A SUBHASH MAHADEVASA HABIB

v.

NEMASA AMBASA DHARMADAS (D) BY LRS. AND ORS.

MARCH 19, 2007

B [S.B.SINHA AND P.K. BALASUBRAMANYAN, JJ.]

Code of Civil Procedure, 1908: Sections 11, 15, 20, 21 and 21A.

C **Res judicata**—*Inherent jurisdiction and territorial jurisdiction—Lack of—Distinction between—Place of suing—Suit for redemption—Three items of property were allotted to one 'CB' in partition—He along with his two minor sons executed a mortgage in respect of all the three items in favour of one 'D'—Subsequently 'CB' acting for himself and as the guardian of his minor sons, executed a simple mortgage in respect of the properties to one* D *'H'—Thereafter, 'CB', on his own, sold the properties, rather, the equity of redemption, to the appellant—The wife and sons of 'CB' filed a suit arraying the appellant and 'CB' as defendants Nos. 1 and 2 respectively for a declaration that the sale deed executed by 'CB' in favour of the appellant was bogus and not binding on them and, in the alternative, for a declaration* E *that the sale deed did not affect their shares in the properties and was not binding on them—The trial court found that the plaintiffs had not proved that the sale deed executed by 'CB' was not binding on them and, therefore, upheld the whole title conveyed to the appellant—'CB' also filed a suit challenging the sale in favour of the appellant—During the pendency of the appeal, 'CB', his wife and his sons then purported to sell their rights in the* F *properties to defendant No. 6 and asked him to get himself impleaded in the appeal or in the suit—The appeal was dismissed and, thus, the decree became final as against the wife and sons of 'CB'—The trial court, while dismissing the suit filed by 'CB', held that the trial court which dismissed the earlier suit had no pecuniary jurisdiction to entertain that suit and, therefore,* G *the decree in that earlier suit was one without jurisdiction—The first and second appeals were also dismissed—Thereafter, the appellant filed two suits for redemption of the mortgage in favour of 'D'—The trial court found that the properties were the separate properties of 'CB' and, therefore, upheld the sale to the appellant and held that the appellant was entitled to redeem the mortgage—Defendant No. 1, the mortgagee, and defendant No. 6 filed appeals*

H

before the lower appellate court—The lower appellate court partly allowed the appeal and held that 'CB' had only 1/4th share in the properties and his assignment to the appellant was limited only to 1/4th share and accordingly modified the decree of the trial court—The High Court dismissed the second appeals—Correctness of—Held: Finding in the second suit that the decree in the first suit could be ignored or the effect of it swept under the carpet because the court which passed that decree lacked pecuniary jurisdiction was clearly unsustainable in law—Defendant No. 6, as assignee, had no interest in the properties sought to be redeemed and could not put forward any valid defence to the suit for redemption filed by the appellant—The decree passed in the suit filed by the wife and sons of 'CB' would bar defendant No. 6 from questioning the right of the appellant under the assignment in his favour—High Court judgment set aside.

Words and Phrases:

"Place of suing"—Meaning of—In the context of Section 21A of the Code of Civil Procedure, 1908.

In a partition between three brothers, three items of property were allotted to one 'CB', the original defendant No. 2. He along with his two minor sons, who were defendant Nos. 3 and 4, executed a mortgage in respect of all the three items in favour of one 'D', defendant No. 1 in the suit. Subsequently, defendant No. 2, acting for himself and as the guardian of his minor sons, executed a simple mortgage in respect of the properties to one 'H'. Thereafter, defendant No. 2, on his own, sold the properties, rather, the equity of redemption, to the appellant.

The wife and sons of defendant No. 2 filed a suit arraying the appellant and defendant No. 2 as defendants Nos. 1 and 2 respectively for a declaration that the sale deed executed by defendant No. 2 in favour of the appellant was bogus and not binding on them and, in the alternative, for a declaration that the sale deed did not affect their shares in the properties and was not binding on them.

The appellant filed a written statement and raised several issues. The trial court found that the plaintiffs had not proved that the sale deed executed by defendant No. 2 was not binding on them and, therefore, upheld the whole title conveyed to the appellant. Defendant No. 2 also filed a suit challenging the sale in favour of the appellant.

A During the pendency of the appeal, defendant No. 2, his wife and his sons then purported to sell their rights in the properties to defendant No. 6 and asked him to get himself impleaded in the appeal or in the suit. The appeal was dismissed and, thus, the decree became final as against the wife and sons of defendant No. 2. The trial court, while dismissing the suit filed by the defendant No. 2, held that the trial court which dismissed the earlier suit had B no pecuniary jurisdiction to entertain that suit and, therefore, the decree in that earlier suit was one without jurisdiction. The first and second appeals were also dismissed.

Thereafter, the appellant filed two suits for redemption of the mortgage C in favour of 'D'. The trial court found that the properties were the separate properties of defendant No. 2 and, therefore, upheld the sale to the appellant and held that the appellant was entitled to redeem the mortgage.

Defendant No. 1, the mortgagee, and defendant No. 6 filed appeals before the lower appellate court. The lower appellate court partly allowed the appeal D and held that defendant No. 2 had only 1/4th share in the properties and his assignment to the appellant was limited only to 1/4th share and accordingly modified the decree of the trial court. Challenging this decree of the lower appellate court, both sides filed second appeals in the High Court, which were dismissed. Hence the appeal.

E Allowing the appeal, the Court

HELD: 1.1. Defendant No. 2 and the appellant were only co-defendants in the suit filed by the wife and the sons of defendant No. 1. Even then, the decree therein could operate as *res judicata* as between them if the conditions therefor are satisfied. The conditions as laid down by this Court are: (i) there F must be a conflict of interest between the defendants concerned; (ii) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims; (iii) the co-defendants must be necessary or proper parties to the suit and (iv) the question between the defendants must have been finally decided *inter se* between them. [Para 22] [168-E, F]

G *Iftikhar Ahmed* v. *Syed Meharban Ali,* [1974] 3 SCR 464 and *Mahboob Sahab* v. *Syed Ismail,* [1995] 2 SCR 975, relied on.

1.2. There was conflict of interest between defendant No. 2, the father, and the appellant since the father was supporting the plaintiff and was H questioning the sale deed and appellant, the defendant No. 1 therein, was

resisting the claim and supporting the sale transaction. It was necessary to decide the conflict in that suit since the claim of the plaintiff therein and the defence put up by the appellant made it obligatory for the court to decide the issue for the purpose of finding out whether the plaintiffs therein were entitled to relief. Defendant No. 2 and the appellant were necessary parties to the suit, since the suit challenged the alienation made by defendant No. 2 to the appellant, defendant No. 1 therein. The question was clearly finally decided in that suit resulting in dismissal of the challenge to the validity of the sale effected by defendant No. 2 to defendant No. 1. Thus, when that decision attained finality it also precluded defendant No. 2 from seeking to challenge his sale to the appellant on the basis that the alienation was beyond his competence as Karta of the joint family or on the basis that the sale was not binding on the joint family or on the basis that the rights of the family had not been validly conveyed to the appellant. [Para 22] [168-F, G, H; 169-A-B]

2.1. The Code of Civil Procedure, 1908 has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas, an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied. It may be noted that Section 21 provided that no objection as to place of suing can be allowed by even an appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. In 1976, the existing Section was numbered as sub-Section (1) and sub-Section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice. Section 21A also was introduced in 1976 with effect from 1.2.1977 creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing. The amendment by Act 104 of 1976 came into force only on 1.2.1977 when the second suit was pending. By virtue of Section 97(1)(c) of the Amendment Act, 1976, the said suit had to be tried and disposed of as if Section 21 of the Code had not been amended by adding sub-Section (2) thereof. Of course, by virtue of Section

A 97(3) if Section 21A had to be applied, if it has application. But then Section 21 A on its wording covers only what it calls a defect as to place of suing. [Para 24] [170-A-F]

Saunders v. *Anglia Building Society,* (1971) A.C. 1004, referred to.

B 2.2. Though Section 21A of the Code speaks of a suit not being maintainable for challenging the validity of a prior decree between the same parties on a ground based on an objection as to "the place of suing", there is no reason to restrict its operation only to an objection based on territorial jurisdiction and excluding from its purview a defect based on pecuniary jurisdiction. In the sense in which the expression "place of suing" has been C used in the Code it could be understood as taking within it both territorial jurisdiction and pecuniary jurisdiction. Section 15 of the Code deals with pecuniary jurisdiction and, Sections 15 to 20 of the Code deal with "place of suing". The heading "place of suing" covers Section 15 also. [Para 25] [170-F, G]

D *The Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu,* [1966] 1 SCR 46, relied on.

2.3. Even otherwise, considering the interpretation placed by this Court on Section 11 of the Suits Valuation Act and treating it as equivalent in effect to Section 21 of the Code of Civil Procedure, as it existed prior to the E amendment in 1976, it is possible to say, especially in the context of the amendment brought about in Section 21 of the Code by Amendment Act 104 of 1976; that Section 21A was intended to cover a challenge to a prior decree as regards lack of jurisdiction, both territorial and pecuniary, with reference to the place of suing, meaning thereby the court in which the suit was F instituted. As can be seen, the Amendment Act 104 of 1976 introduced sub-Section (2) relating to pecuniary jurisdiction and put it on a par with the objection to territorial jurisdiction and the competence to raise an objection in that regard even in an appeal from the very decree. [Para 25] [171-A-B-C]

Kiran Singh v. *Chaman Paswan,* [1955] 1 SCR 117, *Seth Hiralal Patni* G v. *Sri Kali Nath,* [1962] 2 SCR 747 and *The Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu,* [1966] 1 SCR 46, referred to.

2.4. There is no justification in understanding the expression "objection as to place of suing" occurring in Section 21A as being confined to an objection only in the territorial sense and not in the pecuniary sense. Both H could be understood, especially in the context of the amendment to Section 21

brought about by the Amendment Act, as objection to place of suing. It appears that when the Law Commission recommended insertion of Section 21A into the Code, the specific provision subsequently introduced in sub-Section (2) of Section 21 relating to pecuniary jurisdiction was not there. Therefore, when introducing sub-Section (2) of Section 21 by the Amendment Act 104 of 1976, the wordings of Section 21A as proposed by the Law Commission was not suitably altered or made comprehensive. But an objection to territorial jurisdiction and to pecuniary jurisdiction is treated on a par by Section 21. The placing of Sections 15 to 20 under the heading 'place of suing' also supports this position. Taking note of the object of the amendment in the light of the law as expounded by this Court, it would be incongruous to hold that Section 21A takes in only an objection to territorial jurisdiction and not to pecuniary jurisdiction. It is, therefore, to be held that in the second suit, the validity of the decree in the first suit could not have been questioned based on the alleged lack of pecuniary jurisdiction. Of course, the suit itself was not for challenging the validity of the decree in the first suit and the question of the effect of the decree in the first suit only incidentally arose. In a strict sense, therefore, Section 21A of the Code may not ipso facto apply to the situation. [Para 25] [171-D-H; 172-A]

3. But the fact that Section 21(2) or Section 21A of the Code may not apply would not make any difference in view of the fact that the position was covered by the relevant provision in the Suits Valuation Act. Section 11 of the Suits Valuation Act provided that notwithstanding anything contained in Section 578 (Section 99 of the present Code covering errors or irregularity) of the Code of Civil Procedure an objection that a court which had no jurisdiction over a suit had exercised it by reason of under-valuation could not be entertained by an appellate court unless the objection was taken in the court of first instance at or before the hearing at which the issues were first framed or the appellate court is satisfied for reasons to be recorded in writing that the over-valuing or under-valuing of the suit has prejudicially affected the disposal of the suit. [Para 26] [172-A-B-C]

Kiran Singh v. *Chaman Paswan*, [1955] 1 SCR 117, relied on.

4. In the light of the above, it is clear that no objection to the pecuniary jurisdiction of the court which tried the first suit could be raised successfully even in an appeal against that very decree unless it had been raised at the earliest opportunity and a failure of justice or prejudice was shown. Obviously, therefore, it could not be collaterally challenged. That too not by the plaintiffs

A therein, but by a defendant whose alienation was unsuccessfully challenged by the plaintiffs in that suit. In the first suit an issue on the valuation and court fee paid was raised and the court directed the plaintiffs therein to pay additional court fee on adjudicating on that issue and the plaintiffs complied with that direction. In the second suit in which the plaintiffs in the first suit or their assignee was not a party, the court had no occasion to go into the B question of the decree in the first suit having been passed by a court which lacked pecuniary jurisdiction. Even assuming that it has such a jurisdiction, it could not have ignored the finality of that decree or the legal effect of it, merely on a finding that the suit was under-valued in the light of the ratio clearly laid down by this Court in the decision referred to above. Therefore, C finding in the second suit that the decree in the first suit could be ignored or the effect of it swept under the carpet because the court which passed that decree lacked pecuniary jurisdiction was clearly unsustainable in law.

[Para 27] [173-D-H; 174-A]

5.1. Section 11, when it is applied to two suits, has to be literally D complied with and one of the requirements of Section 11 of the Code is that the court which passed the decree in the first suit should have jurisdiction to entertain the second suit in which the earlier decree is put forward as *res judicata.* For, Section 11 provides that no court shall try any suit between the same parties on an issue which was directly and substantially in issue in a E former suit between the same parties in a court competent to try such subsequent suit and the issue had been heard and finally decided. Therefore, in that sense, in the second suit, the decree in the first suit could not have operated as *res judicata.* [Para 29] [174-F-H; 175-A]

5.2. Therefore, even if the finding in the second suit that the properties F belonged to the joint family is taken as having attained finality that would not carry either the mortgagee or the subsequent assignee, defendant No. 6, far in this case, for the reason that the alienation by defendant No. 2 as Karta of the joint family had also been upheld in the first suit, it being clearly held *that the sale* was supported by necessity and as being one within the competence of the Karta of the joint family. [Para 30] [175-C-D]

G

6. There is also another aspect. The second suit was filed by defendant No. 2 challenging the alienation made by him. Though a finding was entered that the properties belonged to the joint family, the suit was dismissed wholly in favour of the appellant, the defendant therein. The finding was that the H alienation effected by defendant No. 2 was perfectly valid. That meant that the

challenge of defendant No. 2 to the alienation had failed in its entirety. In such circumstances, it is highly doubtful whether a finding rendered against the appellant, the defendant, in a suit that was wholly dismissed in his favour would operate as *res judicata*. [Para 31] [175-E, F]

7. When this is the position, there was no necessity for the first appellate court or the High Court to go into the question whether the property in the hands of defendant No. 2 held by him for and on behalf of the family consisting of himself and his sons or it was held by him as his own. There is considerable doubt about the antecedents of the property and the partition among defendant No. 2 and his brothers alone could not prove the character of the properties in the hands of defendant No. 2. It depended on whether defendant No. 2 and his brothers inherited the properties through a female ancestor or a male ancestor. The suit for redemption was filed by the plaintiff as against the mortgagee, defendant No. 1. There is no valid defence put forward by the mortgagee against the redemption of the mortgage. Defendant No. 6 (defendant No. 11 in the other suit) had not derived any right in the properties either from defendant No. 2 or from his wife and sons in view of the prior assignment by defendant No. 2 in favour of the plaintiff and by virtue of the adjudication in the first suit, it has to be held that defendant No. 6, as assignee, had no interest in the properties sought to be redeemed and could not put forward any valid defence to the suit for redemption filed by the plaintiff. If so, the decrees now passed by the High Court have to be found to be unsustainable. The High Court has asked itself the wrong question. It has not considered whether defendant No. 6 could claim to have derived any right over the properties or in the equity of redemption on the basis of the assignment in his favour. Therefore, the decrees of the High Court call for interference. [Para 34] [177-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1449 of 2007.

From the Final Judgment and Order dated 07.03.2002 of the High Court of Karnataka at Bangalore in R.S.A. No. 472 & 435 of 1998.

WITH

C.A. No. 1450 of 2007

S.N. Bhat, D.P. Chaturvedi and N.P.S. Panwar for the Appellant.

Amit Chadha, G.C. Hiremath, Kunal Sinha and Shankar Divate for the

A Respondents.

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. Leave granted.

B 1. The first of the Civil Appeals challenges the decree of the High Court of Karnakata in R.S.A. Nos. 472 and 435 of 1998, both arising out of O.S. No. 67 of 1975. The second challenges the decree in R.S.A. No. 865 of 2000, arising out of O.S. No. 800 of 1992. Both the suits were for redemption and the decrees passed therein are questioned in these appeals by the common plaintiff in them.

C

2. Three items of properties situated in Hubli City in the State of Karnataka are the subject matters of these two suits. Whereas in the first suit O.S. No. 67 of 1975, we are concerned with C.T.S. No. 1015/A/20 having an extent of 29.38 square yards, in O.S. No. 800 of 1992 we are concerned with C.T.S. No. 1015/A/19 having an extent of 14.7 square yards and 1028/2A D having an extent of 75 square yards. As seen recited in a deed of partition dated 14.2.1961 entered into by three brothers belonging to a Hindu Mitakshara Family, the said items along with other items belonged to their joint family. But there is considerable dispute about the antecedents of the properties or the title to the properties. In that partition, the above items were allotted to E Chandappa Balappa Sangam, original defendant No. 2, in these suits. He along with his two minor sons who are defendant Nos. 3 and 4 executed a mortgage in respect of all the three items on 12.8.1963 in favour of Dharmadas, defendant No.1 in the suit. This was followed by a deed of further charge dated 28.8.1963. Subsequently, on 10.6.1964, defendant No. 2 acting for himself and as the guardian of his minor sons, defendant Nos. 3 and 4, executed a F simple mortgage in respect of the properties to one Hemadi, a moneylender. The document recites that a sum of Rs. 2500/- was taken as a loan for his trade. It may be noted that the deed of partition recites that the family was conducting a joint trade in firewood. On 15.10.1970, defendant No. 2, on his own, sold the properties, rather, the equity of redemption, to Habib, the G plaintiff in these suits for redemption. The sale deed recites that the properties were outstanding on three mortgages and the sale was being effected for family necessity and to pay off debts and to create capital for business. The best price had been offered by the purchaser. It purports to convey the entire rights in the property. It also contains an assertion that the seller, defendant No. 2, was the absolute owner of the properties, having a marketable title. The H mortgage to defendant No. 1 and further charge are referred to as encumbrances

on the properties. A

3. It is seen that the wife and sons of defendant No.2 filed O.S. No. 61 of 1971 arraying Habib, the assignee from defendant No.2, and defendant No.2 as defendants, for a declaration that the sale deed executed by defendant No.2 in favour of Habib was bogus and not binding on the plaintiffs or in the alternative, for a declaration that the sale did not affect their shares in the B properties and was not binding on their shares and for a decree for permanent injunction restraining Habib from taking possession of the suit properties.

4. It was pleaded in the plaint that:

> "Defendant No. 2 was the manager of the joint Hindu family consisting C of himself and the plaintiffs. The joint family owned and possessed and enjoyed the suit properties. It has now transpired that without the knowledge of the plaintiffs, the second defendant, on 15/10/1970 sold the suit properties with the interest of the plaintiffs therein to the first defendant purporting to be for a sum of Rs. 10,000/-. The plaintiffs D and defendant No.2 being coparceners each have 1/4th share in the suit properties, which have been alienated by the second defendant without legal necessity and without considerations of family benefit. Perusal of the recitals of the sale deed showed it to be one without consideration, 'bogus' and having been brought about by fraud, misrepresentation and undue influence. The sale consideration shown E in the document is also too inadequate. The plaintiffs on becoming aware of the impugned transaction, issued a legal notice to the first defendant, and thereafter instituted this suit, the cause of action for which arose on 15/10/1970."

5. In the written statement, Habib who was defendant No.1 therein, F spoke of the prior mortgages in favour of others and of the mortgage in favour of Hemadi being executed by defendant No.2 on his own behalf as well as on behalf of his minor sons and the mortgage transactions being entered into by defendant No.2 for family necessity and family benefit. Defendant No.2 found himself in a position where he had no alternative to selling the G properties for clearing off his debts. Hence he offered to sell the suit properties to Habib with the object of paying off the earlier mortgages. Habib agreed to purchase. Subsequent to the purchase Habib had paid off the amounts due to Hemadi and had obtained a release from his heirs. The transaction he had entered into was a *bona fide* one. The suit had been under-valued. There was no cause of action as against him. Defendant No. 2, who was defendant No.2 H

A in that suit as well, contended that the properties were joint family properties. He further pleaded that the earlier mortgages were binding on the plaintiffs and there was pressure on the estate justifying a further borrowing and he had borrowed a sum of Rs. 10,000/-. The document writer had induced him to execute the sale deed impugned therein making him believe that it was a deed of mortgage to secure a borrowing and the repayment of Rs.10,000/-. B Thus, a fraud had been played on him in getting a sale deed executed. He alone was not competent to enter into a transaction in respect of the properties.

6. The trial court framed issues on whether the suit deed was got executed by exercise of fraud, undue influence and misrepresentation, whether C the plaintiffs proved that the sale deed was not binding on them, did defendant No.1 Habib prove that the sale was for payment of antecedents debts and legal necessity and was effected after due enquiry and binding against the plaintiffs, whether the suit was valued properly for the purpose of court fee and whether Habib proved that the alleged sale transaction was for legal necessity or for benefit of the estate and that it is binding on the plaintiffs. D

7. The court heard the issue of valuation as a preliminary issue. It held that the suit had been under-valued. The plaintiffs were directed to pay additional court fee. The deficit court fees was made up by the plaintiffs. Thereafter, after trial, it found that the plaintiffs had not pleaded properly a case of fraud, misrepresentation and undue influence and even otherwise E there was no adequate or acceptable evidence to find that the suit transaction was vitiated by fraud, misrepresentation or undue influence. The evidence on record was elaborately considered. The court then found that the plaintiffs have not proved that the sale deed executed by defendant No.2 was not binding on them. While arriving at that finding, the court held that it had to F first decide the nature of the property notwithstanding the dearth of pleadings on the side of the Habib on that aspect. The court held that the suit properties were admittedly in the ownership of the mother of the second defendant and the same having been inherited by defendant No.2 from a female ancestor, the properties were his separate properties. The law on the subject was discussed by the court while arriving at that finding. The court also held that there was G no material on the basis of which it could hold that there was a blending of the properties by defendant No.2 on the basis of which the joint family character of the properties could be found. The court then proceeded to consider the question whether the alienation was binding on the plaintiffs on the basis or on the assumption that the suit properties were the joint family H properties of the plaintiffs and defendant No.2. The court held that even if

the properties were treated to be joint family properties, the alienation by defendant No.2 was within the limits of the powers vested in him as the Karta of an Undivided Hindu Family and consequently, the sale deed executed by him was sustainable both in law and on facts. It was binding on the joint family. The plaintiffs could not successfully challenge the same. Thus, the trial court upheld the whole title conveyed to Habib, defendant No.1 therein, by defendant No.2, the father. The suit was thus dismissed on 18.2.1974.

8. An appeal, R.A. 191 of 1991 was filed from the said judgment and decree by the plaintiffs in that suit. Defendant No. 2, his wife and his sons then purported to sell their rights in the property to defendant No.6 by deed dated 9.1.1975. It recited the factum of the earlier sale to Habib and asserted that it was only intended to be a mortgage. The filing of O.S. No. 61 of 1971 and its dismissal was recited and the filing of an appeal against that decree was also recited. The filing of O.S. No. 4 of 1972 was also recited. The purchaser, defendant No.6 was asked to get himself impleaded in both and to pursue the litigation and get cancelled that sale deed. Defendant No. 6 did not choose to get himself impleaded in the appeal or in the suit O.S. No. 4 of 1972. The appeal R.A. 191 of 1991 was dismissed as not pressed on 9.7.1976. Thus, the decree in O.S. No. 61 of 1971 became final as against the wife and sons of defendant No.2 and their assignee to the extent of their alleged rights or shares in the properties.

9. The consequence was that the challenge of the wife and sons of defendant No.2 on behalf of the family to the alienation effected in favour of Habib by defendant No.2 failed. The title of the family was thus held to have passed to Habib, treating the property conveyed to be joint family property. This decision was rendered in favour of Habib, the assignee, in the presence of the father, defendant No.2 therein, as well. On the day defendant No.2, his wife and sons sold their alleged rights to defendant No.6 herein, the joint family or defendant No.2, his wife and sons had nothing to convey since the decree in O.S. No. 61 of 1971 stood confirmed, the appeal against it having been dismissed, subject of course to any relief being granted to defendant No.2 in the suit OS 4 of 1972, he had himself filed, challenging the sale.

10. Even while O.S. No. 61 of 1971 was pending, defendant No.2 who executed the sale deed, had himself filed O.S. No. 4 of 1972 challenging the sale in favour of Habib. Among other issues, two issues were raised therein as to whether the court in which O.S. No. 61 of 1971 was filed by the wife and sons of defendant No.2 (the plaintiff in O.S. No. 4 of 1972) had pecuniary

A jurisdiction to try O.S. No. 61 of 1971 and whether the suit O.S. No. 4 of 1972 was not maintainable in view of the filing of O.S. No. 61 of 1971 in the Munsif court by the wife and sons of the plaintiff in O.S. No. 4 of 1972. Neither the wife of defendant No.2 nor his sons were parties to the suit. The court even though it dismissed the suit, held that O.S. No. 61 of 1971 which had by that time been dismissed by the Munsiff's court, was filed in a court having no B pecuniary jurisdiction to entertain that suit and therefore the decree in O.S. No. 61 of 1971 was one without jurisdiction. Hence the decision therein would not operate as res judicata and estoppel by record in the suit filed by the father (the present defendant No.2). On a finding that no vitiating circumstance to invalidate the sale is established, the trial court dismissed the suit. An C appeal R.A. No. 16 of 1981 filed by the plaintiff in that suit (the present defendant No.2), challenging the dismissal of his suit, was dismissed and a second appeal taken as R.S.A. No. 92 of 1985 was also dismissed. What requires to be emphasised is that Habib was a party both to O.S. No. 61 of 1971 and to O.S. No. 4 of 1972. In fact, the suits were directed against him. In the first suit filed by the wife and children, the sale in his favour was D upheld both on the basis of the sale being supported by necessity and benefit to the joint family of defendant No.2 and his sons and as being one within the competence of defendant No.2 as the Karta of the joint family and also on the basis that the property was the separate property of defendant No.2 and the sale was not vitiated. In the latter suit, the sale was upheld on E the finding that defendant No.2, the plaintiff therein, had failed to establish any element to vitiate or invalidate the sale. While doing so and dismissing the suit filed by defendant No.2, the court held that the decree in O.S. No. 61 of 1971 was passed by a court having no pecuniary jurisdiction and hence the decree therein would not operate as *res judicata*. It was also cursorily held that the properties belonged to the joint family of defendant No.2. It has F to be noted that both Habib, the present plaintiff and the present defendant No.2 were co-defendants, being defendants 1 and 2 in O.S. No. 61 of 1971 and they were respectively the plaintiff and the defendant in O.S. No. 4 of 1972.

11. As noticed earlier, defendant No.2, his wife and defendants 3 and G 4, his sons, purported to sell their rights to defendant No.6 in O.S. No. 67 of 1975 (He is defendant No.11 in O.S. No. 800 of 1992). Now Habib, on the basis of the assignment from defendant No.2, filed the suit O.S. No. 67 of 1975 for redemption of the mortgage in favour of defendant No.1 Dharmadas. On the ground that the deed of mortgage was not produced, the suit was confined to only one item, the extent in C.T.S. No. 1015/A/20, on the basis of an H admission of a subsisting mortgage in the written statement. Habib therefore

filed a second suit O.S. No. 800 of 1992 for redemption of the other two items C.T.S.Nos. 1015/A/19 and 1028/2A-1. In both the suits, the assignee from defendant No.2, his wife and sons was impleaded as a defendant; defendant No. 6 in O.S. No. 67 of 1975 and defendant No.11 in O.S. No. 800 of 1992.

12. In O.S. No. 67 of 1975, the parties joined issue on whether the properties belonged to defendant No.2 or they were the joint family properties of defendants 2, 3 and 4, defendant Nos. 3 and 4 being sons of defendant No.2. Issues were also framed on the finality of the findings in O.S. No. 61 of 1971 and on the effect of the decision in O.S. No. 4 of 1972. The plea of the *res judicata* loomed large. The trial court held that the finding on the nature of the property in O.S. No. 61 of 1971 and the decree therein cannot be ignored as a nullity and that the finding in O.S. No. 4 of 1972 does not bar the court from deciding the issue of the title to the properties. No evidence was adduced by defendants 2 to 4 to establish that the properties were their joint family properties. None of them even went to the box to speak to such a case. Only defendant No.6 attempted to produce evidence in that regard. After discussing the evidence, that court decreed O.S. No. 67 of 1975 for redemption of the item involved therein, finding that the property was the separate property of defendant No.2. It therefore fully upheld the sale to plaintiff Habib, of the equity of redemption and held that Habib was entitled to redeem the mortgage.

13. Defendant No. 1, the mortgagee, and defendant No. 6, the assignee from defendants 2, 3 and 4 of their purported rights, filed R.A. No. 104 of 1992 challenging the decree of the trial court. The lower appellate court held that the judgment and decree in O.S. No. 61 of 1971 was passed by a competent court having pecuniary jurisdiction. It also noticed that the findings in O.S. No. 61 of 1971 were not set aside by any court. Proceeding to discuss the merits, the appellate court held that the finding in O.S. No. 4 of 1972 being that the properties were the properties of the joint family of defendant No.2, the said finding having become final, it had to be held that the properties were properties of the joint family. On discussing the evidence, that court ended up by holding that defendant No.2 had only a 1/4th share in the properties and hence his assignment to Habib, the plaintiff conferred on Habib only a 1/4th interest in the equity of redemption. It did not specifically advert to or deal with the consequence of the finality of the decree in OS No. 4 of 1972. It rejected the case of defendants 1 and 6 that the mortgage already stood redeemed. The appellate court modified the decree of the trial court and passed a preliminary decree for redemption by permitting the plaintiff to

redeem the suit property only to the extent of 1/4th share.

14. Challenging this decree of the lower appellate court, both sides filed second appeals in the High Court. The plaintiff Habib, filed R.S.A. No. 472 of 1998 and defendants 1 and 6 filed R.S.A. No. 435 of 1998. Habib questioned the finding that he was entitled to redeem only 1/4th share. Defendants 1 and 6 questioned the rejection of their plea that the mortgage already stood redeemed. The High Court agreed with the approach and conclusion of the lower appellate court and confirming the decision of the lower appellate court, dismissed both the second appeals. The decision in these second appeals is challenged in the Civil Appeal arising from the Special Leave Petition (Civil) Nos. 4274-4275 of 2003. Defendants 1 and 6 have not appealed against it.

15. O.S. No. 800 of 1992 was filed by Habib, also the plaintiff in the earlier suit, for redemption of items 2 and 3 comprised in the mortgage and the sale in his favour. Defendant No. 1 and defendant No. 11, the assignee (defendants 1 and 6 in the earlier suit) were the main contesting defendants. In the said suit, issues were raised on whether the suit was barred by *res judicata* and whether the suit properties were self-acquired properties of defendant No.2, the assignor of the equity of redemption to the plaintiff. The case of defendant No. 11 on *res judicata* was based on the decision in O.S. No. 67 of 1975. The plaintiff Habib, obviously relied on the findings in O.S. No. 61 of 1971. The trial court accepted the argument that successive suits for redemption was maintainable so long as the right to redeem subsisted. It held that the suit was not barred by *res judicata.* It may be noted that the plea of *res judicata* was emphasised, based more on O.S. No. 67 of 1975 relating to item No. 1 and the refusal of the court therein to give relief in respect of the other two items that were also the subject matter of the mortgage and were involved in O.S. No. 800 of 1992. Whatever it be, the ultimate finding was that the suit was not barred by *res judicata.* Proceeding from there, the trial court, on a consideration of the evidence, came to the conclusion that the suit properties were the separate properties of defendant No.2 and in the light of the repulsion of the challenge to the alienation made by defendant No.2 both in O.S. No. 61 of 1971 and in O.S. No. 4 of 1972, the plaintiff was entitled to redeem the suit properties. A preliminary decree for redemption was therefore passed. Defendants 1 and 11 went up in appeal by way of R.A. No. 107 of 1998. The appellate court agreed with the findings of the trial court both on the plea of *res judicata* and on the nature of the properties in the hands of defendant No.2 and decreed that in the place of the preliminary decree passed by the trial court, a final decree itself be drawn

up in the light of the findings entered. This decree was challenged in R.S.A. No. 685 of 2000. A memorandum of cross-objections was also filed. The second appellate court held that the decree in O.S. No. 61 of 1971 filed by the wife and sons of defendant No.2 and which was dismissed, had no effect in view of the decision in O.S. No. 4 of 1972 and proceeded to reverse the decree of the first appellate court on the basis that the decision in O.S. No. 4 of 1972 that the properties belonged to the joint family and the wife and sons of defendant No.2 had shares therein was final. It hence modified the decree by holding that the plaintiff was entitled to redeem and recover only 1/4th share in the plaint scheduled properties. This decree is challenged by the plaintiff in the Civil Appeal arising from S.L.P. (C) No. 4352 of 2003.

16. Thus, the finding of the High Court in both the suits for redemption ultimately is that the plaintiff, the assignee from defendant No.2 of the equity of redemption is entitled to redeem and recover only a 1/4th share in the three items of properties that were subjected to mortgage based on its understanding of the effect of the decrees in O.S. No. 61 of 1971 and O.S. No. 4 of 1972 and proceeding on the basis that only the share of defendant No.2 had been conveyed to the plaintiff. The common plaintiff in the two suits challenges these decrees of the High Court in these appeals.

17. It is argued on behalf of Habib, the plaintiff appellant, that the decree in O.S. No. 61 of 1971 repulsing the challenge by the wife and sons of defendant No.2 to the sale effected by defendant No.2 and upholding it, had become final and would operate as *res judicata* as against defendants 2, 2(a), 3 and 4 and that neither they nor defendant No. 6 as their assignee, could be heard to contend that the sale of the equity of redemption in his favour is invalid or that it does not convey to him the entire rights in the property. Any challenge to the sale in his favour was barred by *res judicata*. Defendant No. 6 had derived no rights by the sale in his favour. On the other hand, it is contended on behalf of defendants 1 and 6 that in the latter suit O.S. No. 4 of 1972 to which both Habib and defendant No.2 were parties, it was clearly held that the earlier decree in O.S. No. 61 of 1971 in which both of them were co-defendants, was a decree passed by a court having no pecuniary jurisdiction to entertain the suit and that the decree therein would not operate as *res judicata* or preclude them from setting up the title of the wife and sons of defendant No.2 in the property. Thus, whereas Habib claimed that the entire equity of redemption had come to him, defendants 1 and 6 pleaded that what Habib had was only a 1/4th share in the equity of redemption as having been conveyed to him by defendant No.2 and he could not therefore lay claim to

A the shares of the wife and sons of defendant No.2 and the finding in O.S. No. 4 of 1972 that the properties were joint family properties would operate as *res judicata*. The share of the wife and sons of defendant No.2 had come to defendant No.6. The alternate contention on behalf of Habib is that even as the owner of a fraction of equity of redemption, he could redeem the whole of the mortgage and the mortgagee could not resist such a redemption. The B answer to this is that even though that might be correct as far as the mortgage is concerned, in view of the fact that defendant No. 6 had acquired shares in the equity of redemption and he had also been impleaded in the suit and the mortgage was being redeemed, it was only possible to grant the plaintiff Habib a decree for redemption and recovery of possession of 1/4th share in C the properties, the other 3/4th share going to defendant No.6. The questions for our decision arise out of what is thus posed by learned counsel.

18. Now that we have set out the facts and the history of the litigations in some detail, it is not necessary to reiterate the facts all over again. Essentially, the questions are, what is the effect of the decree in O.S. No. 61 of 1971 and D whether it would bar defendant No.6 from questioning the right of the plaintiff under the assignment, in his favour, what is the effect, if any, of the decree in O.S. No. 4 of 1972 and if it is open to defendant No.6 to raise a claim based on the assignment in his favour, and on the materials, whether the properties mortgaged are the separate properties of defendant No.2 or that of his joint E family in which at least his sons are entitled to shares capable of being conveyed to defendant No.6. How the wife was entitled to a share therein has not been explained or clearly indicated in the judgments even if the properties are held to be the joint family properties of defendant No.2. Even if the properties are held to be joint family properties, whether the subsequent assignee, defendant No.6 could claim any right against Habib, the prior F assignee in the light of the dismissal of both O.S. No. 61 of 1971 and O.S. No. 4 of 1972.

19. O.S. No. 61 of 1971 was filed by the wife and sons of defendant No.2 challenging the alienation of the equity of redemption made by defendant No.2 in favour of the present plaintiff. Though the father had sold the G properties on his own, the wife and sons of defendant No.2 challenged the sale as conveying the entire rights of the joint family, obviously because defendant No.2 was the Karta of the joint family and he had purported to sell it for family necessity. In that suit, which was filed in the Munsiff's court, the basis of the claim to relief was that the properties obtained by defendant No.2 H in the partition with his brothers was coparcenary properties in his hands in

which his sons would have a share. The whole challenge to the alienation by the father was based on such a claim. It was therefore essential for the court trying that suit to decide the nature of the property in the hands of defendant No.2. The court, on a consideration of the materials produced therein, came to the conclusion that the properties were not shown to be coparcenary properties in the hands of defendant No.2. The Court also considered the alternate case based on the premise that the properties belonged to the joint family and the question whether the sale by the Karta was binding on the joint family. On the basis of the facts established and the findings, the court found the alienation valid and binding on the wife and sons as it was supported by necessity and was within the power of defendant No.2 as the Karta of the joint family. The suit was thus dismissed upholding the alienation to Habib. In the normal course, such an adjudication would be final and binding on the wife and sons of defendant No.2 and their assignee. In addition, the assignee had also notice of the sale to Habib and of the suit and the appeal therefrom. It would also be binding on defendant No.2 to the extent he supported the case of the plaintiffs in that suit. The appeal filed against the decree not having been pursued, that decree became final.

20. Then came O.S. No. 4 of 1972. We must emphasize that this suit was filed by defendant No.2 himself challenging the alienation effected by him. His wife and sons were not parties to that suit. The assignee did not get himself impleaded and left it to defendant No.2 to protect his rights also. The plaintiff in the present suit was arrayed as the defendant in that suit. It may be noted that the plaintiff and the defendant herein were co-defendants in O.S. No. 61 of 1971. In the second suit, which was in the subordinate Judge's court, the court proceeded to enter a finding that O.S. No. 61 of 1971 was tried and decided by a court which lacked pecuniary jurisdiction. It therefore proceeded to hold that the decree in O.S. No. 61 of 1971 did not preclude it from deciding the question whether the properties were the separate properties of defendant No.2 (the plaintiff in that suit) or were the properties of the joint family in his hands. The court proceeded to enter a finding that the properties were joint family properties. But even then, the suit was dismissed in its entirety finding that the plaintiff therein, the father, had not established any ground for setting aside the alienation effected by him. Though an Appeal and a Second Appeal were filed, no relief could be obtained by defendant No.2. Thus the alienation became unassailable at the instance of defendant No.2 also, and consequently of his assignee as well.

21. We find that what really emerges is the question based on the

finality of the decree in O.S. No. 61 of 1971 filed by the wife and sons of defendant No.2. The consequence, according to us, of that decree having become final, is that the wife and sons of defendant No.2 lost whatever rights they had to question the alienation effected by defendant No.2 or to claim that their rights in the properties remained unaffected by the alienation by the father. In other words, they had challenged the alienation effected by defendant No.2, the Karta of the joint family on the basis that he had exceeded his authority in effecting that sale and their suit has been dismissed upholding the alienation both on the basis that it could be supported as an alienation of his separate property by defendant No.2 and also on the basis that the alienation can be supported as one by the Karta of a joint family and consequently binding on the joint family consisting of the plaintiffs in that suit. This meant that the court found that the rights of the plaintiffs in that suit had also been conveyed to Habib in terms of a valid assignment by the Karta of the joint family. By the sale, the family including the plaintiffs had lost their rights. The challenge to the decree was not pursued and the decree attained finality. They cannot get over the effect of that decree by merely putting forward a claim in the present suits that the property belonged to their joint family and they have subsequently conveyed their rights to defendant No.6. It is worth re-stating that neither they, nor their assignee were even parties to OS No.4 of 1972.

22. Defendant No.2, the father and Habib, the plaintiff therein were only co-defendants in O.S. No.61 of 1971. Even then, the decree therein could operate as res-judicata as between them if the conditions therefor are satisfied. The conditions as laid down by this Court are: (i) there must be a conflict of interest between the defendants concerned; (ii) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims; (iii) the co-defendants must be necessary or proper parties to the suit and; (iv) the question between the defendants must have been finally decided inter se between them (see for instance *Iftikhar Ahmed and Ors.* v. *Syed Meharban Ali and Ors.*, [1974] 3 SCR 464 and *Mahboob Sahab* v. *Syed Ismail and Ors.*, [1995] 2 SCR 975. There was a conflict of interest between Defendant No.2, the father and Habib since the father was supporting the plaintiff and was questioning the sale deed and Habib, defendant No.1 therein, was resisting the claim and supporting the sale transaction. It was necessary to decide the conflict in that suit since the claim of the plaintiff therein and the defence put up by Habib made it obligatory for the court to decide the issue for the purpose of finding out whether the plaintiffs therein were entitled to relief.

Defendant No.2 and Habib were necessary parties to the suit, since the suit challenged the alienation made by defendant No.2 to Habib, defendant No.1 therein. The question was clearly finally decided in that suit resulting in dismissal of the suit as a consequence of the decision on the question of validity of the sale effected by defendant No.2 to defendant No.1. Thus, when that decision attained finality it also precluded defendant No.2 from seeking to challenge his sale to Habib on the basis that the alienation was beyond his competence as Karta of the joint family or on the basis that the sale was not binding on the joint family or on the basis that the rights of the family had not been validly conveyed to Habib.

23. As we have seen, O.S. No. 4 of 1972 was filed by defendant No.2 himself questioning the alienation on the ground that it was vitiated by fraud, coercion and undue influence. In a sense, it is seen that his plea was that he was under the impression, when he executed the sale deed, that he was executing a document to secure repayment of a loan of Rs.10,000/- which he had taken from Habib. He had not intended to execute a sale deed. The document writer had played a fraud on him. He was in a sense pleading a case of non-est factum [See *Saunders* v. *Anglia Building Society,* [1971] A.C. 1004 for instance]. The court negatived his claim and dismissed that suit. No doubt, the court also rendered findings on other issues. But the result was that the challenge of defendant No.2 to that alienation also failed. It is not claimed before us that the right of defendant No.2 have come to defendant No.6 by virtue of defendant No.2 joining the sale by his wife and sons in favour of defendant No.6. It is conceded that the rights of defendant No.2 have gone to Habib. The decree for redemption granted to Habib based on the assignment to him of the share of defendant No.2 was not questioned by defendant No.2 even before the High Court. Therefore, strictly nothing turns upon the so-called findings in O.S. No. 4 of 1972 because there is no case for defendant No.6 that he had acquired the rights of defendant No.2 by virtue of the subsequent sale in his favour. Thus, we are reduced to a situation where the rights, both of the wife and sons of defendant No.2 and that of defendant No.2, to question the sale in favour of Habib, the plaintiff, stood concluded against them by the respective decrees. Really, the question is not whether the issue regarding the nature of the property separate or joint family should be taken to be concluded by the first decision or the second decision. That is only a secondary aspect.

24. What is relevant in this context is the legal effect of the so-called finding in O.S. No. 4 of 1972 that the decree in O.S. No. 61 of 1971 was passed

A by a court which had no pecuniary jurisdiction to pass that decree. The Code of Civil Procedure has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas, an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At B best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied. It may be noted that Section 21 provided that no objection as to place the suing can be allowed by even an appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible C opportunity and unless there has been a consequent failure of justice. In 1976, the existing Section was numbered as sub-Section (1) and sub-Section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible D opportunity and unless there had been a consequent failure of justice. Section 21A also was introduced in 1976 with effect from 1.2.1977 creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing. The amendment by Act 104 of 1976 came into force E only on 1.2.1977 when O.S. No. 4 of 1972 was pending. By virtue of Section 97(1)(c) of the Amendment Act, 1976, the said suit had to be tried and disposed of as if Section 21 of the Code had not been amended by adding sub-Section (2) thereof. Of course, by virtue of Section 97(3) if Section 21A had to be applied, if it has application. But then, Section 21A on its wording covers only what it calls a defect as to place of suing.

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25. Though Section 21A of the Code speaks of a suit not being maintainable for challenging the validity of a prior decree between the same parties on a ground based on an objection as to "the place of suing", there is no reason to restrict its operation only to an objection based on territorial G jurisdiction and excluding from its purview a defect based on pecuniary jurisdiction. In the sense in which the expression "place of suing" has been used in the Code it could be understood as taking within it both territorial jurisdiction and pecuniary jurisdiction. Section 15 of the Code deals with pecuniary jurisdiction and, Sections 15 to 20 of the Code deal with 'place of suing'. The heading 'place of suing' covers Section 15 also. This Court in *The*

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Bahrein Petroleum Co. Ltd. v. *P.J. Pappu & Anr.*, [1966] 1 S.C.R. 461 made no distinction between Section 15 on the one hand and Sections 16 to 20 on the other, in the context of Section 21 of the Code. Even otherwise, considering the interpretation placed by this Court on Section 11 of the Suits Valuation Act and treating it as equivalent in effect to Section 21 of the Code of Civil Procedure, as it existed prior to the amendment in 1976, it is possible to say, especially in the context of the amendment brought about in Section 21 of the Code by Amendment Act 104 of 1976, that Section 21A was intended to cover a challenge to a prior decree as regards lack of jurisdiction, both territorial and pecuniary, with reference to the place of suing, meaning thereby the court in which the suit was instituted. As can be seen, the Amendment Act 104 of 1976 introduced sub-Section (2) relating to pecuniary jurisdiction and put it on a par with the objection to territorial jurisdiction and the competence to raise an objection in that regard even in an appeal from the very decree. This was obviously done in the light of the interpretation placed on Section 21 of the Code as it existed and Section 11 of the Suits Valuation Act by this Court in *Kiran Singh & Ors.* v. *Chaman Paswan & Ors.*, [1955] 1 S.C.R. 117 followed by *Seth Hiralal Patni* v. *Sri Kali Nath,* [1962] 2 S.C.R. 747, and *The Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu & Anr.* (supra). Therefore, there is no justification in understanding the expression "objection as to place of suing'" occurring in Section 21A as being confined to an objection only in the territorial sense and not in the pecuniary sense. Both could be understood, especially in the context of the amendment to Section 21 brought about the Amendment Act, as objection to place of suing. It appears that when the Law Commission recommended insertion of Section 21A into the Code, the specific provision subsequently introduced in sub-Section (2) of Section 21 relating to pecuniary jurisdiction was not there. Therefore, when introducing sub-Section (2) of Section 21 by the Amendment Act 104 of 1976, the wordings of Section 21A as proposed by the Law Commission was not suitably altered or made comprehensive. Perhaps, it was not necessary in view of the placing of Sections 15 to 20 in the Code and the approach of this Court in *Bahrein Petroleum Co. Ltd.* (supra). But we see that an objection to territorial jurisdiction and to pecuniary jurisdiction, is treated on a par by Section 21. The placing of Sections 15 to 20 under the heading 'place of suing' also supports this position. Taking note of the objec of the amendment in the light of the law as expounded by this Court, it would be in congruous to hold that Section 21A takes in only an objection to territorial jurisdiction and not to pecuniary jurisdiction. We are therefore inclined tohold that in the suit O.S. No. 4 of 1972, the validity of the decree in O.S. No. 61 of 1971 could not have been questioned based on alleged lack of pecuniary jurisdiction. Of course, the suit

A itself was not for challenging the validity of the decree in O.S. No. 61 of 1971 and the question of the effect of the decree in O.S. No. 61 of 1971 only incidentally arose. In a strict sense, therefore, Section 21A of the Code may not ipso facto apply to the situation.

26. But the fact that Section 21(2) or Section 21A of the Code may not
B apply would not make any difference in view of the fact that the position was covered by the relevant provision in the Suits Valuation Act. Section 11 of the Suits Valuation Act provided that notwithstanding anything contained in Section 578 (Section 99 of the present Code covering errors or irregularity) of the Code of Civil Procedure, an objection that a court which had no
C jurisdiction over a suit had exercised it by reason of under-valuation could not be entertained by an appellate court unless the objection was taken in the court of first instance at or before the hearing at which the issues were first framed or the appellate court is satisfied for reasons to be recorded in writing that the over-valuing or under-valuing of the suit has prejudicially affected the disposal of the suit. There was some confusion about the content
D of the Section. The entire question was considered by this Court in *Kiran Singh* (supra). Since in the present case, the objection is based on the valuation of the suit or the pecuniary jurisdiction, we think it proper to refer to that part of the judgment dealing with Section 11 of the Suits Valuation Act. Their Lordships held:

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> "It provides that objections to the jurisdiction of a Court based on over-valuation or under-valuation shall not be entertained by an appellate Court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on over-valuation or under-valuation
F can be raised otherwise than in accordance with it. With reference to objections relating to territorial jurisdiction, section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in section 11 of the Suits Valuation Act with reference to
G pecuniary jurisdiction. The policy underlying sections 21 and 99 of the Civil Procedure Code and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice,
H and the policy of the Legislature has been to treat objections to

jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits."

In *Seth Hiralal Patni* v. *Sri Kali Nath* (supra), it was held that:

"It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like S. 21 of the Code of Civil Procedure."

In *Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu & Anr.* (supra), it was held Section 21 is a statutory recognition of the principle that the defect as to the place of suing under Sections 15 to 20 of the Code may be waived and that even independently of Section 21, a defendant may waive the objection and may be subsequently precluded from taking it.

27. In the light of the above, it is clear that no objection to the pecuniary jurisdiction of the court which tried O.S. No. 61 of 1971 could be raised successfully even in an appeal against that very decree unless it had been raised at the earliest opportunity and a failure of justice or prejudice was shown. Obviously therefore, it could not be collaterally challenged. That too not by the plaintiffs therein, but by a defendant whose alienation was unsuccessfully challenged by the plaintiffs in that suit. We may also notice that in O.S. No. 61 of 1971, an issue on the valuation and court fee paid was raised and the court directed the plaintiffs therein to pay additional court fee on adjudicating on that issue and the plaintiffs complied with that direction. In O.S. No. 4 of 1972, in a suit to which the plaintiffs in O.S. No. 61 of 1971 or their assignee was not a party, the court had no occasion to go into the question of the decree in O.S. No. 61 of 1971 having been passed by a court which lacked pecuniary jurisdiction. Even assuming that it had such a jurisdiction, it could not have ignored the finality of that decree or the legal effect of it, merely on a finding that the suit was under-valued in the light of the ratio clearly laid down by this Court in the decision referred to above. Therefore, finding in O.S. No. 4 of 1972 that the decree in O.S. No. 61 of 1971 could be ignored or the effect of it swept under the carpet because the court which passed that decree lacked pecuniary jurisdiction was clearly

A unsustainable in law.

28. The question that really arose in O.S. No. 4 of 1972 was whether the sale deed executed by the plaintiff therein (defendant No.2) to Habib was liable to be set aside as one vitiated by fraud, coercion, misrepresentation or undue influence. On that question, the nature of the property whether separate
B or joint family had not that much relevance. The validity of the decree in O.S. No. 61 of 1971 was also not involved directly and substantially. So, a finding that the decree in O.S. No. 61 of 1971 was passed by a court not having pecuniary jurisdiction, could not be held to be heard and finally decided. Moreover, since O.S. No. 4 of 1972 was dismissed in its entirety in favour of
C Habib, the present plaintiff, the finding on the question of the alleged lack of pecuniary jurisdiction of the Court which passed the decree in O.S. No. 61 of 1971 cannot be said to operate as *res judicata* in any subsequent suit where the legal effect of the decree in O.S. No. 61 of 1971 is in question. In O.S. No. 4 of 1972, what was required to be decided was the question whether defendant No.2 herein was entitled to get the sale deed executed by him in
D favour of Habib declared invalid or inoperative as a sale.

29. Actually, it was not relevant for that court to go into that question in the sense that the plaintiff and the defendant before it, were co-defendants in the earlier suit. As co-defendants, no doubt, either of them would have been barred by *res judicata* because of the finding on the issue whether the
E alienation effect by defendant No.2 in favour of Habib, was liable to be set aside or ignored at the instance of the members of the joint family, since that was an issue that it was essential to decide, for adjudicating on the rights put forward by the plaintiffs in O.S. No. 61 of 1971. As a consequence, the finding would have been *res judicata* even between the co-defendants. Moreover,
F defendant No.2 therein, the father was obviously supporting the plaintiffs in O.S. No. 61 of 1971 in their challenge to the alienation. But the question then would arise whether the court which passed the decree in O.S. No. 61 of 1971 was having jurisdiction to hear and decide finally the second suit O.S. No. 4 of 1972 for lack of pecuniary jurisdiction. This is also an essential element in terms of Section 11 of the Code of Civil Procedure. Section 11, when it is
G applied to two suits, has to be literally complied with and one of the requirements of Section 11 of the Code is that the court which passed the decree in the first suit, should have jurisdiction to entertain the second suit in which the earlier decree is put forward as *res judicata*. For, Section 11 provides that no court shall try any suit between the same parties on an issue
H which was directly and substantially in issue in a former suit between the

same parties in a court competent to try such subsequent suit and the issue had been heard and finally decided. Therefore, in that sense, in O.S. No. 4 of 1972, the decree in O.S. No. 61 of 1971 could not have operated as *res judicata.*

30. But the question then is what is the effect of a finding in O.S. No. 4 of 1972 that the properties belonged to the joint family of defendant No.2. Firstly, in spite of such a finding that suit was wholly dismissed in favour of Habib. Secondly, in view of the dismissal of in O.S. No. 61 of 1971, and the rejecting of the challenge to the alienation by the members of the joint family, such a finding made no difference to the parties to the present litigation. This is because the court which decided O.S. No. 61 of 1971 had also held in one of the issues that was framed that the sale of the properties by defendant No.2 to Habib was binding on the joint family consisting of the plaintiffs in O.S. No. 61 of 1971 and defendant No.2 therein and the sale could not be set aside or declared invalid even to the extent of the shares of the plaintiffs in that suit on the materials available. Therefore, even if the finding in O.S. No. 4 of 1972 that the properties belonged to the joint family is taken as having attained finality that would not carry either the mortgagee or the subsequent assignee, defendant No.6, far in this case, for the reason that the alienation by defendant No.2 as Karta of the joint family had also been upheld in O.S. No. 61 of 1971, it being clearly held that the sale was supported by necessity and as being one within the competence of the Karta of the joint family.

31. There is also another aspect. O.S. No. 4 of 1972 was filed by defendant No.2 challenging the alienation made by him. Though a finding was entered that the properties belonged to the joint family, the suit was dismissed wholly in favour of Habib, the defendant therein. The finding was that the alienation effected by defendant No.2 was perfectly valid. That meant that the challenge of defendant No.2 to the alienation had failed in its entirety. In such circumstances, it is highly doubtful whether a finding rendered against Habib, the defendant, in a suit that was wholly dismissed in his favour would operate as *res judicata.*

32. We think that on the facts of this case it is not necessary to decide finally either whether the decree in O.S. No. 4 of 1972 would operate as *res judicata* or about the nature of the properties in the hands of defendant No.2. Defendant No. 6 claims to be the assignee from defendant No.2, his wife and his sons. The assignment in his favour was on 9.1.1975. As far as the defendant No.2 was concerned, he had sold whatever rights he had in the

properties to the plaintiff on 15.10.1970. His challenge to the sale by him in favour of the plaintiff had also been repelled. Therefore, on 9.1.1975 when he is said to have conveyed the suit properties in junction with his wife and sons to defendant No.6 (defendant No.11 in O.S. No. 800 of 1992), he had nothing to convey to the assignee. In other words, when he joined the sale deed executed by his wife and sons in favour of defendant No.6, defendant No.2 had no title to convey to defendant No.6, he having already conveyed whatever rights he had to the plaintiff. The courts below in the present suits have also upheld the sale by finding that the rights of defendant No.2 had gone to the plaintiff. Defendant No. 6 has also acquiesced in that decree.

33. When defendant No.2 conveyed the properties to the plaintiff, his wife and sons had filed O.S. No. 61 of 1971 challenging the alienation by defendant No.2. They proceeded on the basis that it was the sale of the properties of the joint family. Their challenge had been repelled by the decree in O.S. No. 61 of 1971 passed on 18.2.1974. They allowed that decree to become final by not pursuing their appeal against that decree. They had asserted their title to the properties, but relief was denied to them finding that they had no subsisting right in the properties, their rights also having been conveyed to Habib, the present plaintiff. They had sued the present plaintiff and defendant No.2, the executant of the deed. So, when on 9.1.1975 the wife and sons purported to execute a sale deed in favour of defendant No. 6, on the basis of the same, defendant No.6 could put forward no claim to the properties at least as against Habib, the present plaintiff, against whom O.S. No. 61 of 1971 had been filed by his assignors. The decree in O.S. No. 61 of 1971 would not only bar the wife and sons of defendant No.2 from putting forward any claim to the properties as against the present plaintiff, but the said decree would also bar the subsequent assignee from them from putting forward any claim over the properties. In other words, defendant No.6 cannot claim to have derived any right over the properties by way of assignment either from defendant No.2 or from the wife and sons of defendant No.2. The decree in O.S. No. 4 of 1972 to which the wife and sons of defendant No.2 were not parties could not alter this position. The cause of action put in suit by the plaintiff in that suit (defendant No.2 herein) was independent of any right of his wife and sons. A finding therein that the court while passing the decree in O.S. No. 61 of 1971 had no pecuniary jurisdiction to entertain that suit, cannot survive the dismissal of O.S. No. 4 of 1972 itself. On our part, we find no merit in the plea that decree in O.S. No. 61 of 1971 is liable to be ignored in the circumstances of the case.

34. When this is the position, there was no necessity for the first appellate court or the High Court to go into the question whether the property in the hands of defendant No.2 was held by him for and on behalf of the family consisting of himself and his sons or it was held by him as his own. There is considerable doubt about the antecedents of the property and the partition among defendant No.2 and his brothers alone could not prove the character of the properties in the hands of defendant No.2. It depended on whether defendant No.2 and his brothers inherited the properties through a female ancestor or a male ancestor. The suit for redemption was filed by the plaintiff as against the mortgagee, defendant No.1. There is no valid defence put forward by the mortgagee against the redemption of the mortgage. In our view that defendant No. 6 (defendant No.11 in the other suit) had not derived any right in the properties either from defendant No.2 or from his wife and sons in view of the prior assignment by defendant No.2 in favour of the plaintiff and by virtue of the adjudication in O.S. No. 61 of 1971, it has to be held that defendant No.6 as assignee, had no interest in the properties sought to be redeemed and could not put forward any valid defence to the suit for redemption filed by the plaintiff. If so, the decrees now passed by the High Court have to be found to be unsustainable. According to us, the High Court has asked itself the wrong question. It has not considered whether defendant No.6 could claim to have derived any right over the properties or in the equity of redemption on the basis of the assignment in his favour. Therefore, the decrees of the High Court call for interference.

35. It is clear in the circumstances that the plaintiff is entitled to a decree for redemption of the entire properties. Defendant No. 6 (Defendant No. 11 in O.S. 800 of 1992) has no right in the properties. We see no reason to prolong this proceeding by passing a preliminary decree to be followed by a final decree. The mortgage money in both the suits as payable has been quantified. Apparently, the amounts have been deposited also. We therefore grant the plaintiff decrees for redemption in both the suits. We pass a composite final decree for redemption. Defendant No.1, the mortgagee and now his legal representatives shall execute a deed of redemption or reconveyance as required under law in favour of the plaintiff after receipt of the amounts due under the two decrees as fixed by the trial court. If the plaintiff has not deposited the amounts, he will deposit the same within three months from this date with notice to the mortgagee. All defendants in both the suits would jointly and severally vacate the suit properties and shall hand over vacant possession of the suit properties to the plaintiff within four months from the date of this judgment. If the defendants fail to do so, the

A plaintiff would be entitled to recover the properties in execution of this decree without any objection or obstruction from them. For the purposes of execution, the decree would be treated as a composite decree. We thus allow the appeals. The parties would suffer their respective costs in the circumstances of the case.

B V.S.S. Appeals allowed.