an incompentent appeal which would indeed be no apreal in the eye of law cannot in any way prejudice the right of any appellant to file a proper appeal, if the right of appeal is not otherwise lost by lapse of time or for any other valid reason. [52 F-G]

Order 2, r.2, contemplates that at the time of the institution of the suit, the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, has to be made and also deals with the consequences of non-compliance with the requirements of the said rule. It is doubtful whether the principles underlying this rule can be said to be applicable to an appeal. This rule is applicable only to suits and cannot in terms apply to appeals. Even if

an appeal be considered to be a continuation of a suit for certain purposes, the provision of this rule cannot in terms be made applicable to an appeal in view of the scheme of the said rule and the language used therein. A

[53 F-G, 53 E-F]

In the instant case the provisions of Order 2, r.2 of the Code do not stand in the way of the appellant in the matter of filing the subsequent appeal No. 44. Even if the principles underlying Order 2, r.2 are considered as applicable to an appeal the maintainability of the appeal No. 44 cannot be held to be affected in any way as the cause of action in respect of the present appeal is entirely different from the cause of action on which the earlier appeal was filed. [23 A-B, G] B

Order 23, r.1 of the Code does not also stand in the way of the maintainability of the instant appeal No. 44. Apart from the incompetency of the earlier appeal No. 36, the subject matter of the said appeal was entirely different from the subject matter of the present appeal. [53 H, A-B] C

The provisions of the Code of Civil Procedure contained in Order 20, r. 11, Order 2. r. 2 and Order 23, r. 1 do not in terms deal with any question in relation to the right of appeal or the extinguishment thereof. These provisions do not by themselves confer any right of appeal on a party or deprive any party of the right of appeal which a party may enjoy. These are not the statutory provisions which either confer a right of appeal on a party or deprive a party of any such right. [54 B-C] D

A mere prayer for postponment of payment of decretal amount or for payment thereof in instalments on the basis of the provisions contained in Order 20, r.11 (1) of the Code at a time when the decision in the suit is yet to be announced can never be considered to amount to such conduct of the party as to deprive him his right to prefer an appeal against any decree, if ultimately passed, and to disentitle him from filing an appeal against the decree. [55 G-H] E

In the matters of litigation the litigant who is not expected to be familiar with the formalities of law and rules of procedure is generally guided by the advice of his lawyers. The statement of the lawyers recorded by the Division Bench in its judgment clearly goes to indicate that the lawyer had advised filing of the earlier appeal under mistaken belief. The act done by the defendant-appellant on the mistaken advice of a lawyer cannot furnish a proper ground for depriving the defendant-appellant of his valuable statutory right of preferring an appeal against the decree. The filing of an incompetent appeal on the mistaken advice of a lawyer cannot, in our opinion, reflect any such conduct on the part of the defendant-appellant as to disentitle him to maintain the peresent appeal. [56 C, D; F, G] F G

The present appeal No. 44 had been filed long before the decree had been drawn up, and, there can be no question of execution of any decree at the time when that appeal was filed. The question of the defendant-appellant having obtained an advantage under the decree does not therefore really arise. [59 A-B] H

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2905 of 1981.

From the Judgment and Order dated the 19th June, 1981 of the Bombay High Court in Appeal No. 44 of 1981 in Suit No 540 of 1970.

F. S. Nariman, V. Tulzapurkar, R. Nariman, Srikant Singh and *Rajan Karanjawala* for the Appellants.

L. N. Sinha, Attorney General and *P. P. Singh* for the Respondent.

The Judgment of the Court was delivered by

AMARENDRA NATH SEN, J. The maintainability of an appeal filed by the defendant in the suit against a money-decree payable in instalment after the defendant had filed an appeal only aganist the part concerning the direction with regard to the instalments and had withdrawn the same, is the question for consideration in this appeal by certificate granted by the High Court under Article 133 (1) of the Constitution.

The facts material for the purpose of the decision involved in this appeal are brief and may be stated.

The State Trading Corporation, the respondent in this appeal, as plaintiff, filed a suit against the appellant who was the defendant in the suit on the Original Side of the Bombay High Court for the enforcement of the plaintiff's claim for a large amount which inclusive of interest worked out to over Rs. 40,00,000.00. For the purpose of deciding this appeal, it does not become necessary to refer to the nature of the claim and the averments made by the plaintiff in the plaint for claiming a decree for the said amount against the defendant-appellant. The defendant appellant had contested the claim. The defendant-appellant in the written statement had denied the claim of the plaintiff-respondent, pleaded legal as well as equitable set-off and had made a counter claim. In due course the suit came up for hearing before Bharucha, J. It appears that on the conclusion of the hearing, the defendant-appellant prayed that the defendant-appellant might be allowed to pay the decretal amount in the event of a decree being passed against the defendant-appellant, in instalment in the

manner prayed for in an affidavit containing such prayer, filed on behalf of the defendant. The learned single Judge for reasons recorded in his judgment passed a decree in favour of the plaintiff-respondent for a sum of Rs. 40,00,000.00 with costs quantified at Rs. 42,750.00, two counsel being certified. The learned Judge dismissed the counter claim of the defendant-appellant without any order as to costs. The learned Judge in the concluding portion of the judgment observed as follows :

> "Mr. Thakkar relied upon affidavits filed on behalf of the 1st and 2nd defendants and sought for the payment of the decretal amount a moratorium of 5 years, and after the expiration of these 5 years, instalments of Rs. 4,00,000 per annum. He then left it to the Court to fix such instalments as it deemed proper. Mr. Doctor opposed the grant of any instalment.
>
> Neither the facts of the suit nor the averments, such as they are, made in the affidavits would justify the giving of an extended period for the payment of the decretal amount. In the circumstances I order that the decretal amount be paid by mothly instalments of Rs. 3,50,000 each, the first of such instalment to be paid up on or before 7th March, 1981 and subsequent instalment on or before the 7th day of each succeeding month. The plaintiffs shall be at liberty to execute the decree for the amount then due in the event of the plaintiff committing any one default in payment of the said instalments."

Delivery of the judgment commenced on the 12th December, 1980 and was concluded on the 16th December, 1980. On the day of the conclusion of the judgment i.e. 16th December, 1980, three precipes were addressed by the Advocates for the defendant-appellant to the Prothonotary and Senior Master of the Bombay High Court, (1) for certified copy of the decree when drawn up, (2) certified copy of the judgment and (3) for certified copy of the minutes of the order. On the 16th of January, 1981, the Advocates for the Defendant-Appellant addressed a letter to the Prothonotary and Senior Master, High Court Bombay to the following effect :

> "Be pleased to take on file the accompanying Memo of appeal along with compilation in duplicate. We also

send herewith Vakalatnama duly signed by our clients the appellants abovenamed. Kindly take the same on file.

We have to put on record that the appeal is under Order 20, rule 11 of the Civil Procedure Code and Court fee of Rs. 5 is payable. We have to further state that the appeal is in time as certified copy of the order and judgment as well as the decree was applied for on 16th December, 1980 but the same has not been received by us. Appeal is therefore in time.

Kindly see that the said appeal is circulated before the Chief Justice and Hon'ble Mr. Justice Rege and that the same appeal is called on Wednesday the 21st day of Junuary, 1981".

The memorandum of appeal which was numbered as appeal No. 36 of 1981 and was filed on 20.1.81 by the defendant-appellant states :—

"Being aggrieved by the judgment and order dated 16th December by the Hon'ble Mr. Justice Bharucha directing payment of the Decretal amount by monthly instalments of Rs. 3,50,000 each, the appellants beg to appeal therefrom on the following amongst other grounds".

In this memorandum of appeal directed against the order of instalments, the defendant-appellant had taken 21 grounds and each of the ground related to the order with regard to the payment of decretal amount by monthly instalment of Rs. 3,50,000. This appeal No. 36 of 1981 came up for admission before a division Bench of the High Court consisting of the learned Chief Justice and Rege, J. on 21.1.81 and when the matter was called on for admission, the counsel for the appellant asked for leave to withdraw the appeal and the appeal was allowed to be withdrawn. The minutes of the Court record — "Appeal allowed to be withdrawn". On 29.1.82 i.e. just after a week of the withdrawal of the appeal No. 36/1981, the defendant-appellant filed an appeal against the judgment delivered on 16th December, 1980 by Bharucha, J. and this appeal was numbered as appeal No. 44 of 1981. The memorandum of appeal in this appeal states : "Being aggrieved by the judgment dated

16.12.1980, passed by the Hon' ble Mr. Justice Bharucha,' the appellant begs to appeal therefrom on the following amongst other grounds." In this memorandum of appeal, the appellant has taken as many as 73 grounds out of which grounds nos. 1 to 53 relate to Judgment and decree on the merits and grounds 54 to 73 relate to the provision as to instalments. This appeal i.e. appeal no. 44 of 1981 came up for admission on 3.2.1981 before the same Bench consisting of the learned Chief Justice and Rege, J., when the plaintiff-respondents appeared through their counsel and opposed the admission on the ground that the appeal was not maintainable. The appeal was, however, admitted and the minutes of the Court after noting the appearances record—Admitted. After filing the appeal, the defendant-appellant, made an application for stay of the execution of the decree by way of notice of motion which was rejected by the division Bench. Against the said order of refusal to stay execution, a special leave petition was filed in this Court. For the propose of the present appeal, it does not become necessary to refer to this special leave petition and the proceedings arising therefrom. The appeal came up for hearing before a Division Bench on the 24th of March, 1981 and the hearing continued till 27th March, 1981 and on that date hearing of the appeal was adjourned to 8th April, 1981 as per following order :

> "Having heard Mr. Nariman on the merits of the appeal for almost four days though we had not heard the respondents, we, *prima facie*, were of the opinion that there was force and substance in several of the contentions raised and the arguments advanced on behalf of the appellants and as the second instalment under the said decree was payable by April 8, 1981, we suspended the operation of the decree appealed against pending the hearing and final disposal of the said appeal."

Hearing of the appeal commenced again on the adjourned date i.e. 8th April, 1981 in terms of the earlier order and continued for some days It appears that after the appeal had been heard on merits for some days, it was stated on behalf of the plaintiff-respondent before the Division Bench that the plaintiff-respondent would be raising a preliminary objection as to the maintainability of the appeal. It was stated on behalf of the plaintiff-respondent that since the defendant-appellant had earlier filed an appeal, being

A appeal no. 36 of 1981 against the provision regarding instalments which had been withdrawn on 21.1.1981 by the defendant-appellant, plaintiff respondent would be contending that the present appeal No. 44 of 1981 was not maintainable. It appears that since the objection was taken at a late stage after the learned counsel for the defendant appellant had addressed the Court on merits for a number
B of days : the Court permitted the counsel for the defendant appellant to complete the arguments and the Court thereafter proceeded to hear the respondent on the question of maintainability. On 19.6.1981, the Division Bench dismissed the appeal up holding the preliminary objection to the maintainbility of the appeal on the ground that the defendant-appellant had, by filing appeal no. 36 of 1981 against the
C provision relating to instalments which the defendant-appellant had withdrawn, abandoned its right to challenge the decree on merits. The Division Bench, however, while dismissing the appeal substituted for the decree of the Trial Court a decree for the sum of Rs. 40,18,737.38 with interest on the principal amount of
D Rs. 18,18,451.39 @ 6 percent per annum from the date of the judgment till the payment or realisation and maintained the order for costs as passed by the Trial Court.

Aggrieved by the judgment and decree of the dismissal of
E the appeal filed by the defendant-appellant in the High Court on the ground that the appeal was not maintainable, this appeal has been filed by the defendant appellant with certificate granted by the High Court.

F Mr. Nariman, learned counsel appearing on behalf of the defendant-appellant, has submitted that the High Court has erred in holding that the instant appeal no. 44 of 1981 is not maintainable, as the defendant-appellant by filing the earlier appeal no. 36 of 1981 against the provision relating to instalments had abandoned its right to challenge the decree on merits. The principal contention of
G Mr. Nariman is that the filing of the earlier appeal no. 36 of 1981 or the withdrawal of the same by the defendant-appellant does not affect the right of the defendant-appellant to prefer the present appeal against the decree on merits and does not preclude the defendant appellant from filing the present appeal and proceeding with
H the hearing thereof. Mr. Nariman has argued that the earlier appeal no. 36 of 1981 was filed against the order of the High Court passed under Order 20, rule 11 of the Code of Civil Procedure with regard to the instalments only and the said appeal was not an appeal against

the decree. In support of his submission Mr. Nariman has referred to the precipe filed on behalf of the defendant-appellant, the letter addressed by the Advocates for the defendant appellant on the 16th January, 1981 to the Prothonotary and Senior Master, High Court and also to the memorandum of appeal filed in appeal no. 36 of 1981 and the stamps paid on the said memorandum of appeal. Mr. Nariman has submitted that the earlier appeal no. 36 of 1981 which was an appeal against an order was incompetent, as no appeal lay from the said order. It is the submission of Mr. Nariman that the right to prefer an appeal is a creature of Statute and unless the right to prefer an appeal is conferred by law a litigant cannot prefer any appeal. Mr. Nariman submits that an order regarding instalment is not appealable under the Code and such an order cannot also be considered to be a 'judgment' within the meaning of cl. 15 of the Letters Patent. Mr. Nariman, therefore, contends that the earlier appeal no. 36 of 1981 was an incompetent appeal and was, therefore, no appeal in the eye of law and for all legal purposes was *non-est*. It is the contention of Mr. Nariman that as the earlier appeal no. 36 of 1981 was incompetent and *non-est* in the eye of law, the filing of the appeal and its withdrawal do not have any legal consequence and cannot, in any way, prejudice the right of the defendant-appellant to prefer a proper appeal against the decree.

Mr. Nariman has next contended that notwithstanding the amendment introduced in order 20, rule 11 of the Code providing that the order of instalment of payment of the decretal amount has to be incorporated in the decree, the said appeal no. 36 of the 1981 still must be held to be incompetent, Mr. Nariman argues that the Rules of Original Side of the High Court make provisions with regard to drawing up of the decree and there is a time-lag between judgment and the drawing up of the decree. Mr. Nariman points out that as the rules of the Original Side of the High Court permit filing of an appeal without a certified copy of the decree or order, appeal no. 36 of 1981 had been filed soon after the judgment had been pronounced and long before the decree had been drawn up, and the said order had been filed without the certified copy of the order or the decree in terms of the provisions of rules of the Original Side of the High Court. It is the argument of Mr. Nariman that as the appeal no. 36 of 1981 had been filed long before the decree incorporating the order had been drawn up, appeal No. 36 of 1981 which had been filed only against the order regarding instalments must be

considered to be an appeal against the order and not against the decree. Mr. Nariman has further argued that even if it can be said that Appeal no. 36 of 1981 has to be considered to be an appeal against the decree in view of the amended provisions of Order 20, rule 11 of the Code, it cannot be disputed that the said appeal had been filed without a certified copy of the decree and the said appeal had been withdrawn before any certified copy of the decree had been filed in the said appeal, and the said appeal must therefore be held to be no appeal in the eye of law. Mr. Nariman submits that the later appeal no. 44 of 1981 against the decree had been filed in terms of the provisions contained in the Original Side rules of the Bombay High Court had the certified copy of the judgment and decree had been filed in Appeal no. 44 of 1981. It is Mr. Nariman's argument that appeal No. 44 of 1981 becomes a proper and competent appeal, as the earlier appeal no. 36 of 1981 could not be considered to be a valid appeal in the eye of law at the time of the withdrawal of the same in the absence of the certified copy being filed. Mr. Nariman argues that though by virtue of the provisions of the Bombay High Court Original Side Rules an appeal can initially be filed without the certified copy, the certified copy the filing of which is a mandatory requirement of law has to be filed within the period of limitation before the hearing of the appeal to render the appeal valid and competent. Mr. Nariman in this connection has referred to the decisions of this Court in *Jagat Dhish Bhargava* v. *Jawaharlal Bhargava & Ors.*(1) and *Shakuntla Devi Jain* v. *Kuntal Kumari & Ors.*(2) Mr. Nariman has further argued that there is no provision in the Code or any other law which prevents an appellant from preferring more than one appeal. Relying on the decision of this Court in *Jagat Dhish Bhargava* (supra) Mr. Nariman has submitted that where the decree consists of distinct and severable parts enforceable against the same or several defendants, separate appeals against such distinct and severable directions or orders or provisions in a decree may be filed. It is Mr. Nariman's argument that in the instant case, even if the order for instalment be considered to be a part of the decree, the decree shall consist of two distinct and severable parts, (1) on the merits of the claim and (2) on the question of payment in instalment. Mr. Nariman has next contended that the provisions of Order 2, rule 2 of the Civil Procedure Code do not in any way affect the maintainability and the merits of the

(1) [1961] 2 S.C.R. 918.
(2) [1969] 1 S.C.R. 1006.

present appeal no. 44 of 1981. He has submitted that the said provisions have no application to an appeal and in any event, the cause of action and the subject matter of the present appeal are entirely different from the cause of action and the subject of the earlier appeal. Mr. Nariman argues that though this Court in the case of *Bijoyananda Patnaik* v. *S. Sahu*(1) has held that the provisions of Order 23, rule 1 of the Code of Civil Procedure will be applicable to the withdrawal of an appeal, the provisions will also not preclude the appellant from filing the present Appeal no. 44 of 1981. It is his submission that in considering the provisions of order 23, rule 1, the relevant fact to be borne in mind is the subject matter of the appeal and if the subject matter of the appeal be different, as in the present case it is,—the earlier appeal no. 36 of 1981 being confined to the subject matter of instalment and the subsequent appeal no. 44 of 1981 being against the decree on the merits of the claim,—the withdrawal of the earlier appeal cannot, in any way, be a bar to the maintainability of the subsequent appeal. Mr. Nariman has in this connection referred to the decision of this Court in *Vallabhdas* v. *Dr. Madan Lal & Ors.*(2) in which this Court equated the meaning of the words "subject matter" in order 23 rule 1 with the meaning of the words "cause of action" in Order 2 rule 2. Relying on this decision, Mr. Nariman has argued that the "subject matter" of the appeal within the meaning of Order 23, rule 1, must be considered in the light of the meaning of the words "cause of action" in Order 2, rule 2; and it is his argument that as the "cause of action" in respect of the claim for instalment is entirely different from the "cause of action" in respect of decree which embraces within its fold the "subject matter" of the respective claims of the parties in the suit, the withdrawal of the earlier appeal no. 36 of 1981 against the instalments cannot in any way affect the maintainability of the appeal no. 44 of 1981 against the decree on the merits of the claim.

Mr. Nariman does not dispute that though the right of an appeal is a statutory right enjoyed by a party, the party in an appropriate case may lose his right of appeal. But he submits that a very strong case must be made out to establish that a party has forfieted his right to prefer an appeal. According to Mr. Nariman, the right

(1) [1964] 2 SC.R. 539.
(2) [1971] 1 S.C.R. 211.

of appeal may be lost because of any provision of law and also in appropriate cases, the parties may lose his right of appeal because of his conduct. Mr. Nariman contends that in the instant case, the present appeal is within time; and the provisions of the Code earlier referred to or the provisions of any other law do not have the effect of extinguishing the right of the appellant to prefer an appeal against the decree. Mr. Nariman submits that the facts and circumstances of this case cannot justifiably lead to the conclusion that the appellant by his conduct has disentitled himself to file the present appeal against the decree. He argues that the conduct that can be attributed to the appellant is that he prayed for instalments, filed an appeal against the order regarding instalments and he has withdrawn the same. He reiterates that if the earlier appeal against the order regarding the instalments is held to be incompetent, the conduct of the appellant in withdrawing the incompetent appeal is indeed of no consequence. Mr. Nariman argues that the prayer for instalments is made only on the basis that if the case of the appellant is not accepted and a decree is passed against him, the appellant may be granted instalments to pay the decretal amount and such a prayer when it is not known whether a decree will at all be passed against the appellant and if so, for what amount, can never be considered to amount to such conduct as to disentitle or preclude him from filing an appeal against the decree. Mr. Nariman argues that it cannot be said that in the instant case the defendant-appellant has elected to exercise one of two alternatives remedies and by virue of such election he has deprived himself from exercising the other right, as the defendant-appellant has both the remedies open to him and no question of election on his part arises. Mr. Nariman submits that in the facts and circumstances of this case it cannot legitimately be held that the appellant waived his statutory right to file an appeal against the decree and otherwise became estopped from exercising his right. In this connection Mr. Nariman has referred to Halsbury's Laws of England, 4th Edn., vol 16, paras 1471, 1472, 1473 and 1474 at pages 992 to 996 which read as follows :

> "1471. Waiver.—Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel,

waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract of transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right, without need for writing or for consideration moving from, or detriment to, the party, who benefits by the waiver; but mere acts of indulgence will not amount to waiver; nor can a party benefit from the waiver unless he has altered his position in reliance on it. The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him. It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.

Where the right is a right of action or an interest in property, an express waiver depends upon the same consideration as a release. If it is a mere statement of an intention not to insist upon the right it is not effectual unless made with consideration, but where there is consideration the statement amounts to a promise and operates as a release. Even where there is no express waiver the person entitled to the right may so conduct himself that it become inequitable to enforce it (this is sometimes called an implied waiver), but in such cases the right is lost on the ground either of estoppel or of

acquisence, whether by itself or accompanied by delay. Where it is claimed that the decision of a tribunal is a nullity, a party's right of action in the High Court is not waived by appeal to a higher tribunal whose decision is expressed by Parliament to be final.

1472. Knowledge of rights essential. For a release or waiver to be effectual it is essential that the person granting it should be fully informed as to his rights. Similarly, a confirmation of an invalid transaction, is inoperative unless the person confirming knows of its invalidity.

1473. Estoppel and acquiescene. The term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time, and in that sense acquiescence is an element in laches. Subject to this, a a person whose rights have been infringed without any knowledge or assent on his part has vested in him a right or action which, as a general rule, cannot be delivered without accord and satisfaction or release under seal.

The term, is however, properly used where a person having a right, and seeing another person about to commit it in the course of committing an act infringing upon the right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, a person so standing by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiscence under such circumstance that assent my be resonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescene is equitable. The estoppel rests upon the circumstance that the person standing by in effect makes a misrepresentation as to a fact, namely, his own title; a mere statement that he intends to do something, for

example, to abandon his right, is not enough. Furthermore, equitable estoppel is not applied in favour of a voluntear

The doctrine of acquiescene operating as an estoppel was founded on fraud, and for the reason is no less applicable when the person standing by is a minor. As the estoppel is raised immediately by the conduct giving raise to it lapse of time is of no importance, and for the reason the effect of acquiscence is expressly preserved by statute.

1474. Elements in the estoppel : When A stands by while his right is being infringed by B the following circumstances must as a general rule be present in order that the estoppel may be raised against A: (1) B must be mistaken as to his own legal rights: if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted; (2) B must expend money, or do some act, on the faith of his mistaken belief: otherwise, he does not suffer by A's subsequent assertion of his rights; (3) acquiescence is founded on conduct with a knowlege of one's legal rights, and hence A must know of his own rights; (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep ailence and allow B to proceed on his mistake; (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right. On the other hand there is no hard and fast rule that ignorance of a legal right is a bar to acquiescence in a breach of trust, but the whole of the circumstances must be looked at to see whether it is just that a complaining beneficiary should proceed against a trustee."

Mr. Nariman has argued that in the instant case the plaintiff respondent has claimed against the defendant-appellant a very large sum of money and the claim has been very seriously centested by the defendant-appellant who has not merely disputed the claim of the plaintiff-respondent but has in fact made a counter-claim in the suit against the plaintiff-respondent. He points out that immediatley after the pronouncement of the judgment, three separate precipies or requisitions have been put in on behalf of the defendant-appellant. In view of the urgency of the situation, an appeal had immediately

been filed against tha order of instalment for immediate relief and thereafter an appeal against the decree had been filed after the earlier appeal against the instalments had been withdrawn. He has submitted that under these facts and circumstances it can never be said that the appellant had accepted the decree and had abandoned its right to prefer an appeal against the same. Mr. Nariman further submits that a litigant usually proceeds on the advice of his lawyer and the mistaken advice of a lawyer cannot be the foundation of the plea of estoppel and in support of his submission he relies on the decision of the Judicial Committee in the case of *John Agabog Vertannes & Ors.* v. *James Golder Robinson & Another.*(1) He has further argued that in the instant case no possible prejudice has been done to the respondent by the filing or withdrawal of the earlier appeal and the respondent could never, in any way, be under an impression that by the institution of appeal No. 36 of 1981, the appellant had unequivocally given up his right to appeal from the decree on merits. Mr. Nariman has commented that the Division Bench had admitted this appeal despite the objection of the plaintiff-respondent and it is his comment that after having admitted the appeal the Division Bench had in fact heard the appeal for a number of days. He submits that the Division Bench should not have, therefore, entertained the plea of maintainability and the Division Bench should not have dismissed the appeal on the ground that the appeal is not maintaintable and it is his submission that the said view of the Division Bench is any event erroneous and unsustainable in law.

The learned Attorney General, appearing on behalf of the plaintiff-respondent, has submitted that the Division Bench in the instant case has correctly come to the conclusion that the appeal preferred by the defendant-appellant against the decree is not maintainable in view of the filing of the earlier appeal by the defendant-appellant against the provision regarding instalments and the withdrawal of the same. The learned Attorney-General has argued that the provision in the judgment regarding instalments on the basis of the affidavit filed on behalf of the defendant-appellant forms part of the decree and cannot be considered to be an order. The learned Attorney-General has in this connection referred to the amended provisions contained in Order 20, rule 11 of the Code of Civil Procedure. Relying on these provisions, the learned Attorney-General contends that the order regarding instalments which is required to

(1) A.I.R. 1927 P.C. 151.

be incorporated in the decree, necessarily forms a part of the decree itself. It is his contention that the mere fact that it may take a little time to draw up the decree, incorporating the privisions regarding instalments does not make the provisions any the less a part of the decree. He argues that it was open to the appellant to prefer an appeal against the decree and it was also open to him to appeal against any part thereof. It is his argument that the appellant preferred to file an appeal only against the part of the decree regarding instalments without filing any appeal against the decree as a whole. He contends that the filing of a restricted appeal against the directions for instalments bars any subsequent appeal against the amount decreed on merits. In support of this contention the learned Attorney General has referred to the provisions contained in Order 2, rule 2 and to order 23, rule 1 of the Code of Civil Procedure. Order 2, rule 2 of the Code of Civil Procedure provides :—

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs : but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation :— For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

Order 23, rule 1 of the Code of Civil Procedure reads :—

(1) At any time after the intsitution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim :

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

B The Attorney General argues that an appeal is a continuation of the suit and the principles underlying Order 2, rule 2, therefore, apply to an appeal. It is his argument that the right of appeal which is no doubt a statutory right will also necessarily be governed by the provisions of Order 2, rule 2 and as the appeal is filed not against the entire subject matter of appeal arising out of the cause C of action in the appeal, the right to file another appeal against the decree is clearly lost. He has further submitted that the defendant-appellant having chosen to file an appeal only against a part of the decree confined to the payment of the decretal amount in instalments and not against the decree on its merits and having withdrawan the D said appeal unconditionally has clearly forfeited his right to prefer the instant appeal.

The learned Attorney General has next contended that in the instant case apart from the aspect that the right of appeal has been extinguished by virtue of the statutory provisions earlier referred to, E the defendant appellant must be held to have clearly abandoned or waived his right of preferring an appeal against the decree by filing an appeal only against the part of the decree directing the payment of the decretal amount in instalments. It is the argument of the Learned Attorney General that defendent-appellant had the right to F prefer an appeal against the whole of the decree, if he had felt aggrieved by the same. He submits that if the defendant-appellant does not have any grievance against the decree on merits but is only aggrieved against the par of the decree providing for instalments, the defendant-appellant would not certainly exercise his right of appeal against the decree on merits against which he had no grievance, and G the defendant-appellant has filed an appeal only against the part against which he had a grievance. He submits that the defendant-appellant having done so, must be held to have waived his right to file an appeal against the decree on merits.

H The learned Attorney General has argued that in any event the defendant-appellant is estopped from exercising his right of appeal in view of the fact that the defendant-appellant has asked for

and obtained a decree payable in instalments and the defendant-appellant has taken advantage of the said instalment decree to the prejudice of the plaintiff-respondent. It is his argument that it is not open to the defendant-appellant to question the validity of the decree after he has obtained benefit under the same. The Learned Attorney General contends that although a right to prefer an appeal is a right conferred by the Statute on a party aggrieved, the agrieved party may be estopped and or precluded from asserting or exercising the right of appeal under given circumstances. He submits that is well-settled that if any party takes advantage of an order or decree or derives benefit under the same, he disentitles himself by his conduct to question the validity of the order or the decree. The learned Attorney General sums up submitting that in the instant case, the defendant-appellant is clearly estopped from filing appeal No. 44 of 1981 against the decree and the said appeal filed by the appellant is not maintainable because of the following circumstances :—

1. The defendant-appellant has asked for the payment of the decretal amount in instalments;

2. The defendant-appellant had filed appeal No. 36/1981 against the decree only with regard to the instalments allowed and the defendant appellant had not filed any appeal against the decree as a whole questioning the correctness of the decree;

3. The defendant-appellant had subsequently withdrawn the appeal no. 36/1981 filed against the decree without obtaining any leave of the court to file any fresh or subsequent appeal; and

4. The defendant-appellant having asked for payment of the decretal amount in instalments and having obtained such a decree has enjoyed the benefit of such a decree to the prejudice of the plaintiff respondent who was prevented from executing the decree for recovering the entire decretal amount immediately in view of the provisions regarding payment in instalments and had suffered prejudice; and the defendant appellant having obtained a benefit or advantage under the decree to the prejudice of the

plaintiff-respondent cannot now turn round to question the correctness of the decree passed.

The right to prefer an appeal is a right created by Statute. No party can file an appeal against any judgment, decree or order as a matter of course in the absence of a suitable provisions of some law conferring on the party concerned the right to file an appeal against any judgment, decree or order. The right of appeal so conferred on any party may be lost to the party in appropriate cases by the provisions of some law and also by the conduct of the party The law of limitation may deprive a party of the right he may enjoy to prefer an appeal by virtue of any statutory provisions. Also, in appropriate cases a party may be held to have become disentitled from enforcing the right of appeal which he may otherwise have.

In the present case there cannot be any manner of doubt that the defendant appellant did have a right of appeal against the decree by virtue of the provisions of the Code of Civil Procedure. S. 96 of the Code, read with O. 41 of the Code makes it abundently clear that an appeal will lie from an original decree. It is also not in dispute that the appeal has been filed within the period of limitation. The law of limitation, therefore, does not defeat the right of the appellant to file appeal.

The provisions of Order 20, rule 11, in our opinion, do not deprive the appellant in the instant case of his right to prefer an appeal against the decree. Order 20, rule 11, of the Code provides as follows :—

"(1) Where and in so far as a deceee is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decree shall be postponed or shall be made by instalments, with or without interest, not withstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor, and with consent of the decree-holder, order that payment of the decreed shall be postponed or shall be made by instalments on such terms as to the payment of inte-

rest, the attachment of the property of the judgment-debtor, or the taking of the security from him, or otherwise as it thinks fit."

By the C.P.C. Amendment Act, 1976, O. 20, R. 11 (1) was amended and the amended ruly reads :—

"(1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason (incorporate in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order that) payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable."

Order 20, rule 20, rule 11 makes provision for postponement of payment of a money decree and of its payment in instalments and lays down the procedure for directing payment of a money decree in instalments. The amendment introduced in O. 20, rule 11, (1) by the Amending Act, 1976 requires that any provision directing that payment of the amount decreed shall be postponed or shall be made by instalments may be incorporated in the decree. In view of the provisions requiring the order of postponement of payment of money decree or payment thereof in instalments to be incorporated in the decree, the question for consideration is whether the earlier appeal filed against the provision in relation to instalments, is an appeal against the decree or against an order, and the further question is whether the said appeal was competent or not. If the earlier appeal is considered to be an appeal against an order, the earlier appeal will clearly be incompetent. An appeal against any provision granting instalments or refusing to grant instalments will not be competent, if the direction granting or refusing to grant instalment is considered to be an order. Such an order is not appealable under the Code. Such an order will also not be a 'judgment' within the meaning of cl. 15 of the Letters Patent and will not be appealable as such. There is, indeed, no provision in any law to make such an order appealable. If, however, the direction with regard to instalments is considered to be a part of the decree, an appeal will undoubtedly lie as an appeal from a decree. In the instant case, the facts and circumstances go to indicate that the defendant-appellant

had, in fact, filed an appeal against the direction regarding instalment treating the same to be an order. The precipe filed, the letter addressed by the Advocates for the defendant-appellant dated 16th January, 1981 to the Prothonotary and Senior Master High Court of Bombay, the memorandum of appeal filed and the stamp furnished on the memorandum, all go to indicate that the appeal filed was an appeal against an order. If Mr. Nariman's contention that the earlier appeal No. 36 of 1981 was an appeal against an order is accepted, the said appeal must be held to be incompetent. There appears to be force in the contention of Mr. Nariman that the earlier appeal No. 36 of 1981 was an appeal against an order notwithstanding the provisions contained in Order 20, rule 11 of the Code. The rules of the Original Side of the Bombay High Court make necessary provisions as to the drawing up of a decree. An order under Order 20, rule 11 of the Code can only be incorporated in the decree when the decree is drawn up. The rules of the Original Side of the Bombay High Court make necessary provisions as to the drawing up of a decree. In view of the procedure laid down in the rules for the drawing up of a decree, there is bound to be a time lag between the judgment and the drawing up of a decree in which the order regarding instalment is to be incorporated. Mr. Nariman rightly points out that the earlier appeal No. 36 of 1981 had been filed long before the decree in which the order regarding instalments under Order 20, rule 11 of the Code had to be incorporated, had been drawn up and had come into existence with the orders incorporated therein. There appears to be force in the contention of Mr. Nariman that so long as the decree incorporating the order regarding the instalments in terms of the provisions contained in the amended provisions of Order 20, rule 11 of the Code is not drawn up, the direction or order regarding instalments retains the character of an order in law.

Order 20, rule 11 of the Code clearly postulates that the direction regarding postponement of payment of money decree or payment thereof in instalments is an independent order which is to be incorporated in the decree. Appeal No. 36 of 1981 hadb een filed soon after the pronouncement of the judgment, before the decree incorporating the order regarding the instalments had been drawn up. The direction regarding payment of the decretal amount is an order which is required to be incorporated in the decree and it can only be incorporated in the decree, when the decree is drawn up. It retains the character of an order till it is so incorporated in the decree. As at the time of filing the earlier appeal No. 36 of 1981 the order regarding instalments had not been incorporated in the decree, the order retained

its character of an order. The earlier appeal No. 36 of 1981 at the time when it was filed, should therefore be regarded as an appeal against an order. The precipe filed for the drawing up of the order, the letter to the Prothonotary and Senior Master of the High Court by the Advocates for the defendant-appellant, the memorandum appeal filed and the amount of stamp furnished on the memorandum are facts which go to indicate that the earlier appeal had been filed against an order regarding instalments treating the same to be an order.

Even if we accept the contention of the learned Attorney General that the earlier appeal No. 36 of 1981 must in law be held to be an appeal against a decree, as the order regarding instalments has to form in law a part of the decree by virtue of the provisions contained in amended rule 11 of order 20 of the Code, the appeal will still be incompetent, because the defendant-appellant had furnished the amount of stamp necessary for preferring an appeal against an order and the requisite stamp in respect of an appeal against a decree had not been affixed. If the earlier appeal No. 36 of 1981 were to be considered to be an appeal against the decree, the appeal would not be competent for want of payment of requisite Court fee payable in respect of an appeal against the decree. Though by virtue of the provisions contained in the Original Side Rules of the High Court an appeal may be filed without the certified copy of the decree or order a provision made to enable the party to seek immediate interim relief from the Appellate Court,-the further requirement to file a certified copy of the decree in the case of an appeal from a decree within the period of limitation to make the appeal valid and competent has still to be satisfied: Unless a certified copy of the decree is filed, the appeal does not become competent and the appeal is liable to be dismissed as incompetent and invalid for not filing the certified copy of the decree within the period of limitation. So long as the certified copy of the decree is not filed there is no valid appeal in the eye of law. In the case of *Jagat Dhish Bhargava* v. *Jawaharlal Bhargava* (*supra*) this Court held at page 922 :—

> "The position of law under O. 41, r. 1 is absolutey clear. Under the said rule every appeal has to be perferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in that behalf, and has to be accompanied by a copy of the decree appealed from, and of the jndgmeut on which it is founded. Rule 1 empowers the

appellate Court to dispense with the filing of the judgment but there is no jurisdiction in the appellate Court to dispense with the filing of the decree. Where the decree consists of different distinct and severable directions enforceable against the same or several defendants the Court may permit the filing of such portions of the decree as are the subject matter of the appeal but that is a problem with which we are not concerned in the present case. In law the appeal is not so much against the judgment as against the decree; that is why Article 156 of the Limitation Act prescribes a period of 90 days for such appeals and provides that the period commences to run from the date of the decree under appeal. Therefore there is no doubt that the requirements that the decree should be filed along with the memorandum of appeal is mandatory, and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent."

Also in the case of *Shankuntala Devi* v. *Kuntal Kumari* (*supra*), this Court held at pp. 1008 to 1010 :

"Order 41, rule 1 of the Code provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader 'and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate court dispenses therewith) of the judgment on which it is founded'. Under 0.41, r. 1 the appellate Court can dispensee with the filing of the copy of the judgment but it has no power to dispense with the filing of the copy of the decree. A decree and a judgment are public documents and under S. 77 of the Evidence Act only a certified copy may be produced in proof of their contents. The memorandum of appeal is not validly presented, unless it is accompanied by certified copies of the decree and the judgment.

The contention of Mr. Misra is that a decree is the formal expression of the adjudication and that where, as in this case, no formal decree is drawn up, the determination under sec. 47 is a judgment and the Court having admitted the appeal must be presumed to have

dispensed with the filing of the copy of the judgment. In this connection he drew our attention to sec. 2(2), 33 and O.20 rules 1, 4, 6. We are unable to accept these contentions. We are not satisfied that the High Court dispensed with the filing of the copy of the order under Sec. 47. Admittedly, the High Court did not pass any express order to that effect. It may be that in a proper case such an order may be implied from the fact that the High Court admitted the appeal after its attention was drawn to the defect [see *G.I.P. Railway Co.* v. *Radhakissan*(1)]. But in the present case the High Court was not aware of the defect and did not intend to dispense with the filing of the copy.

Moreover an order under Sec. 47 is a decree, and the High Court had no power to dispense with the filing of a copy of the decree. Ordinarily a decree means the formal expression of the adjudication in a suit. The decree follows the judgment and must be drawn up separately. But under sec. 2(2), the term 'decree' is deemed to include the determination of any question within sec. 47. This inclusive definition of decree applies to O.41, r. 1. In some courts, the decision under sec. 47 is required to be formally drawn up as a decree in that case the memorandum of appeal must be accompanied by a copy of the decree as well as the judgment. But in some other Courts no separate decree is drawn up embodying the adjudication under sec. 47. In such a case, the decision under sec. 47 is the decree and also the judgment, and the filing of a certified copy of the decision is sufficient compliance with O.41, r. 1. As the decision is the decree the appeal is incompetent unless the memorandum of appeal is accompanied by a certified copy of the decision. Our attention was drawn to the decision in *Bodh Narain Mahto* v. *Mahabir Prasad & Ors.*(2) where Agarwala, J. seems to have held that where no formal decree was prepared in the case of a decision under sec. 47 the appellant was not required to file a copy of the order with the memorandum of appeal. We are unable

(1) A.I.R. 1926 Nag. 57.
(2) A.I.R. 1940 Pat. 176.

to agree with this ruling. The correct practice was laid down in *Kamla Devi* v. *Tarapada Mukherjee*[1] where Mookerjee, J. observed :

> 'Now it frequently happens that in cases of execution proceedings, though there is a judgment, an order, that is, the formal expression of the decision is not drawn up. In such cases the concluding portion of the judgment which embodies the order may be treated as the order against which the appeal is preferred. In such a case it would be sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone, and time should run from the date of the judgment. Where, however, as in the case before us, there is a judgment stating the grounds of the decision and a separate order is also drawn up embodying the the formal expression of the decision, copies of both the documents must be attached to the memorandum, and the appellant is entitled to a deduction of the time taken up in obtaining copies thereof.
>
> We hold that the memorandum of appeal from the order dated January 20, 1967 should have been accompanied by a certified copy of the order and in the absence of the requisite copy of the appeal was defective and incompetent."

Though by virtue of the provisions of the Original Side Rules of the Bombay High Court the earlier appeal could be permitted to be filed without a certified copy of the decree or order, the appeal would not be valid and competent unless the further requirement of filing the certified copy had been complied with. At the time when the earlier appeal no. 36 of 1981 had been withdrawn, the certified copy of the decree had not been filed. The said appeal without the certified copy of the decree remained an incompetent appeal. The withdrawal of an incompetent appeal which will indeed be no appeal in the eye of law cannot in any way prejudice the right of any appellant to file a proper appeal, if the right of appeal is not otherwise lost by lapse of time or for any other valid reason. We are, therefore, of the opinion that the provisions contained in order 20,

(1) 15 C.L.J. 498.

rule 11 of the Code do not in the facts and circumstances of the present case deprive the appellant of his right to file an appeal against the decree. A

The provisions of O. 2, rule 2 of the Code of Civil Procedure do not stand in the way of the appellant in the matter of filing the subsequent Appeal no. 44 of 1981. Order 2, rule 2 deals with suits and provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. Order 2, rule 2(2) further provides that where the plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. The requirement of Order 2, rule 2(3) is that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. The explanation provides that for the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action. It is clear from the provisions of Order 2, rule 2 that this rule is applicable only to suits and cannot in terms apply to appeals. Even if an appeal be considered to be a continuation of a suit for certain purposes, the provision of Order 2, rule 2 cannot in terms be made applicable to an appeal in view of the scheme of the said rule and the language used therein. Order 2, rule 2, contemplates that at the initial stage of the institution of the suit, the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, has to be made and further deals with the consequences of non-compliance with the requirements of the said rule. It is indeed doubtful whether the principles underlying this rule can be said to be applicable to an appeal. Even if the principles underlying Order 2, rule 2 can be considered to apply to an appeal, the maintainability of the instant case cannot be held to be affected in any way as the cause of action in respect of the present appeal is entirely different from the cause of action on the basis of which the earlier appeal had been filed. B C D E F G H

Order 23, rule 1 of the Code of Civil Procedure does not also stand in the way of the maintainability of the instant appeal. The

withdrawal of the earlier appeal which was not competent and was no appeal in the eye of the law and which was only concerned with regard to the provision of instalment cannot in any way effect the validity of the present appeal. Apart from the incompetency of the earlier appeal No. 36 of 1981, the subject matter of the said appeal was entirely different from the subject-matter of the present appeal.

It may further be noted that the provisions of the Code of Civil Procedure contained in Order 20, rule 11 order 2, rule 2 and Order 23 rule 1 do not in terms deal with any question in relation to the right of appeal or the extinguishment thereof. The aforesaid provisions do not by themselves confer any right of appeal on a party or deprive any party of the right of appeal which a party may enjoy. These are not the statutory provisions which either confer a right of appeal on a party or deprive a party of any such right. We have earlier considered the effect of there provisions and we are of the opinion that these provisions do not in the facts and circumstances of this case have the effect of depriving the defendant-appellant of his right to file the present appeal.

The only other question that requires to be considered is whether the defendant-appellant in the facts and circumstances of this case has become disentitled to file the instant appeal after the filing of the earlier appeal and the withdrawal of the same. It is beyond question that the right of appeal which is, no doubt, a creature of statute, may be lost to a party in a proper case and an appellant may be debarred from exercising the right of ths appeal Whether any party has lost his valuable right of preferring an appeal conferred on him by law must necessarily depend upon the facts and circumstances of a particular case.

The facts and circumstances which have been relied upon in support of the submission that the defendant-appellant in the instant case has become disentitled to file the present appeal No. 44 of 1981 are : (1) the defendant-appellant filed an affidavit asking for postponment of payment of the decretal amount in instalments; (2) the dafendant-appellant filed an appeal only against the direction regarding instalments before the filing of the present appeal against the decree on merits; (3) the defendant-appellant had withdrawn the earlier appeal without obtaining leave of Court to file any fresh appeal; (4) the defendant-appellant had obtained benefit of the instalment decree passed by the trial Court. We may not that the

ground which weighed with the learned judges of the Division Bench of the Bombay High Court was the filing of an appeal against only the provision regarding instalments and not against the decree on merits. A

We shall now proceed to consider whether the facts and circumstances of this case justifiably lead to the conclusion that the defendant-appellant has become disentitled to file the present appeal. B

It is not in dispute that the defendant-appellant had filed an affidavit asking for postponement of payment of any money decree that may be passed and also for payment of the amount in instalments. The filing of an affidavit on the conclusion of hearing and before pronouncement of judgment cannot in the facts and circumstances of this case be considered to amount to such conduct on the part of the defendant-appellant as to disentitle him to file an appeal against any decree that may ultimately be passed against him. In view of the provisions contained in Order 20, rule 11 (1) of the Code, the prayer for instalment has necessarily to be made before the pronouncement of the judgment and the passing of a decree, as the Court after the passing of the decree can grant instalments only with the consent of the decree-holder in terms of the provisions contained in Order 20, rule 11 (2) of the Code. Till the very last stage of the hearing of the suit the defendant-appellant had seriously contested the claim of the plaintiff-respondent and had in fact pressed for a counter claim against the plaintiff-respondent. Before the delivery of judgment the defendant-appellant could not possibly have known with any amount of certainty whether an decree against the defendant appellant would be passed in the suit, and if so, for what amount. Under such circumstances it cannot be said that any party who in view of the provisions contained in Order 20, rule 11 (1) makes a prayer for postponement of payment of the decretal amount and asks for payment of the same in instalments makes any representation that he will accept any decree that may be passed against him and will not prefer any appeal against the same. A mere prayer for postponement of payment of the decretal amount or for payment thereof in instalments on the basis of the provisions contained in Order 20, rule 11 (1) of the Code at a time when the decision in the suit is yet to be announced can never be considered to amount to such conduct of the party as to deprive him of his right to prefer an appeal against any decree, if ultimately passed, and to disentitle him from filing an appeal against the decree. It is no doubt true that C D E F G H

after the judgment had been pronounced and the decree had been passed it was open so the defendant-appellant to file an appeal against the decree. It may be noted that immediately after the pronouncement of judgment and the passing of the decree three separate precipes or requisitions had been filed on behalf of the defendant-appellant to the Prothonotary and Senior Master of the Bombay High Court and there was a specific requisition for a certified copy of the decree when drawn up, apart from requisitions for a certified copy of the judgment and also for certified copy of the minutes of the order. The immediate filing of the requisition for the certified copy of the decree and also of the judgment clearly manifests the intention of the defendant-appellant to prefer an appeal against the decree. It is common knoledge that in matters of litigation the litigant who is not expected to be familiar with the formalities of law and rules of procedure is generally guided by the advice of his lawyers. The statement of the lawyers recorded by the Division Bench in its judgment clearly goes to indicate that the lawyer had advised filing of the earlier appeal under a mistaken belief. The act done by the defendant-appellant on the mistaken advice of a lawyer cannot furnish a proper ground for depriving the defendant-appellant of his valuable statutory right of preferring an appeal against the decree. We have already held that the earlier appeal No. 36 of 1981 against the provision regarding instalments was incompetent and the filing of an incompetent appeal or the withdrawal of the same does not entail any legal consequences, prejudicing the right of the defendant-appellant to file a proper appeal against the decree. The question which still remains to be considered is whether the act of filing an appeal against the order regarding instalments and not filing an appeal against the decree, when it was open to the defendant-appellant to do so, can be regarded to constitute such conduct on the part of the defendant-appellant as to disentitle him to maintain the present appeal. The filing of an incompetent appeal on the mistaken advice of a lawyer cannot, in our opinion, reflect any such conduct on the part of the defendant-appellant. An appeal which is not competent is necessarily bound to fail, and in such a case the proper course for an appellant would be to file a valid and competent appeal. The filing of an incompetent appeal and withdrawal of the same do not prejudice the right to file a proper appeal and cannot be held to constitute such conduct on the part of an appellant as to deprive him of his right to file a valid appeal. The filing of the earlier appeal No. 36 of 1981 cannot in

the facts and circumstances of this case be said to manifest any intention on the part of the defendant-appellant that he would not prefer an appeal against the decree and the same does not amount to any representation that the otherwise accepts the decree. In judging the conduct of the defendant-appellant to decide whether the defendant-appellant had abandoned, relinquished or waived his right of appeal against the decree, all the relevent facts and circumstances which have a bearing on the question have to be considered. The facts and circumstances of this case clearly go to indicate that the defendant-appellant had felt aggrieved by the decree and had not mainfested any intention to accept the same and not to prefer an appeal against the decree. As we have earlier seen, the defendant-appellant had not only denied and disputed the case of the plaintiff-respondent but had also made a counter claim in the suit against the plaintiff-respondent. The defendant-appellant had throughout contested the suit and the claim of the plaintiff-respondent with all seriousness. Immediately on the pronouncement of judgment the defendant-appellant clearly manifested its intention of preferring an appeal against the decree by causing the necessary requisition for the certified copy of the decree and judgment to be filed. The stakes involved in the suit of the defendant.appellant were very high and the judgment and the decree in the suit had gone against the defendant-appellant. In this background the filing of the earlier appeal on the mistaken advice of the lawyer cannot in our opinion, legitimately lead to the conclusion that the defendant appellant had abandoned or relinquished his right to prefer the present appeal and that the defendant-appellant had become disentitled to file the same. The further fact that the earlier appeal No. 36 of 1981 was withdrawn the very next day after the same had been filed at the stage of admission and the present appeal came to be filed just a week after the withdrawal of the earlier appeal clearly establishes that the defendant-appellant had never intended to relinquish or abandon its right to file an appeal against the decree. The earlier appeal No. 36 of 1981 which was filed on 20.1.1981 and was withdrawn on 21.1.1981 at the time of admission, could not possibly have caused any prejudice to the plaintiff-respondent. The promptitude with which the present appeal was filed just after a week on 29.1.1981 indicates that the defendant appellant had never intended to give up their right of appeal against the decree and they have acted with all promptness and earnestness on being properly advised as to the legal position and as to their legal rights. The filing of the earlier appeal No. 36 of 1981 in the facts and circumstances of this case

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does not amount to any representation or promise on the part of the defendant appellant to accept the decree on merits and not to prefer an appeal from the same. There is also no question of election on the part of the defendant-appellant in preferring an appeal against the order regarding the instalment and not against the decree on merits. It is not a case where a party is called upon to elect one of two alternative remedies, when by a election of one of two alternative remedies he loses his right to pursue the other. In the instant case, the defendant-appellant has a statutory right to prefer an appeal against the decree and any question of election on his part does not aries.

The withdrawal of the earlier appeal No. 36 of 1981 without obtaining the leave of Court does not in the facts and circumstances of this case, affect in any way the maintainability of the present appeal. We have already held that the earlier appeal No. 36 of 1981 was an incompetent appeal and the withdrawal of the incompetent appeal in the instant case did not have prejudice, in any way, the right of the defendant-appellant to file a proper appeal against the decree. The withdrawal of the earlier appeal at the stage of admission on the very next day after the same had been filed and the filing of the present appeal just after a week thereafter, on the other hand, have a bearing on the conduct of the defendant-appellant and they manifestly make it clear that the defendant-appellant had always intended to file an appeal against the decree and it never intended to give up his right of appeal against the decree.

In the instant case we are not satisfied that the defendant-appellant had obtained any advantage under the decree to preclude him from filing an appeal against the same. Even before any instalment had fallen due under the decree, the defendant appellant had filed the earlier appeal No. 36 of 1981 against the provisions regarding instalments. It is to be noted that instead of taking or getting any advantage under the decree in the matter of granting instalments, the defendant-appellant had challenged the same long before the question of deriving any benefit thereunder had come. As we have earlier noticed, the defendant-appellant had withdrawn the earlier appeal the very next day and had filed the present appeal within eight days thereafter. In an appropriate case any party which derives any advantage under a decree or order may, depending on the facts and circumstances of the case, disentitle himself to challenge the same and will be estopped from filing an appeal against the same,

It is also to be borne in mind that no execution of decree passed in a suit on the original side is normally permitted unless a certified copy of the decree is on the record in the execution proceeding. A certified copy of the decree is not available so long as the decree is not drawn up and filed. The present appeal had been filed long before the decree had been drawn up and, therefore, there could be no question of execution of any decree at the time when the present appeal was filed. The question of the defendant appellant having obtained an advantage under the decree does not therefore, really arise. In the case of *Bhau Ram* v. *Baijnath*,(1) this Court observed at p. 362 :

> "It seems to us, however, that in the absence of some statutory provision or of a well-recongnised principle of equity, no one can be deprived of his legal rights including a statutory right of appeal."

We have earlier held that no statutory provision deprives the defendant-appellant of his right to file the present appeal. We have carefully considered the facts and circumstances of this case and the facts of this case also do not attract any well-recognised principle of equity to deprive the appellant of his very valuable statutory right of appeal. The various passages from Halsbury relied on by Mr. Nariman which we have earlier quoted lend support to the view that the defendant-appellant in the instant case by reason of its conduct or otherwise is not estopped or has not become disentitled to file the appeal.

In the result the appeal has to be allowed. We, therefore, set aside the judgment and decree of the Division Bench of the Bombay High Court dismissing the appeal of the defendant-appellant on the ground of maintainability. We remand the appeal to the High Court for decision on merits. In the facts and circumstances of this case, we make no order as to costs.

H.S.K. *Appeal allowed.*

(1) [1962] 1 S.C.R. 358.