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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order pronounced on: 03 March, 2025**

\+ ITA 320/2023, CM APPL. 9854/2025 (Cross Objection) & CM APPL. 9855/2025 (Delay 471 Days in Filing Cross Objection)

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2 .....Appellant

Through: Mr. Sanjay Kumar, Ms. Monica Benjamin & Ms. Easha, Advs.

versus

NAGAR DAIRY PVT. LTD. .....Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

\+ ITA 326/2023, CM APPL. 9852/2025 (Cross Objection) & CM APPL. 9853/2025 (Delay 471 Days in Filing Cross Objection .)

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2 .....Appellant

Through: Mr. Sanjay Kumar, Ms. Monica Benjamin & Ms. Easha, Advs.

versus

NAGAR DAIRY PVT. LTD. .....Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

\+ ITA 341/2023, CM APPL. 9857/2025 (Cross Objection) & CM APPL. 9858/2025 (Delay 471 Days in Filing Cross Objection .)

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2 .....Appellant

Through: Mr. Sanjay Kumar, Ms. Monica Benjamin & Ms. Easha, Advs.

versus

NAGAR DAIRY PVT. LTD. .....Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

\+ ITA 369/2023, CM APPL. 9849/2025 (Cross Objection) & CM APPL. 9850/2025 (Delay 471 Days in Filing Cross Objection.)

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2 .....Appellant

Through: Mr. Sanjay Kumar, Ms. Monica Benjamin & Ms. Easha, Advs.

versus

NAGAR DAIRY PVT. LTD. .....Respondent

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

O R D E R

YASHWANT VARMA, J.

1. In terms of this order, we propose to dispose of the preliminary objection which was raised by the appellants with respect to the maintainability of the cross-objections filed by the respondent-assessee.

2. The appeals emanate from an order dated 24 November 2022 passed by the **Income Tax Appellate Tribunal**[1] and had originally posited the following questions of law for our consideration:

> "A. Whether the Ld. ITAT has erred in law on the facts of the case in confirming the order of the Ld. CIT(A) on account of unexplained

[1] Tribunal

purchases amounting to Rs. 1,77,31,37,509/- while holding that the books of accounts of the assessee were defective?

B. Whether the Ld. ITAT has erred in law on the facts of the case in not upholding the action of the AO in disallowance of Rs. 1,08,34,15,088/- under Section 40A(3) of the Act and in holding that no addition was made by the AO under Section 40A(3) whereas the AO had categorically mentioned this addition in order and also initiated penalty under Section 271(l)(c) of the Act, though no separate addition was made considering the disallowance of higher amount on account of bogus purchases?

C. Whether the Ld. ITAT has erred in law on the facts of the case in adjudicating the addition made under Section 40A(3) of the Act when the assessee had not taken any ground in this respect before the Ld. CIT(A)?

D. Whether, the Ld. ITAT has erred in law on the facts of the case in not sustaining the addition made by the Assessing Officer of Rs.72,18,132/- on the issue of Deemed Dividend even when the provisions of the Section 2(22)(e) of the Act are clearly applicable?"

3. After hearing learned counsels for respective sides, we had by our order of 18 September 2024 admitted these appeals on the following question of law:

> "A. Whether the Tribunal has erred in not upholding the action of the Assessing Officer in disallowing INR 1,08,34,15,088/- under Section 40A(3) and in holding that no addition was made by the AO under Section 40A(3) whereas the AO had categorically mentioned this addition in the order and had also initiated penalty proceedings under Section 271(l)(c), though no separate addition was made considering the disallowance of higher amount on account of bogus purchases?"

4. The appeals themselves arise out of a search and seizure operation undertaken on 17 September 2010 in terms of Section 132(1) of the **Income Tax Act, 1961**[2], in the case of the Nagar Dairy Group. In the course of that search, the appellants are stated to have also seized documents and material from the premises of M/s AIMS Promoters Pvt. Ltd. relating to the respondent-assessee. It is this which led to the

[2] Act

initiation of proceedings referable to Section 153C of the Act. By the time the matter reached the Tribunal, we find that insofar as the challenge of the assessee to the invocation of Section 153C was concerned, the same came to be negated with the Tribunal noting as follows:

> "4. The assessee has raised the issue of satisfaction and also assessment of undisclosed income not based on seized document. With regard to the recording of satisfaction note, the matter stands adjudicated in the case of the assessee in CO Nos. 26, 27 & 28/Del/2016 by relying on the Judgment of Hon'ble Apex Court in the case of Super Malls Pvt. Ltd. in CA No. 2006 to 2007 of 2020, by following the very same ratio since the satisfaction recorded by the ACIT, Central Circle-21 who is the common AO of the searched person and the other person, the Ground No. 1 raised by the assessee are liable to be dismissed.
>
> 5. With regard to the objection that the addition has not been based on seized material, we hold that the instant assessment is not an abated assessment owing to the recording of satisfaction and issue of notice u/s 153C on 26.09.2012 and filing of the regular return of income on 30.09.2011. The assessment cannot be said to be unabated. Hence, the judgment in the case of PCIT Vs. Kabul Chawla 380 ITR 573 is not applicable to the instant case. Accordingly, we do not find merit in the Ground No. 2 of the C.O. Thus, we dismiss the Ground No. 2 of the C.O.
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> In view of the same, the issues are being examined on merits of the case in the appeal of the revenue along with Ground No. 3 of the Cross Objection."

The appeals preferred by the assessee, however, came to be partly allowed and which led to the institution of the present appeals.

5. The appellants argue that the cross-objections would not be maintainable in light of Section 260A of the Act neither envisaging nor creating such a remedy. According to learned counsels, Section 260A is a remedy of redressal before the High Court in respect of an order passed by the Tribunal provided a substantial question of law arises. It was their contention that the provision itself enables the Income Tax

Department or an assessee to institute such an appeal against an order of the Tribunal and the same being liable to be entertained only if it were to give rise to a substantial question of law. According to them, absent Section 260A conferring a right upon a respondent in such an appeal to prefer a cross-objection, the objections as preferred are liable to be dismissed. The appellants argue that Section 260A clearly does not create such a right in explicit terms. It was further averred that even the language and structure of the provision is not demonstrative of an implied intent of a cross-objection being maintained. They would thus submit that it would be wholly incorrect to impute the principles underlying Order XLI Rule 22 of the **Civil Procedure Code, 1908**[3] as being applicable to an appeal referrable to Section 260A of the Act. This more so since, according to the appellants, a cross-objection has not been recognised as an avenue available to be pursued in an appeal from an appellate decree under the Code itself.

6. Mr. Kantoor, learned counsel representing the respondent-assessee had addressed submissions in support of the maintainability of the cross-objections, arguing that any finding or conclusions rendered by this Court on the question as posited would result in the respondent being left remediless to assail the conclusions rendered by the Tribunal with respect to invocation of Section 153C. According to learned counsel, Section 260A should not be conferred an interpretation which deprives the assessee of such a right especially when some High Courts have held that a cross-objection would be maintainable even at the second appeal stage and to which the provisions of the Code would apply.

[3] Code

7. According to Mr. Kantoor, irrespective of the answer that may ultimately be framed by this Court while evaluating the substantial question of law on which the appeals have been admitted, the objections taken by the respondents to the maintainability of the cross-objection would foreclose all rights of challenge that the respondents could urge.

8. This aspect was sought to be highlighted with Mr. Kantoor bidding us to bear in consideration the facts of the present appeal itself and where although the invocation of Section 153C of the Act was upheld, the various additions made against the respondent-assessee had come to be set aside. To the extent that the Tribunal has upheld the initiation of search assessment, the appellant, learned counsel argued, would clearly not be an aggrieved party. The appeal of the Department, Mr. Kantoor submitted, would thus be confined to the deletion of the various additions which were made in the course of assessment.

9. According to learned counsel, the respondent, however, faces the spectre of the High Court either accepting the challenge which stands raised at the behest of the Department or affirming the view expressed by the Tribunal. While in the case of the latter, the assessee may not be prejudiced if the High Court were to dismiss the appeal, it would stand permanently deprived of the right to question or assail the rendering of opinion by the Tribunal on the invocation of Section 153C of the Act. Learned counsel argued that the issue of whether Section 153C was validly invoked undoubtedly strikes at the root of the jurisdiction which was exercised by the **Assessing Officer**[4]. It was pointed out that the assessee had argued before the Tribunal that there was no incriminating

[4] AO

material which would have justified the invocation of that provision and which undoubtedly is a *sine qua non* for the commencement of search assessment proceedings against the other person. Mr. Kantoor thus submitted that the right to prefer cross-objections should be read into the provisions of Section 260A of the Act.

10. Learned counsel also sought to buttress his submissions with the aid of the following example. He submitted that the Court may consider a hypothetical case where an assessment is triggered by an AO invoking the powers of reassessment or alternatively, an assessment coming to be annulled by the Commissioner in exercise of revisional powers. This may lead to various additions being made by the AO adverse to the assessee. If the view advocated by the appellants were to be accepted, the ruling of the Tribunal on the validity of Section 148 or Section 263 of the Act being invoked would be rendered immunity from challenge in an appeal preferred by the Revenue. Hereto, the assessee would stand deprived of the right to contend that the determination by the Tribunal on these issues was wrong. He contended that the determination on those issues would constitute an integral part of the decision which gives rise to the question of law on which the appeal itself may have been instituted in terms of Section 260A(1) of the Act and thus the right to file cross-objections liable to be recognised.

11. Learned counsels also laid stress upon the language in which sub-section (4) of Section 260A stands couched and submitted that although in terms thereof the right of a respondent in such an appeal stands confined to addressing arguments solely on the ground that the appeal does not involve a substantial question of law, the section itself

provides that the provisions of the Code as far as may be applicable would govern. In view of the above, Mr. Kantoor submitted that there is no justification to deprive the respondent of the salutary right that the Code otherwise confers.

12. It becomes pertinent to note that insofar as Section 260A is concerned, only the Karnataka High Court appears to have considered and conclusively answered the question which stands posited holding that a cross-objection would not be maintainable in an appeal under Section 260A. At least no other decision was cited for our consideration in this regard. In **Smt. Jyoti Kumari v. Asst. CIT**[5], the Karnataka High Court had ultimately come to hold that since a cross-objection would not be maintainable in a second appeal instituted in terms of the Code, *a fortiori* that right cannot be read into Section 260A of the Act.

13. The decision in *Jyoti Kumari* is based on the High Court having noticed some of the landmark decisions rendered by the Supreme Court in the context of the right to prefer a cross-objection as contemplated by Order XLI Rule 22 as well as various other High Courts which appear to have taken conflicting views with respect to the filing of cross-objection in a second appeal. The principal decisions of the Supreme Court which were noticed by the Karnataka High Court were those in **Superintending Engineer v. B. Subba Reddy**[6] and **Municipal Corpn. of Delhi v. International Security & Intelligence Agency Ltd.**[7]

14. However, it would be pertinent to note that none of the decisions of the Supreme Court cited above were concerned with the maintainability of cross-objections in a second appeal nor does that

[5] 2010 SCC OnLine Kar 5147
[6] (1999) 4 SCC 423
[7] (2004) 3 SCC 250

question appear to have been raised or answered. Those decisions had principally ruled on the scope of Order XLI Rule 22 of the Code and the extent of the right inhering in a party-respondent to assail a part of the judgment or decree operating against it or a finding appearing in such a judgment adverse to that party.

15. For the purposes of examining the scope of the right which Order XLI Rule 22 of the Code creates, we at the outset deem it appropriate to set out a table which captures the significant amendments which came to be introduced in that provision and how the rule read pre and post amendment of the Code by virtue of Act 104 of 1976:

"Order 41 Rule 22 prior to its amendment	**Order 41 Rule 22 as amended by Act 104 of 1976**
22. Upon hearing respondent may object to decree as if he had preferred a separate appeal.—(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow.	**22. Upon hearing respondent may object to decree as if he had preferred a separate appeal**.—(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow. [Explanation.—A respondent aggrieved by a finding of the Court in the judgment on which the

	decree appealed against is based may, under this rule, file cross-objection in respect of the decree insofar as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]" (emphasis supplied)

16. As the provision originally stood, a respondent in an appeal was entitled to not only support the decree on any other ground decided against it but also conferred a right to prefer a cross-objection to the decree in the same manner as they would have by way of an appeal. Post the 1976 amendments, the provision as it stands now explicitly enables the respondent to also assail the correctness of a finding contained in the judgment under appeal rendered upon an issue and assert that the same ought to have been decided in its favour. The aforesaid right which the statute now confers is in addition to it being open to the respondent to not only support the decree but to also prefer a cross-objection to the decree itself. The three recourses which are open for the respondent to adopt were elaborately explained by the Supreme Court in *B. Subba Reddy*, **Banarsi v. Ram Phal**[8] and *International Security & Intelligence Agency*.

17. Explaining the scope of Order XLI Rule 22 of the Code, the Supreme Court in *B. Subba Reddy* summed up the legal position in the following terms:

[8] (2003) 9 SCC 606

"**23.** From the examination of these judgments and the provisions of Section 41 of the Act and Order 41 Rule 22 of the Code, in our view, the following principles emerge:

(*1*) Appeal is a substantive right. It is a creation of the statute. Right to appeal does not exist unless it is specifically conferred.

(*2*) Cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.

(*3*) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeals by an indigent person also apply to cross-objection.

(*4*) Even where the appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.

(*5*) The respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the court like in appeal.

(*6*) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to the whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order.

24. In the present case, as noted above, the respondent did not file any appeal under Section 39 of the Act in the High Court which right he admittedly had when the award of interest @ 18% per annum was reduced to 12% per annum by the trial court. Section 41 of the Act is merely procedural in nature. If there is no right of cross-objection given under Section 39 of the Act, it cannot be read into Section 41 of the Act. Filing of cross-objection is not procedural in nature. Section 41 of the Act merely prescribes that the procedure of the Code would be applicable to the appeal under Section 39 of

> the Act. We are, therefore, of the opinion that cross-objection by the respondent was not maintainable and the High Court was not correct in holding otherwise and restoring the award of interest to 18% per annum and thus interfering in the decree of the trial court."

18. As is evident from the above, in *B. Subba Reddy* the Supreme Court was principally examining the issue of whether a cross-objection would be maintainable in appellate proceedings referable to Section 39 of the **Arbitration and Conciliation Act, 1996**[9]. It was in that aforesaid context that it observed that a cross-objection has all the trappings of an appeal since it could be continued and determined even if the principal appeal came to be withdrawn. It was further observed that the right conferred by Order XLI Rule 22 of the Code is intended to enable the respondent to seek closure of the entire litigation and for all questions being finally laid to rest even in situations where the judgment or decree may be only partly against its interest.

19. However, the Supreme Court in *B. Subba Reddy* categorically held that an appeal is a substantive right and essentially a creation of the statute. It was thus explained that a right to appeal cannot be claimed to be one which inheres in a party and that it must be founded upon a specific statutory conferment. It was in the aforesaid backdrop that it held that since the right to prefer cross-objections was not merely procedural but one which would have to be based on a statutory grant, the cross-objections in the appeal under Section 39 of the Arbitration Act would not be maintainable.

20. The question again appears to have arisen for the consideration of the Supreme Court in *Banarsi*. In *Banarsi*, the Supreme Court firstly culled out the three possible scenarios in which a respondent may seek

[9] Arbitration Act

to claim the right to prefer cross-objections. This becomes apparent from a reading of paragraphs 10 and 11 of the report and which are extracted hereinbelow:

> "**10.** The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a *finding*. The difference which has resulted we will shortly state. A respondent may *defend* himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to *attack* any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:
>
> (*i*) The impugned decree is *partly* in favour of the appellant and *partly* in favour of the respondent.
>
> (*ii*) The decree is *entirely* in favour of the respondent though an *issue* has been decided against the respondent.
>
> (*iii*) The decree is *entirely* in favour of the respondent and all the *issues* have also been answered in favour of the respondent but there is a *finding* in the judgment which goes against the respondent.
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> **11.** In the type of case (*i*) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (*ii*) and (*iii*) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any *finding* adverse to him as the decree is *entirely* in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a *finding* recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the

> cross-objection taken to any *finding* by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any *finding* recorded against the respondent."

21. Insofar as case (i) was concerned and where the decree partly be against the respondent, the Supreme Court held that it would be necessary for the respondent to either file an appeal against that part of the decree or prefer a cross-objection. Proceeding then to take note of the legislative changes that had been ushered in by Act 104 of 1976, the Supreme Court, while dealing with cases (ii) and (iii), explained that under the amended Code, the respondent would have the right to assail the correctness of an adverse finding, even though the decree may be entirely in its favour without preferring a cross-objection. It further observed that it would be open for the respondent to continue to prosecute the cross-objection, notwithstanding the original appeal itself coming to be withdrawn or dismissed.

22. While explaining the scope of Order XLI Rule 22 in *International Security & Intelligence Agency*, the Supreme Court rendered the following pertinent observations:

> "**14.** Right of appeal is creature of statute. There is no inherent right of appeal. No appeal can be filed, heard or determined on merits unless the statute confers right on the appellant and power on the court to do so. Section 39 of the Act confers right to file appeal, insofar as the orders passed under this Act are concerned, only against such of the orders as fall within one or other of the descriptions given in clauses (*i*) to (*vi*) of sub-section (1) of Section 39. Parliament has taken care to specifically exclude any other appeal being filed, against any order passed under the Act but not covered by clauses (*i*) to (*vi*) abovesaid, by inserting the expression "and from no others" in the text of sub-section (1). Clause (*a*) of Section 41 extends applicability of all the provisions contained in the Code of Civil Procedure, 1908 to (*i*) all proceedings before the court under the Act, and (*ii*) to all the appeals, under the Act. However,

the applicability of such of the provisions of the Code of Civil Procedure shall be excluded as may be inconsistent with the provisions of the Act and/or of rules made thereunder. A bare reading of these provisions shows that in all the appeals filed under Section 39, the provisions of the Code of Civil Procedure, 1908 would be applicable. This would include the applicability of Order 41 including the right to take any cross-objection under Rule 22 thereof to appeals under Section 39 of the Act.

15. Right to prefer cross-objection partakes of the right to prefer an appeal. When the impugned decree or order is partly in favour of one party and partly in favour of the other, one party may rest contented by his partial success with a view to giving a quietus to the litigation. However, he may like to exercise his right of appeal if he finds that the other party was not interested in burying the hatchet and proposed to keep the lis alive by pursuing the same before the appellate forum. He too may in such circumstances exercise his right to file appeal by taking cross-objection. Thus taking any cross-objection to the decree or order impugned is the exercise of right of appeal though such right is exercised in the form of taking cross-objection. The substantive right is the right of appeal; the form of cross-objection is a matter of procedure.

16. Though the statement of law made hereinabove flows simply by the reading of the relevant statutory provisions yet some available decisions may also be noticed. In *Bhadurmal* v. *Bizaatunnisa Begum* [AIR 1964 AP 365 : (1964) 1 An WR 290] a Division Bench presided over by Jaganmohan Reddy, J. (as His Lordship then was) held cross-objection to be maintainable in an appeal preferred under Sections 47 to 49 of the Hyderabad Jagirdars Debt Settlement Act, 1952 because the provisions of the Civil Procedure Code were generally applicable by virtue of Section 51 thereof. The applicability of Order 41 Rule 22 to the appeals under that Act was held not excluded merely because provisions governing grounds of appeal and court fees were specifically enacted in the Hyderabad Act. In *Inayatullah Khan* v. *Diwanchand Mahajan* [AIR 1959 MP 58 : 1958 MP LJ 786] Chief Justice M. Hidayatullah (as His Lordship then was) upheld maintainability of the cross-objection in an election appeal under Section 116-A of the Representation of the People Act, 1951 because the High Court as an appellate court hearing an appeal under Section 116-A was enjoined to exercise the same powers, jurisdiction and authority and to follow the same procedure as it would have exercised or followed in respect of a civil appeal under the Code of Civil Procedure. In *Ramasray Singh* v. *Bibhisan Sinha* [AIR 1950 Cal 372] the Division Bench consisting of Harries, C.J. and Bachawat, J. (as His Lordship then was) held that conferment of right of appeal by Section 38 of the Bengal Money-Lenders Act, 1940 which spoke of the order being

appealable in the same manner as if it were a decree of the court implied a right in the respondent to file cross-objection inasmuch as the jurisdiction to hear appeal was conferred on a pre-established civil court, namely, the Court of the District Judge and nothing was expressly stated as to the procedure regulating such appeal. In *A.L.A. Alagappa Chettiar* v. *Chockalingam Chetty* [AIR 1919 Mad 784 : ILR 41 Mad 904 (FB)] a Full Bench of the High Court of Madras presided over by Wallis, C.J. held that right of the respondent to proceed by way of memorandum of cross-objections was strictly incidental to the filing of appeal by opposite party and therefore in an appeal under Sections 46 and 47 of the Provincial Insolvency Act, 1907, cross-objections were maintainable as the procedure prescribed in the Civil Procedure Code is the standard procedure and applicable to courts exercising powers in insolvency cases.

17. With advantage, we may also refer to observations of this Court made in *Baru Ram* v. *Prasanni* [AIR 1959 SC 93 : 1959 SCR 1403] . Section 116-A of the Representation of the People Act, 1951 contemplates an appeal being laid before the Supreme Court from every order made by the High Court under Section 98 or Section 99 of that Act. Section 116-C provides for every such appeal being heard and determined by the Supreme Court as nearly as may be in accordance with the procedure applicable to the hearing and determination of any appeal from any final order passed by the High Court in exercise of its original civil jurisdiction subject to the provisions of that Act and the Rules, if any. All the provisions of the Code of Civil Procedure, 1908 and rules of the court shall, so far as may be, apply in relation to such appeal. P.B. Gajendragadkar, J. (as His Lordship then was) speaking for the Court observed : (AIR p. 99, para 11)

> "There is no doubt that, in an ordinary civil appeal, the respondent would be entitled to support the decree under appeal on grounds other than those found by the trial court in his favour. Order 41 Rule 22 of the Code of Civil Procedure which permits the respondent to file cross-objections recognize the respondent's right to support the decree on any of the grounds decided against him by the court below. In the present case no appeal could have been preferred by Respondent 1 because she had succeeded in obtaining the declaration that the appellant's election was void and it should therefore be open to her to support the final conclusion of the High Court by contending that the other finding recorded by the High Court which would go to the root of the matter is erroneous. Prima facie there appears to be some force in this contention;"

However, the Court did not express any final opinion thereon as it was considered not necessary to decide the point in that appeal.

18. We have, therefore, no doubt in our mind that right to take a cross-objection is the exercise of substantive right of appeal conferred by a statute. Available grounds of challenge against the judgment, decree or order impugned remain the same whether it is an appeal or a cross-objection. The difference lies in the form and manner of exercising the right; the *terminus a quo* (the starting point) of limitation also differs."

23. However, upon noticing the principles which had come to be laid down in *B. Subba Reddy***,** the Supreme Court held:

"**19.** In *Superintending Engineer* v. *B. Subba Reddy* [(1999) 4 SCC 423] a two-Judge Bench of this Court observed (vide SCC p. 434, para 24):

> "If there is no right of cross-objection given under Section 39 of the Act, it cannot be read into Section 41 of the Act. Filing of cross-objection is not procedural in nature. Section 41 of the Act merely prescribes that the procedure of the Code would be applicable to the appeal under Section 39 of the Act. We are, therefore, of the opinion that cross-objection by the respondent was not maintainable…."

Such observation is not correct and proceeds on certain wrong premises. Firstly, form of cross-objection is procedural and is only a manner of exercising right of appeal which is substantive, as we have already stated. Secondly, it is not merely the procedure prescribed by the Code of Civil Procedure which has been made applicable to proceedings under the Arbitration Act by Section 41(*a*) of the Act; the entire body of the Code of Civil Procedure, 1908 has been made applicable to all proceedings before the court and to all appeals under the Arbitration Act, 1940. The provision is general and wide in its applicability which cannot be curtailed; the only exception being where the provisions of the Arbitration Act and/or of the rules made thereunder may be inconsistent with the provisions of the Code of Civil Procedure, 1908 in which case the applicability of the latter shall stand excluded but only to the extent of inconsistency. We may hasten to add that to the extent of our disagreement with the law laid down in *B. Subba Reddy case* [(1999) 4 SCC 423] the proposition appears to have been rather widely stated in that case. In fact the question before the Court in *B. Subba Reddy case* [(1999) 4 SCC 423] was whether cross-objection seeking the relief of award of interest at a higher rate was maintainable though such an order did not fall within the purview of Section 39(1) of the Act.

> **20.** Once we hold that by taking cross-objection what is being exercised is the right of appeal itself, it follows that the subject-matter of cross-objection and the relief sought therein must conform to the requirement of Section 39(1). In other words, a cross-objection can be preferred if the applicant could have sought for the same relief by filing an appeal in conformity with the provisions of Section 39(1) of the Act. If the subject-matter of the cross-objection is to impugn such an order which does not fall within the purview of any of the categories contemplated by clauses (*i*) to (*vi*) of sub-section (1) of Section 39 of the Act, the cross-objection shall not be maintainable."

24. It is thus apparent that insofar as the Code is concerned, the interplay between Section 96 and Order XLI Rule 22 of the Code is no longer *res integra*. The question, however, which still merits consideration is whether a cross-objection would be maintainable in a second appeal which traces its genesis to Section 100 of the Code. This aspect assumes significance since Order XLI Rule 22 is placed in Chapter XLI and which primarily deals with appeals from original decrees. Mr. Kantoor essentially urged us to hold that the said provision would apply even to appeals from appellate decrees by virtue of Order XLII Rule 1 and which stipulates that the rules comprised in Order XLI would, '*so far as may be*,' relevant also apply to appeals from appellate decrees. Mr. Kantoor would thus argue that the expression *'so far as may be'* should be read as an embodiment of the statutory intent to read the right created by Order XLI Rule 22 as being applicable to appeals from appellate decrees including second appeals.

25. Insofar as the question of whether a cross-objection would be maintainable in a second appeal is concerned, the only decision that was cited for our consideration was that rendered by a learned Judge of the Kerala High Court in **Palasseri Velayudhan v. Palasseri Ithayi**[10]. While answering this question, the learned Judge in *Palasseri* held as

[10] 1994 SCC OnLine Ker 38

follows:

> "**13.** The question then arises whether cross objections can be filed by any of the respondents in a second appeal. When a second appeal can be maintained only on a substantial question of law it would appear that the respondent, if he wants to raise any other substantial question of law, has to move this Court by way of a separate appeal. Learned counsel for the respondents-cross objectors draws attention to the provision contained in R. 1 of O. 42 which makes the rules of O. 41 so far as may be applicable to appeals from appellate decrees. Rule 22 of O. 41 enables any respondent in an appeal to take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such further time as the appellate court may see fit to allow. This provision is applicable to second appeals also and the right to file cross objections in a second appeal has not been taken away by the amended Section 100 or by any other provision introduced by the amendment, argues counsel. He has also cited various judicial pronouncements in support of this contention.
>
> **14.** Rule 1 of Order 42 makes the rules of Order 41 so far as may be applicable to appeal as from appellate decrees. Rule 2 introduced by the amendment of 1976 only refers to the power of court to direct that the appeal be heard on the questions formulated by it. That was inserted in consequence to the amendment made in Section 100. Still Rule 1 of Order 42 remained unchanged. The question whether the provisions contained in Rule 10 of Order 41 apply to appeals under Letters Patent came up for consideration before the Privy Council in *Sabitri Thakurain* v. *Savi*, AIR 1921 PC 80, where it was held that the provision applies to appeals under Letters Patent as to appeal under the Civil Procedure Code. The Madhya Pradesh High Court in the decision in *Satyabhamadevi* v. *Ramkishore*, AIR 1975 MP 115 held that Order 41 applies to Letters Patent Appeals and in appeals from the decisions of a single Judge in original matters or in first appeals which lie to the High Court as of right under Clause 10 of the Letter Patent (MP). Relying on the decision in AIR 1921 PC 80, it was held that cross objection can be filed under Rule 22 as of right. The Jammu and Kashmir High Court is also of the same view. In *Wali Mohd.* v. *Faqir Mohd.*, AIR 1978 J & K 92, a Full Bench of that High Court held that Order 41 of the Code of Civil Procedure applies to Letters Patent Appeals. Since Order 41 permits the filing of the cross objections by the respondent there is no warrant for the conclusion that the procedure indicated in the aforesaid order does not apply to cross objections and that leave of the court is a must before they are filed. It is observed that the restriction to seek leave

to file Letters Patent Appeal does not apply in the case of cross objections.

15. The purpose of Order 41, Rule 22 was discussed in detail by the Rangoon High Court in *Ma Lon* v. *Ma Mya May*, AIR 1939 Rangoon 59. After referring to the provisions contained in Rule 22 of Order 41 it was held that where respondent takes any cross objection to the decree such cross objection would be governed by the rules of porcedure governing an appeal because under Order 41, Rule 22(1) a cross objection must be such as the respondent could have taken by way of appeal.

16. The position therefore is that a respondent in an appeal can maintain a cross objection under Rule 22 of Order 41 even without the permission of the court. That provision has been made applicable to the appeals filed under Letters Patent in the decisions aforementioned. The question arises whether the principle enunciated in the above decisions can be applied to the case of cross objection filed in a second appeal filed under Section 100 C.P.C.

17. Only those provisions of Order 41 applicable to a first appeal are made applicable to an appeal filed under Section 100, C.P.C. by Rule 1 of Order 42. Even before the amendment of C.P.C. in 1976 the rule was same. It has to be seen whether there is any change on account of the amendment of Section 100, C.P.C. On a careful reading of Rule 1 of Order 42 it would appear that all the rules of Order 41 are not made applicable to second appeals whereas only those provisions "so far as may be" are made applicable. The Nagpur High Court in *Kesho Bhika* v. *Tukaram Puna*, AIR 1951 Nagpur 8, has considered the right of a respondent in a second appeal to support a decree. After referring to the provisions contained in Rule 22 of Order 41 and Rule 1 of Order 42 it was held that the words "so far as may be" means that if any other provision prohibits the respondent from agitating any of the grounds he would not be able to support the decree on those grounds.

18. In order to find out whether a respondent in a second appeal is competent to maintain a cross objection and whether Rule 22 of Order 41 has been made applicable to second appeals by virtue of the provision in Rule 1 of Order 42 one has to see the grounds on which a cross objection can be taken in a first appeal. Under Rule 22 a cross objection can be filed only by a party who might have appealed but did not choose to file an appeal. The test to determine whether any objection can be taken by way of cross objection is to see whether the respondent could have appealed against the portion of the decree which is against him and whether he could have raised it in a memorandum of appeal. If he can raise such an objection in a memorandum of appeal he can also raise it by way of cross

objections. The question therefore is whether the objection sought to be raised can be raised in a memorandum of second appeal.

19. An appeal to this Court under Section 100 lies only if this court is satisfied that the case involves a substantial question of law. If the memorandum of appeal has precisely stated the substantial question of law involved in the appeal and if this court is satisfied that such a question is involved this court has to formulate that question and hear the appeal on the question so formulated. If on the objections raised by the respondent a substantial question of law arises he can maintain a second appeal subject to the conditions embodied in Section 100, C.P.C. The provision of Rule 22 of Order 41 regarding the taking of cross objections by respondent in a first appeal can therefore be made applicable to an appeal from an appellate decree since the provisions in Order 41 "so far as may be" had been made applicable to second appeals also. The phrase "so far as may be" only means that provisions of Order 41 are to be made applicable to second appeals subject to the other provisions contained in the Act relating to second appeals. In other words, the applicability of Rule 22 of Order 41 to an appeal against an appellate decree will be subject to the provisions contained in Section 100, C.P.C.

20. The position therefore is that a cross objection can be maintained in an appeal against an appellate decree but only if a substantial question of law is raised therein. The stringent conditions embodied in Section 100 shall be applicable to a cross objection filed in a second appeal. In other words, the cross objection shall precisely state the substantial question of law involved in the cross objection and the cross objections will be admitted only if this Court is satisfied that the case involves a substantial question of law. On such admission of the cross objections this court has to formulate that question and the cross objections shall be heard only on the question so formulated."

26. As was noticed by us in the prefatory parts of this order, the question of whether a cross-objection would be maintainable under Section 260A of the Act has been directly examined and answered only in *Jyoti Kumari*. It was in this matter that the Karnataka High Court was called upon to consider the maintainability of a cross-objection in an appeal instituted under Section 260A of the Act. The High Court in *Jyoti Kumari* firstly took note of the legislative history preceding the amendments which were introduced in Order XLI Rule 22 of the Code and which had fallen for notice of the Supreme Court in **Ravinder**

Kumar Sharma v. State of Assam[11]. This becomes evident from a reading of paragraph 49 of the report which is reproduced hereunder:

> "**49.** Though Sri Shankar, learned counsel for the assessee, has placed reliance on the following decisions of the Supreme Court as also other High Courts to support the submission with regard to the maintainability of a cross-objection, even in a second appeal or in an appeal of the nature of section 260A of the Act, viz., Ravinder Kumar Sharma v. State of Assam reported in (1999) 7 SCC 435 relying particularly on paras. 19 to 24:
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> > "19. In connection with Order 41 rule 22 CPC after the 1976 amendment, we may first refer to the judgment of the Calcutta High Court in Nishambhu Jana v. Sova Guha [1984-85] 86 CWN 685. In that case, Mookerjee J. referred to the 54th Report of the Law Commission (at page 295, para. 41.70) to the effect that Order 41, rule 22 gave two distinct rights to the respondent in the appeal. The first was the right to uphold the decree of the court of first instance on any of the grounds which that court decided against him. In that case, the finding can be questioned by the respondent without filing cross objections. The Law Commission had accepted the correctness of the Full Bench of the Madras High Court in Venkata Rao case, AIR 1943 Mad 698. The Commission had also accepted the view of the Calcutta High Court in Nrisingha Prosad Rakshit v. Commissioners of Bhadreswar Municipality that a cross-objection was wholly unnecessary in case the adverse folding was to be attacked. The Commission observed that the words 'support the decree' appeared to be strange and 'what is meant is that he may support it by asserting that the ground decided against him should have been decided in his favour. It is desirable to make this clear'. That is why the main part of Order 41, rule 22 was amended to reflect the principle in Venkata Rao case, AIR 1943 Mad 698 as accepted in Chandra Prabhuji case, AIR 1973 SC 2565.
> >
> > 20. So far as the Explanation was concerned, the Law Commission stated (page 298) that it was necessary to 'empower' the respondent to file cross-objection against the adverse finding. That would mean that a right to file cross-objections was given but it was not obligatory to file cross-objections. That was why the word 'may' was used. That meant that the provision for filing cross-objections against a finding was only an enabling provision.

[11]

21. These recommendations of the Law Commission are reflected in the Statement of Objections and Reasons for the amendments. They read as follows:

> 'Rule 22 [i.e. as it stood before 1976] gives two distinct rights to the respondent in appeal. The first is the right of upholding the decree of the court of first instance on any of the grounds on which that court decided against him ; and the second right is that of taking any cross-objection to the decree which the respondent might have taken by way of appeal. In the first case the respondent supports the decree and in the second case he attacks the decree. The language of the rule, however, requires some modification because a person cannot support a decree on a ground decided against him. What is meant is that he may support the decree by asserting that the matters decided against him should have been decided in his favour. The rule is being amended to make it clear.
>
> An Explanation is also being added to rule 22 empowering the respondent to file cross-objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour.'

Mookerjee J. observed in Nishambhu Jana case (see p. 689) that the amended rule 22 of Order 41 of the Code has not brought any substantial change in the settled principles of law' (i.e. as accepted in Venkata Rao case) and clarified (page 691) that

> 'it would be incorrect to hold that the Explanation now inserted by Act 104 of 1976 has made it obligatory to file cross-objections even when the respondent supports the decree by stating that the findings against him in the court below in respect of any issue ought to have been in his favour'.

22. A similar view was expressed by U. N. Bachawat J. in Tej Kumar Jain v. Purshottam, AIR 1981 MP 55 that after the 1976 amendment, it was not obligatory to file cross-objection against an adverse finding. The Explanation merely empowered the respondent to file cross-objections.

23. In our view, the opinion expressed by Mookerjee J. of the Calcutta High Court on behalf of the Division Bench in Nishambhu Jena case and the view expressed by U. N.

> Bachawat, J. in Tej Kumar case in the Madhya Pradesh High Court reflect the correct legal position after the 1976 amendment. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed, against the respondent, for the purpose of sustaining the decree to the extent the lower court had dismissed the suit against the defendant-respondent. The filing of cross-objection, after the 1976 amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao case by the Madras Full Bench and Chandre Prabhuji case by this court is merely clarified by the 1976 amendment and there is no change in the law after the amendment.
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> 24. The respondents before us are, therefore, entitled to contend that the finding of the High Court in regard to the absence of reasonable and probable cause or malice—(upon which the decree for pecuniary damages in B and C Schedules was based) can be attacked by the respondents for the purpose of sustaining the decree of the High Court refusing to pass a decree for non-pecuniary damages as per A Schedule. The filing of cross-objections against the adverse finding was not obligatory. There is no res judicata. Point 1 is decided accordingly in favour of the respondent-defendants."

27. Proceeding further to notice the decisions of the Supreme Court in *B. Subba Reddy* as well as *International Security & Intelligence Agency*, the High Court ultimately held as follows:

> "**54.** Though this judgment of the Supreme Court in the case of B. Subba Reddy cited supra had come in for examination again in the later judgment Municipal Corporation of Delhi v. International Security and Intelligence Agency Ltd. reported in (2004) 3 SCC 250 on which Sri Seshachala has placed reliance, we find that this judgment has only reiterated with regard to the nature of right for claiming a right of appeal as observed in para. 14, which is as under:
>
> > "14. Right of appeal is creature of statute. There is no inherent right of appeal. No appeal can be filed, heard or determined on merits unless the statute confers right on the appellant and power on the court to do so. Section 39 of the Act confers right to file appeal, in so far as the orders passed under this Act are concerned, only against such of the orders as fall within one or other of the descriptions given in clauses (i) to (vi) of sub-section (1) of section 39.

> Parliament has taken care to specifically exclude any other appeal being filed, against any order passed under the Act but not covered by clauses (i) to (vi) abovesaid, by inserting the expression 'and from no others' in the text of sub-section (1). Clause (a) of section 41 extends applicability of all the provisions contained in the Code of Civil Procedure, 1908, to (i)all proceedings before the court under the Act, and (ii) to all the appeals, under the Act. However, the applicability of such of the provisions of the Code of Civil Procedure shall be excluded as may be inconsistent with the provisions of the Act and/or of rules made thereunder. A bare reading of these provisions shows that in all the appeals filed under section 39, the provisions of the Code of Civil Procedure, 1908, would be applicable. This would include the applicability of Order 41 including the right to take any cross-objection under rule 22 thereof to appeals under section 39 of the Act."

and, therefore, having regard to the language of section 39 of the Arbitration Act, 1940, the Supreme Court ruled that section 39 being in the nature of first appeal and with the provisions of Order 41 having been made applicable rule 22 of Order 41 was also attracted and applicable to an appeal under section 39 of the Act. However, in the present situation, we find such is not the case in so far as sub-section (7) of section 260A of the Act is concerned for the reason that the provisions of section 260A of the Act are more comparable to an appeal under section 100 of the Code of Civil Procedure rather an appeal under section 96 and even hearing in so far as the second appeal is concerned not all provisions of Order 41 are made automatically applicable to an appeal under section 100 both in terms of Order 42 read with section 108 of the Code of Civil Procedure and as the appeal being a creature of a statute, a cross-objection in terms of rule 22 being barred with an appeal until and unless there is express provision on settling the legal provisions one cannot hold that the implication or a right of cross-objection should be read into either the provisions of Order 42 read with sections 100 and 108 of the Code of Civil Procedure or under the provisions of sub-section (7) of section 260A of the Income-tax Act.

55. In so far as the Income-tax Act is concerned we say it is fortiori so for the reason that even while adopting the procedure as indicated in the Code of Civil Procedure for the purpose of disposal of a cross-objection the procedure is again made applicable in so far as, as far as may be, apply in the case of appeals under section 260A(1) and not in its entirety.

56. As we have discussed above, if the cross-objection is not even tenable in a second appeal under section 100 of the Code of Civil

Procedure, it is more so in an appeal under section 260A of the Act. It is for this reason we reject the submission of Sri Shankar, learned counsel for the assessee, that the right of cross-appeal or the right to defend an order of the Tribunal to the extent it is in favour of the respondents and which is appealed against before this court in this appeal is available to the assessee on all grounds which may be otherwise available to either answer against the assessee in appeal by the Tribunal. However, we are aware that the principles of natural justice even otherwise, would require that if a person who has obtained some benefit or relief is to be deprived of that benefit or relief he should have an opportunity to defend that possession. The minimum that is expected in law and procedure is that a person is given an opportunity before being deprived of any benefit or relief which a person had already obtained."

28. The Karnataka High Court also struck a discordant note on the issue of whether a cross-objection would be maintainable in a second appeal by holding thus:

"**79.** While there are no direct or specific authorities of the Supreme Court on the question to hold that a cross-objection in terms of Order 41 rule 22 is tenable in a second appeal particularly, such a question having been not raised nor made an issue in the several authorities placed before us by the learned counsel and the other authorities, which we had occasion to refer to are only incidentally touching upon the aspect and in the wake of the provisions of Order 41, rule 22 as it occurs as part of the procedure regulating the filing of a regular first appeal, it cannot be by implication extended under order 42 to attribute a right of filing a cross-objection in a section 100 appeal also.

80. A Single Bench decision of the Orissa High Court in the case of Sridhar Ghose v. Harimohan Sahu reported in [1964] AIR 1964 Orissa 141, while opines that a cross-objection in terms of Order 41, rule 22 is not tenable in a second appeal. A contrary view appears to have been taken in a Single Bench decision of the Kerala High Court in the case of Palasseri Velayudhan v. Palasseri Ithayi reported in [1994] AIR 1994 Ker 267, however, to the limited extent of the cross-objection also conforming to the requirements of a section 100 appeal.

81. We have bestowed our attention to these two authorities of the Orissa High Court as well as the Kerala High Court. On an independent analysis also we find that with a second appeal being not the same as a first appeal and having regard to the provisions of section 108 of the Code of Civil Procedure, if we examine the scope

of a cross-objection in an appeal against the original decree it is obvious that a provision of this nature was provided for to enable the defendant who might have suffered an adverse finding on any of the issues framed in the suit, but nevertheless the suit having been dismissed by the trial court but against which the defendant is not independently enabled to file an appeal as there is no decree suffered by the defendant, but when the failed plaintiff files an appeal and in this appeal should call in and the adverse finding recorded against the defendant by the trial court on a particular issue, then the defendant should be given an opportunity to get over the adverse finding by filing the cross-objection in the appeal preferred by the plaintiff.

82. Such a situation can arise only in an appeal against an original decree and not in an appeal against an appellate decree. A situation of this nature gets exhausted at the first appeal stage and need not be permitted/enabled again in an appeal against an appellate decree. For this reason also, we are inclined to take a view that a cross-objection is neither expressly enabled in an appeal under section 100 of the Code of Civil Procedure nor can it be inferred by the language of rule 2 of Order 42 which enables the provisions of Order 41 and the rules therein being made applicable to the procedure required to be followed in respect of an appeal preferred under Order 42 only to the extent it permits and not in its entirely. The preponderance of judicial opinion to the effect that the cross-objection in terms of Order 41, rule 22 of the Code of Civil Procedure cannot be inferred in all situations where even a first appeal is provided against an order of the original authority is also a legal principle which weighed heavily with us in coming to the conclusion that a cross-objection is not enabled in terms rule 2 of Order 42 of the Code of Civil Procedure."

29. Reverting then to the issue of the permissibility of a cross-objection being entertained while considering an appeal under Section 260A, the High Court held:

"**83.** We have also for a good measure examined the possibility of a cross objection in terms of Order 41, rule 22 of the Code of Civil Procedure being entertained in an appeal under section 260A of the Act and on such examination and we notice our examination only indicates to the contrary, that when a cross-objection is not tenable even in an appeal under section 100 of the Code of Civil Procedure, it is a fortiori so in an appeal under section 260A of the Act.

84. We find that the provisions of sub-section (7) of section 260A of the Act on which Sri Shankar, learned counsel for the assessee, has

placed considerable reliance to contend that cross-objections are tenable even in an appeal under section 260A of the Act, also only enables the provisions of Code of Civil Procedure relating to the appeal to the High Court being made applicable only as far as may be and subject to the other provisions in this section or in the Act also. Sub-section (7) of section 260A of the Act figuring towards the end of the section "Expressly providing for the procedure to be followed, it should be understood to be only in respect of the procedural aspects of Order 42 that is made applicable and even there to the extent it may be made applicable. While even in Order 42 not all provisions of Order 41 are made applicable, the scope of the provisions of Order 42 are being made applicable to an appeal under section 260A of the Act should necessarily be read as a provision in providing for creating substantive rights. A right of appeal under section 260A of the Act is governed by sub-sections (1) to (6).

85. The scope of an appeal is that the order appealed against should involve a substantial question of law and of course such question having been decided erroneously by the Tribunal should warrant interference by the High Court in the appeal.

86. For the purpose of disposing of an appeal under section 260A of the Act, the High Court being satisfied that the appeal which involve substantial question of law in the course of passing of the order by the Tribunal which is appealed against such question is to be formulated and at the time of hearing of the appeal, the hearing should be restricted only to such questions which have already been formulated and notified. While it is open to the respondent even to urge that the question does not even arise. It is obvious that the respondent can join issue on the merits to defend the order. The enabling provision of the proviso to subsection (4) does permit the High Court to formulate additional questions and not so formulated in the beginning but even it is found that such additional question arise or involved in the decision of the Tribunal appealed against. It is of some significance to investigate that the decision of the High Court in an appeal under section 260A should be based only on the answer given to the questions of law formulated and examined and not based on any other considerations. When such are the restrictions imposed on an appeal under section 260A of the Act, it is rather difficult to accept the submission that a substantive right like a cross-objection which is nothing but a right of appeal in favour of the respondent can be inferred only because of the language of sub-section (7) of section 260A of the Act.

87. We are of the considered opinion that even if a cross-objection is possible or permitted and assuming on such premise also cross-objection is definitely not permissible under section 260A of the Act

based only on the language of sub-section (7) of section 260A and in the absence on any express enabling provision creating a right of cross-objection. It is on an over all examination of all these aspects, we hold that a cross-objection is not permitted in an appeal under section 260A of the Act."

30. In our considered opinion, the question which stands posited for our consideration would have to be firstly and independently answered, bearing in mind the nature of the remedy that the Act creates and the language in which Section 260A stands couched. The said provision is extracted hereinbelow:

"**260A. Appeal to High Court**.—(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal], if the High Court is satisfied that the case involves a substantial question of law.

(2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such] appeal under this sub-section shall be—

(*a*) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

(*b*) [* * *]

(*c*) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2-A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (*a*) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which—

(*a*) has not been determined by the Appellate Tribunal; or

(*b*) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

31. It is pertinent to note that the Section 260A appeal remedy came to be inserted in the statute book by virtue of **Finance (No. 2) Act, 1998**[12] with effect from 01 October 1998. Section 260A ordains that an appeal would lie to the High Court from every order passed by the Tribunal. In order to examine the principal objectives underlying the insertion of Section 260A in the Act, it would also be apposite to reproduce the Notes on Clauses that accompanied the Finance Bill and relevant parts whereof are extracted hereunder:

"*Clause 60* seeks to insert new sections 260A and 260B under sub-heading "Appeals to High Court" containing provisions regarding direct appeal to High Court.

The proposed amendment seeks to provide that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. In an appeal under the proposed new section, the Memorandum of Appeal shall precisely state the substantial question of law involving the appeal and where the appeal is made by the assessee, such appeal shall be accompanied by

[12] Finance Act

> a fee of ten thousand rupees and shall be filed within sixty days of the date on which order is communicated to him.
>
> Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of appeals, be allowed to argue that the case does not involve such question. However, nothing in this section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such questions. The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit."

32. Turning then to the provision itself, we find that the section contemplates the High Court being moved against an order passed by the Tribunal, subject to it being established that the appeal involves a substantial question of law. The right of appeal stands conferred both on the Income Tax Department as well as the assessee and who may be aggrieved by an order passed by the Tribunal. Of equal significance are sub-sections (3) and (4) of Section 260A and which lay emphasis on the appeal being maintainable only if the High Court were satisfied that a substantial question of law arises from the order of the Tribunal. This becomes even more evident from the imperative language in which sub-section (4) stands cast and which stipulates that the appeal would be heard only on the question so formulated and the right of the respondent at the time of hearing being confined to contending that the case does not involve such a question. The aforesaid restrictions, however, are not liable to be viewed as abridging the power of the High Court itself to admit and entertain that appeal on a substantial question of law other than that which may have been originally formulated.

33. Section 260A(7) provides that the provisions of the Code relating

to appeals to the High Court shall, as far as may be applicable, also govern appeals instituted under the said provision. It is in the aforesaid context that Mr. Kantoor had sought to draw sustenance from Section 100, Order XLI Rule 22 and Order XLII Rule 1 of the Code.

34. However, and in our considered opinion, it would be inappropriate and perhaps unwise to answer the question which stands posed with reference to the various judgments which had come to be rendered solely in the context of the aforenoted statutory provisions existing in the Code. This since each statute may create an independent right of appeal and regulate the exercise of such a right subjecting it to such conditions and stipulations as may be considered appropriate. It is for this reason that Section 260A(7) desists from fully or completely adopting the provisions comprised in the Code. The Legislature has thus clearly been circumspect when stipulating that the provisions of the Code would be applicable only to the extent that Section 260A of the Act may envisage or sanction.

35. Recourse to the Code and the judgments rendered in the context of its provision may also not provide a conclusive answer to the issue that arises for our consideration since, and in any case, learned counsels for respective sides have not cited for our consideration any judgment which may have authoritatively ruled upon the maintainability of a cross-objection in a second appeal. This, of course, subject to the observations which were rendered by the Karnataka High Court in *Jyoti Kumari* and the opinion expressed by a learned Single Judge of the Kerala High Court in *Palasseri*. However and since the question of whether a cross-objection would be maintainable in a second appeal does not directly arise for our consideration, we desist from rendering

any definitive opinion on that issue.

36. For the purposes of evaluating whether a cross-objection would lie, we would thus seek to rest our opinion principally on the language in which Section 260A itself stands couched and refer to the provisions of the Code only for the purposes of a comparative analysis. It is this approach which, in our considered would be the most prudent path to tread in order to discern the true scope of the right that Section 260A creates.

37. Our hesitation and our observation that it would neither be wise nor prudent to base our conclusions on the question of whether a cross-objection would be maintainable in an appeal referable to Section 260A solely on the basis of precedents rendered in the context of an appeal under Section 100 or for that matter on judgments delivered in the context of Order XLI Rule 22 is principally based on the manifest difference in the language in which those provisions stand couched when compared with Section 260A of the Act. Section 100 of the Code reads as follows:

> "**100. Second appeal**.—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
> (2) An appeal may lie under this section from an appellate decree passed *ex parte*.
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not

formulated by it, if it is satisfied that the case involves such question.]"

38. Similarly, Order XLI Rule 22, post its amendment in 1976, appears in the statute book in the following form:

> "**22. Upon hearing respondent may object to decree as if he had preferred separate appeal**.—(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may *see* fit to allow.
>
> [*Explanation*.—A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]"

39. Before attempting to answer the question of whether the appeal under Section 260A contemplates the filing of a cross-objection, our discussion would have to be prefaced by bearing in mind the following well-settled precepts which govern the remedy of an appeal. As has been repeatedly held, an appeal is principally a creation of statute. It is not a remedy which can be said to be either inherent or one which could be claimed as a matter of right. The right of appeal must be founded on a statutory prescription and cannot be assumed to be either implicit or fundamental to an asserted right to contest an adjudication. What needs to be borne in mind is that no person can claim a right to prefer an appeal unless that remedy is specifically conferred. The right of appeal may itself take different shapes in the sense of being open to be instituted on specific grounds or be subject to conditions that statutes

may individually impose. It would therefore be fundamentally imprudent to unquestioningly follow the views expressed in the context of the provisions of the Code.

40. While those decisions would undoubtedly be relevant to broadly discern the nature of the appeal remedy and cross-objections in general, their applicability with respect to the scope and width of the intended remedy provided by Section 260A would have to be preceded by a critical analysis of the extent to which they would apply. This, necessarily, since the language in which the competing provisions stand constructed and placed in the statute is itself clearly distinguishable.

41. Having sounded that note of caution, suffice it to state that the one common thread which flows through a second appeal under the Code and the appeal provided under Section 260A is of both being maintainable against an appellate decree or order and only if they give rise to a substantial question of law. The third common feature of the two remedies is the statute providing that they would both be guided by rules governing a first appeal insofar as the same may be applicable. Last but not least, is the prescription of the right of the respondents in both cases being statutorily confined to urging that no substantial question of law in fact arises. This restriction is distinct from the nature and the extent of the rights which are made available to parties at the stage of a first appeal.

42. Thus, while evaluating the correctness of the submissions which were addressed by Mr. Kantoor, we must, and at the outset, not lose sight of the primordial principles noticed above. An appeal, as has been repeatedly held, is not an inherent right or one which may be claimed irrespective of such a remedy having not been provisioned for.

Decisions have consistently held that a right of appeal must be sourced or founded on a statutory prescription and which enables an aggrieved party to pursue its rights in accordance with the scheme and the procedural framework of the statute itself. In fact, and as was noticed in the preceding parts of this order, the Supreme Court itself while speaking on the nature of the right which Order XLI Rule 22 creates had in unambiguous terms held that a cross-objection was akin to a right to appeal.

43. However, and as we view the appellate mechanism which stands embodied in the Act, we find that the Legislature appears to have consciously desisted from adopting principles akin to Order XLI Rule 22 of the Code or specifically introducing provisions enabling the respondent in an appeal under Section 260A to prefer cross-objections. We allude to a conscious silence in light of the contrast which comes to the fore when we view Section 253 alongside Section 260A. It is pertinent to note that Section 253 of the Act makes the following provisions:

> "**253. Appeals to the Appellate Tribunal**.—(1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—
>
> (*a*) an order passed by a Deputy Commissioner (Appeals) before the 1st day of October, 1998 or, as the case may be, a Principal Commissioner or Commissioner (Appeals) under Section 154, Section 158-BFA, Section 250, Section 270-A, Section 271, Section 271-A Section 271-AAB, Section 271-AAC, Section 271-AAD, Section 271-J or Section 272-A; or
>
> (*aa*) an order passed by a Joint Commissioner (Appeals) under Section 154, Section 250, Section 270-A, Section 271, Section 271-A, Section 271-AAC, Section 271-AAD or Section 271-J; or

(*b*) an order passed by an Assessing Officer under clause (*c*) of Section 158-BC, in respect of search initiated under Section 132 or books of account, other documents or any assets requisitioned under Section 132-A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or

(*ba*) an order passed by an Assessing Officer under sub-section (1) of Section 115-VZC;or

(*c*) an order passed by,—

(*i*) a Principal Commissioner or Commissioner under Section 12-AA or Section 12-AB or under clause (*vi*) of sub-section (5) of Section 80-G or under Section 263 or under Section 270-A or under Section 271 or under Section 272-A or an order passed by him under Section 154 amending any such order; or

(*ii*) a Principal Chief Commissioner or Chief Commissioner or a Principal Director General or Director General or a Principal Director or Director under Section 263 or under Section 272-A or an order passed by him under Section 154 amending any such order; or

(*d*) an order passed by an Assessing Officer under sub-section (3) of Section 143 or Section 147 or Section 153-A or Section 153-C] in pursuance of the directions of the Dispute Resolution Panel or an order passed under Section 154 in respect of such order.

(*e*) [* * *];

(*e*) an order passed by an Assessing Officer under sub-section (3) of Section 143 or Section 147 or Section 153-A or Section 153-C with the approval of the Principal Commissioner or Commissioner as referred to in sub-section (12) of Section 144-BA or an order passed under Section 154 or Section 155 in respect of such order.

(*f*) an order passed by the prescribed authority under sub-clause (*iv*) or sub-clause (*v*) or sub-clause (*vi*) or sub-clause (*vi-a*) of clause (23-C) of Section 10.

(2) The Principal Commissioner or Commissioner may, if he objects to any order passed by a Deputy the Joint Commissioner (Appeals) or the Commissioner (Appeals) before the 1st day of October, 1998] or, as the case may be, a Principal Commissioner or the Joint Commissioner (Appeals) or the Commissioner (Appeals)] under Section 154 or Section 250, direct the Assessing Officer to appeal to the Appellate Tribunal against the order.

(2A) [* * *]

(3) Every appeal under sub-section (1) or sub-section (2) shall be filed within two months from the end of the month in] which the order sought to be appealed against is communicated to the assessee or to the Principal Commissioner or Commissioner, as the case may be:

Provided that in respect of any appeal under clause (*b*) of sub-section (1), this sub-section shall have effect as if for the words "sixty days", the words "thirty days" had been substituted.

(3-A) [* * *]

(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against an order, has been preferred under sub-section (1) or sub-section (2) by the other party, may, notwithstanding that he may not have appealed against such order or any part thereof, within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of such order, and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4) if it is satisfied that there was sufficient cause for not presenting it within that period.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, in the case of an appeal made, on or after the 1st day of October, 1998, irrespective of the date of initiation of the assessment proceedings relating thereto, be accompanied by a fee of,—

(*a*) where the total income of the assessee as computed by the Assessing Officer, in the case to which the appeal relates, is one hundred thousand rupees or less, five hundred rupees,

(*b*) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than one hundred thousand rupees but not more than two hundred thousand rupees, one thousand five hundred rupees,

(*c*) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than two hundred thousand rupees, one per cent of the assessed income, subject to a maximum of ten thousand rupees:

(*d*) where the subject-matter of an appeal relates to any matter, other than those specified in clauses (*a*), (*b*) and (*c*), five hundred rupees.

Provided that no fee shall be payable in the case of an appeal referred to in sub-section (2), or, sub-section (2-A) as it stood before its amendment by the Finance Act, 2016, or, a memorandum of cross-objections referred to in sub-section (4).

(7) An application for stay of demand shall be accompanied by a fee of five hundred rupees.

(8) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of appeal to the Appellate Tribunal under sub-section (2), so as to impart greater efficiency, transparency and accountability by—

(*a*) optimising utilisation of the resources through economies of scale and functional specialisation;

(*b*) introducing a team-based mechanism for appeal to the Appellate Tribunal, with dynamic jurisdiction.

(9) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (8), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

Provided that no direction shall be issued after the 31st day of March, 2025.

(10) Every notification issued under sub-section (8) and sub-section (9) shall, as soon as may be after the notification is issued, be laid before each House of Parliament."

44. Thus, at the stage of an appeal reaching the board of the Tribunal, both the Revenue as well as the assessee are statutorily enabled to prefer a cross-objection on receipt of notice of an appeal by filing a memorandum in that regard. That cross-objection could be in relation to "*any part of such order*" and which forms the subject matter of the appeal filed before the Tribunal. The Legislature has, however, chosen not to introduce any corresponding or parallel provision in Section 260A.

45. The position which thus emerges is that while Order XLI Rule 22 explicitly enables a respondent to assail a finding or a part of the decree by which such party may be aggrieved although the ultimate judgment may be in its favour, Section 260A neither adopts nor replicates that language in express terms. Similarly, Section 260A (6) is cast in language clearly distinguishable from Section 100 and Order XLI Rule 22 of the Code. Whether sub-section (6) can be construed as being an embodiment of an intent to permit cross-objections is an issue which we propose to deal with separately.

46. What essentially emerges from the aforesaid discussion is that Section 260A refrains from incorporating a specific provision permitting the filing of a cross-objection. This is in stark contrast to what is provisioned for at the second appeal stage before the Tribunal. Thus, while at the stage of an appeal reaching the board of the Tribunal, both the Revenue as well as the assessee are statutorily enabled to prefer a cross-objection on receipt of notice of an appeal, the Legislature has not made any corresponding or parallel provision in Section 260A. It is also pertinent to note that while that cross-objection could be in relation to "*any part of such order*" and which forms the subject matter of the appeal filed before the Tribunal, the right of the respondent stands confined to urging for our consideration that the appeal does not give rise to any substantial question of law.

47. It is the above aspect which appears to be of critical significance and representative of the legislative intent of narrowing down the scope of the appeal that may come to be instituted before us under Section 260A of the Act. If we were to countenance a right of preferring a cross-objection despite the aforenoted statutory prescription, it would

result in not only widening the scope of the intended appeal proceedings but also amount to the Court by way of legal interpretation reading into Section 260A the existence of a substantive right which the statute otherwise forbears. Our conclusion with respect to the limited and narrow avenue of appeal which the Legislature sought to provide at the Section 260A stage is fortified by the indubitable fact that while the right to prefer cross-objections is statutorily recognised by Section 253(4), Parliament chose not to confer such a right upon a respondent in an appeal referrable to the former. Legislative silence, as we had an occasion to observe in the preceding parts of this decision, may sometimes resonate louder than express words and which may be either ambiguous or capable of more than one interpretation.

48. Of equal significance is the language employed in Section 253(4) and which speaks of a cross-objection in respect of "*any part of such order*" and the same being inherently incompatible with the nature of the appeal remedy which is envisaged by Section 260A. This, since, indisputably the Section 260A appeal is restricted to a substantial question of law which may be said to arise as opposed to a wholesome or full-scale challenge to the order of the Tribunal on merits.

49. For completeness of the discussion, we then turn our attention to Section 260A(6) although no submissions were addressed by learned counsels for respective sides in its light. Sub-section (6) empowers the High Court, while considering an appeal, to rule on any issue which may have been in its opinion wrongly decided or not determined by the Tribunal. It could have been possibly urged that we should discern the existence of a distinction between the words '*order*' and '*issue*' as they appear in different parts of Section 260A.

50. An '*issue*' as is well recognized in the field of civil procedure essentially means the identification of the substance of a dispute, the question in controversy or the point of contestation between parties. An '*order*', on the other hand, is a definitive determination although it may not necessarily and in all cases have attributes of finality. We note that the Code itself defines the word '*order*' under Section 2(14) as follows:

> "(14) "order" means the formal expression of any decision of a Civil Court which is not a decree;"

51. However, treading down this path hits a roadblock when the word '*issue*' is read in conjunction with the phrase "*by reason of a decision on such question of law as is referred to in sub-section (1)*" and which appears in Section 260A(6)(b). The incorrect determination of an issue by the Tribunal is thus tied to the decision rendered by the Tribunal on the question of law on which the appeal may be liable to be entertained and admitted. The wrongful determination of an issue is thus indelibly connected to that part of the order of the Tribunal and which is referred to in Section 260A(1). Sub-section (6), therefore, could at best be construed as being referrable to the substantial question and a finding of the Tribunal in connection therewith. Thus this too cannot be possibly construed as the embodiment of a right sought to be conferred upon a respondent to raise an issue which is neither connected nor concerned to the question of law on which the appeal comes to be admitted. While it may be open for a respondent to urge for our consideration a point in law or fact which came to be decided against it by the Tribunal while deciding the issue which gives rise to the question of law, it cannot be said to be an independent avenue to agitate an issue distinct from the principal question which stands posed

for our consideration. Thus, even sub-section (6) cannot possibly be construed as being the receptacle of a right to prefer cross-objections in an appeal referable to Section 260A.

52. From a historical perspective, one may usefully advert to the regime of appeals which stood in place prior to the introduction of Section 260A. At that time, the appeals process followed the procedure of a statement of case and a substantial question of law being referred for the consideration of the High Court by the Tribunal by virtue of the provisions comprised in Section 256(1). Various High Courts appear to have taken divergent views on the question of whether a non-applicant could claim a reference being made to the High Court. We deem it apposite to extract Section 256 of the Act hereinbelow:

> "**256. Statement of case to the High Court**.—(1) The assessee or the Principal Commissioner or Commissioner may, within sixty days of the date upon which he is served with notice of an order passed before the 1st day of October, 1998, under Section 254, by application in the prescribed form, accompanied where the application is made by the assessee by a fee of two hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and, subject to the other provisions contained in this section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court :
>
> Provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not exceeding thirty days.
>
> (2) If, on an application made under sub-section (1), the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Principal Commissioner or Commissioner, as the case may be, may, within six months from the date on which he is served with notice of such refusal, apply to the High Court, and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of

any such requisition, the Appellate Tribunal shall state the case and refer it accordingly.

(2-A) The High Court may admit an application after the expiry of the period of six months referred to in sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where in the exercise of its powers under sub-section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to state, the assessee may, within thirty days from the date on which he receives notice of such refusal, withdraw his application, and, if he does so, the fee paid shall be refunded."

53. Laying that controversy to rest, the Supreme Court in **Commissioner of Income Tax v. V. Damodaran**[13] clarified the legal position in the following words:

"**11.** The second question is whether the provision for payment of tax and dividend can be taken into account when computing the accumulated profits as on March 31, 1958. The Revenue contends that this question should not have been referred by the Appellate Tribunal to the High Court at the instance of the assessee because no reference application was made by the assessee. The only reference application, it is pointed out, before the Appellate Tribunal was the reference application filed by the Commissioner of Income Tax. We are of opinion that the Revenue is right. The objection was taken by the Revenue before the Appellate Tribunal when the statement of case was being prepared, but the Appellate Tribunal overruled the objection, relying on *Girdhardas & Co. Ltd.* v. *CIT* [(1957) 31 ITR 82 (Bom HC)] It does not appear that the Revenue contended before the High Court that the reference made to it by the Appellate Tribunal was incompetent insofar as the second question was concerned. Since, however, the objection pertains to the competence of the reference to the extent that it covers the second question and, therefore, relates to the jurisdiction of the High Court to consider and decide that question, we are of opinion that the Revenue is entitled to raise that question before us.

12. Section 256(1) of the Income Tax Act, 1961 entitles the assessee or the Commissioner, as the case may be, to apply to the Appellate Tribunal to refer to the High Court any question of law arising out of the order made by the Appellate Tribunal under Section 254. A period of limitation for making such application is prescribed. If the application is rejected by the Appellate Tribunal the applicant is entitled to apply to the High Court, again within a prescribed period

[13] (1980) 1 SCC 173

of limitation, and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and refer it. It is clear that the statute expressly contemplates an application in that behalf by a party desiring a reference to the High Court. The application has to be filed within a prescribed period of limitation. If the application is rejected by the Appellate Tribunal, it is the applicant thus refused who is entitled to apply to the High Court. If the Appellate Tribunal allows the application made to it, Section 256(1) requires it to draw up the statement of the case and refer it to the High Court. The statement of the case is drawn up on the basis of the application made by the applicant, who in that application must specify the questions of law which, he claims, arise out of the order of the Appellate Tribunal made under Section 254. The form of reference, application prescribed by Rule 48 of the Income Tax Rules, 1962 specifically requires the applicant to state the questions of law which he desires to be referred to the High Court. He may, in appropriate cases, be permitted by the Appellate Tribunal, to raise further questions of law at the hearing of the reference application. But in every case, it is only the party applying for a reference who is entitled to specify the questions of law which should be referred. Nowhere in the statute do we find a right in the non-applicant (a phrase used here for convenience) to ask for a reference of questions of law on the application made by the applicant.

13. In this connection, two categories of cases can be envisaged. One consists of cases where the order of the Tribunal under Section 254 has decided the appeal partly against one party and partly against the other. This may be so whether the appeal consists of a single subject-matter or there are more than one independent claims in the appeal. In the former, one party may be aggrieved by the grant of relief, even though partial, while the other may be aggrieved by the refusal to grant total relief. In the latter, relief may be granted if refused with reference to individual Items in dispute, and accordingly one party or the other will be aggrieved. In either case, the party who is aggrieved and who desires a reference to the High Court must file a reference application for that purpose. It is not open to him to make a reference application filed by the other party the basis of his claim that a question of law sought by him should be referred. The second category consists of cases where the order made by the Appellate Tribunal under Section 254 operates entirely in favour of one party, although in the course of making the order the Appellate Tribunal may have negatived some points of law raised by that party. Not being a party aggrieved by the result of the appeal, it is not open to that party to file a reference application. But on a reference application being filed by the aggrieved party it is open to the non-applicant, in the event of the Appellate Tribunal agreeing to refer the case to the High Court to ask for a reference of

those questions of law also which arise on its submissions negatived in appeal by the Appellate Tribunal. It is, as it were, recognising a right in the winning party to support the order of the Appellate Tribunal also on grounds raised before the Appellate Tribunal but negatived by it.

14. There are, therefore, those two categories, one in which a non-applicant can ask for the reference of questions of law suggested by it and the other in which it cannot. To the extent to which the courts have omitted to consider the distinction between these two categories, they have erred. There are cases where it has been held that there is an absolute bar against a non-applicant seeking a reference of questions of law on a reference application made by the other party. They include: *CIT* v. *S.K. Srinivasan* [(1970) 75 ITR 93 (Mad HC)] and *CIT* v. *Ramdas Pharmacy* [(1970) 77 ITR 276 (Mad HC)] . Cases taking the opposite extreme view are: *CIT* v. *Bantiah Bank Ltd.* [IT Ref No 20 of 1950, decided on October 10, 1950] , followed in *Girdhardas & Co. Ltd.*[(1957) 31 ITR 82 (Bom HC)] and *Educational & Civil List Reserve Fond 1 through H.H. Maharana Bhagwat Singhji of Udaipur* v. *CIT* [(1964) 51 ITR 112 (Raj HC)] . *Dhirajben R. Amin Smt* v. *CIT* [(1968) 70 ITR 194 (Guj HC)] and *CIT*v. *Mrs Arundhati Balkrishna* [(1968) 70 ITR 203 (Guj HC)] . The judgment in the last case was affirmed by this Court in *CWT* v. *Arundhati Balkarishna* [(1970) 1 SCC 561 : (1970) 77 ITR 505] but the point raised before us does not appear to have been taken there. The observations in *Bantiah Bank Limited* [(1964) 51 ITR 112 (Raj HC)] seem to show that the High Court was alive to the possibility of a winning party being deprived of the right to raise questions of law which could properly arise as further questions because they would be intimately involved in a decision on the questions referred at the instance of the applicant, but it failed to classify such a case separately from the case where a non applicant seeks to raise independent and unassociated questions of law. Cases in which a distinction was noticed between the two categories but no opinion was expressed on the right of a winning party to raise questions of law without applying for a reference are *CIT* v. *Jiwaji Rao Sugar Co. Ltd.* [(1969) 71 ITR 319 (MP HC)] followed in *CIT* v. *Dr Fida Hussain G. Abbasi* [(1969) 71 ITR 314 (MP HC)] and *CIT* v. *K. Rathnam Nadar* [(1969) 71 ITR 433 (Mad HC)] . Some attention has been given to the distinction between the two categories in *CIT* v. *A.K. Das* [(1970) 77 ITR 31, 44 (Cal HC)] .

15. In the present case, the question whether the provision of Rs 11,000 for tax and Rs 6900 for dividend can be taken into account when determining the accumulated profits as on March 31, 1958 is not related to the question whether accumulated profits can take in current profits. The two questions involve the grant of separate and

> distinct reliefs and the decision on one question does not affect the decision on the other.
>
> **16.** Accordingly, we hold that the Appellate Tribunal was not competent to refer the second question, and the reference to that extent must be considered void. In the circumstances, it is not necessary to examine the second question on its merits. The judgment of the High Court must be set aside so far as it incorporates its opinion on the second question."

54. Thus even at that time, the limited right which was recognised as inhering in a respondent was to support the order of the Tribunal additionally on grounds that may have been raised but negatived by it. Of significance was the conclusion of the Supreme Court and which had in *V. Damodaran* upheld the objection of the Revenue when it held that the question on which reference was sought by the assessee "*involved the grant of separate and distinct reliefs*" and the decision on the question does not affect the other.

55. Before closing, we deem it appropriate to notice some of the noticeable decisions which were included in the compilation which was placed on the record by Mr. Kantoor for our assistance. In **Commissioner of Income Tax v. Meghalaya Steel**[14], the Supreme Court only observed that Section 260A(7) and by which the provisions of the Code are made applicable would not detract from the inherent power of the High Court to exercise the power of review. The judgment of the Calcutta High Court in **Subodh Gopal Bose v. Brojendra Kishore Roy**[15] is of little assistance since all that it holds is that merely because some of the provisions of Order XLI of the Code are made applicable to second appeals, that would not enable a party to overlook the limitations which are otherwise engrained in Section 100 of the

[14] (2015) 17 SCC 647
[15] 1952 SCC OnLine Cal 73

Code. Similarly, the Madhya Pradesh High Court in **Chandrawati v. Ganesh Prasad Lakshmi Prasad**[16] had held that a respondent in a second appeal could maintain a cross-objection only if it were able to satisfy the Court that a substantial question of law arose. This judgment thus, in a sense, follows the same line as was propounded by that High Court in **Vijay Prakash v. Jankibai**[17].

56. We do not propose to burden this opinion by noticing the various other judgments which were rendered in the context of the Code and are included in the respondent's compilation. However, the following judgments would merit consideration.

57. The judgment of the Calcutta High Court in **S.B.I. Home Finance Ltd. v. Commissioner of Income Tax**[18] was principally concerned with whether in an appeal under Section 260A, a High Court would have to draw authority to pass an interim order from Order XLI Rule 5 of the Code. The High Court ultimately held that it could do so in the exercise of its inherent powers flowing from Section 151 of the Code. Though strictly speaking, that decision throws little light on the question which stands posited for our consideration, we for the purposes of completeness extract the following passages from that decision to underscore the observations appearing above:

> "**6.** After a plain reading of the provisions contained in sub-section (7) of section 260A of the Act, as noted hereinabove, there cannot be any doubt in our mind to hold that the provisions of the Code of Civil Procedure shall apply in the case of an appeal filed under section 260A of the Act. Order 41, rule 5 of the Code of Civil Procedure confers powers on the High Court as well as to the appellate court to stay proceedings under a decree or order. Therefore, ordinarily in view of sub-section (7) of section 260A of

[16] 1998 SCC OnLine MP 187
[17] 1989 SCC OnLine MP 208
[18] 2000 SCC OnLine Cal 692

the Act, the provisions of Order 41, rule 5 of the Code of Civil Procedure would be readily applicable to an appeal filed under section 260A of the Act and the High Court is conferred with power to stay a proceeding for recovery of demand arising out of the assessment order pending disposal of the appeal under section 260A of the Act. This position in law was also not disputed by Mr. Mullick, appearing for the Revenue. However, Mr. Mullick sought to argue that since a penalty proceeding was a distinct and separate proceeding and as in the appeal filed under section 260A of the Act, questions relating to the assessment order can only be decided by this court and furthermore the appeal shall be decided only on the questions formulated by it, there was no question of granting an order of injunction and/or stay of the penalty proceeding in the appeal pending under section 260A of the Act as the High Court would only decide the questions formulated by it for decision and no other question. Therefore, Mr. Mullick contended that the provisions of Order 41, rule 5 of the Code of Civil Procedure in spite of applicability of such a provision in view of sub-section (7) of section 260A of the Act cannot be applied to the facts and circumstances of this case. We are unable to accept this submission of Mr. Mullick. From the facts stated herein earlier, it is clear that the penalty proceeding in fact, has been initiated against the assessee from the assessment order itself. The Assessing Officer, while assessing the Income-Tax dues of the assessee, had passed direction for initiating a penalty proceeding against the assessee. Therefore, it can be easily said that the penalty proceeding has been initiated pursuant to the order of assessment passed by the Assessing Officer. Accordingly, in our view, it cannot be said that the penalty proceeding is a distinct and separate proceeding from the appeal pending under section 260A of the Act in this court. It is true while deciding this appeal on the substantial questions of law, formulated by us for decision, this court shall decide the same only on the questions formulated but in view of the proviso to sub-section (4) of section 260A of the Act, it can always be open to the High Court to decide any other substantial question of law not formulated earlier by this court, if this court is satisfied that the case involves such question. Accordingly, the question whether the direction to initiate a penalty proceeding in the assessment order may be raised for decision by this court. Therefore, it cannot be said that only because no question has been formulated regarding the direction to initiate a penalty proceeding against the assessee, it is not open to this court to decide a question as to whether the direction given by the Assessing Officer in the assessment order to initiate a penalty proceeding pursuant to the order of assessment was liable to be set aside. Therefore, in our view, there cannot be any difficulty to hold that since the assessment order contains direction to initiate a penalty proceeding against the assessee, the provisions of Order 41, rule 5 of the Code of Civil Procedure can very well be applied to stay a penalty proceeding as

well. Assuming the provisions of Order 41, rule 5 of the Code of Civil Procedure cannot be pressed into action, even then, we are of the view that in view of inherent power of the court under section 151 of the Code of Civil Procedure, the High Court being a "court" is entitled either to pass an order of injunction restraining the respondents from proceeding with the penalty proceeding or to stay further penalty proceedings pending disposal of the appeal. As noted herein earlier, in view of sub-section (7) of section 260A of the Act which clearly says that the provisions of the Code of Civil Procedure would be applicable also in an appeal filed under section 260A of the Act there is no doubt that by virtue of the inherent power conferred on the court under section 151 of the Code of Civil Procedure an order of injunction can be passed by this court to stay the penalty proceeding pending disposal of this appeal under section 260A of the Act as there cannot be any dispute that the High Court, while exercising the power under section 260A of the Act is a "court" within the meaning of "court" under section 151 of the Code of Civil Procedure. The law is well settled that where the provisions of Order 41, rule 5 of the Code of Civil Procedure cannot be applied in a given case, the court can exercise the inherent power conferred under section 151 of the Code of Civil Procedure as there is no specific provisions in the Code to grant such an order of stay or injunction. Therefore, even assuming that Order 41, rule 5 of the Code of Civil Procedure cannot be applied in the present case, in our view, the High Court being a "court" is entitled to exercise the inherent power under section 151 of the Code of Civil Procedure to grant stay or to pass an order of injunction restraining the respondents from proceeding with the penalty proceeding during the pendency of the appeal. In the case of *Mrs. Kavita Trehan* v. *Balsara Hygiene Products Ltd.*, (1994) 5 SCC 380 : AIR 1995 SC 441, the Supreme Court while dealing with restitution under section 144 of the Code of Civil Procedure clearly laid down the principles as follows (page 447):

> "*The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of section 144. Section 144 opens with the words 'where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose…' The instant case may not strictly fall within the terms of section 144*; *but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.*"
>
> (emphasis [Here printed in italics.] added)

7. Applying the principles laid down in the aforesaid decision of the

Supreme Court, we are of the view that the High Court being a "court" within the meaning of section 151 of the Code of Civil Procedure and also within the meaning of section 260A of the Act, the High Court is entitled to exercise inherent power under section 151 of the Code of Civil Procedure. That being the position, even if we hold that the provisions of Order 41, rule 5 of the Code of Civil Procedure would not be applicable in the facts and circumstances of the case in its strict term, then also the power to grant stay of the penalty proceeding pending disposal of this second appeal can be exercised by this court under section 151 of the Code of Civil Procedure.

8. There is another aspect of the matter. For the purpose of coming to the aforesaid conclusion, one more section of the Act would be relevant for appreciating the above submission. The section that immediately comes to our mind is section 275 of the Act. If we read sub-section (7) of section 260A of the Act and section 275 of the Act together, it would be clear that the High Court in an appeal filed under section 260A of the Act retains power to grant stay or injunction in respect of the penalty proceeding in question. From a plain reading of section 275 of the Act together with subsection (7) of section 260A, it would be clear that in computing the period of limitation for the purpose of section 275 of the Act, any period during which a proceeding under this Chapter for the levy of penalty is stayed by an order or injunction of any court, shall be excluded. In view of this *Explanation (iii)* although it relates to computation of limitation, we are of the view that *Explanation (iii)* to section 275 makes it clear that the period of limitation should be excluded when any period during which the proceeding for the levy of penalty is stayed by an order or injunction of any court. From the above, an analogy can be easily drawn by us that in an appropriate situation, the High Court is not powerless to grant stay or pass an order of injunction for the purpose of staying the penalty proceeding during the pendency of the appeal. For the reasons aforesaid, we dispose of the instant application by the following directions:

> (a) All further penalty proceedings initiated pursuant to the notice dated March 20, 2000, shall remain stayed till the disposal of this appeal.
>
> (b) Let the hearing of the appeal be expedited. Since the Revenue has already entered appearance, service of notice of appeal be dispensed with. Let the requisite number of paper books be filed. If no such direction for filing the same has not yet been made, the same may be filed within six weeks from this date in default, put up "for orders". The appeal shall be listed within a period of two months from this date. The application for stay is thus disposed of in the manner indicated above."

58. The Madhya Pradesh High Court appears to be the singular High Court which has taken a consistent view with respect to the maintainability of a cross-objection in a second appeal. The earliest decision which was rendered by that Court in that context is that of **Beniprasad Bijaykumar v. Lever Brothers (India) Ltd.**[19] It is pertinent to note that while this judgment was included in our compilation in support of the contention that a cross-objection in a second appeal would be maintainable, *Beniprasad* was a decision concerned with a cross-objection filed in a first appeal which had been instituted against the grant of a temporary injunction. Although in *Beniprasad*, the challenge to the maintainability of the cross-objection was taken on the ground that it would not be maintainable in an appeal against an appellate order, from the report we fail to discern any recital which may indicate that the judgment itself was rendered on a second appeal. The nature of the appeal itself is described in the report as a 'Miscellaneous (First) Appeal'. The appeal itself arose out of the grant of temporary injunction in a suit filed by the respondent. By way of the cross-objections that were preferred therein, the respondents had sought the grant of further injunctions against other alleged infringements of their registered trademarks.

59. It was in that context that the High Court held as follows:

> "Shri A.P. Sen, who appeared for the appellant raised an objection that the cross-objection is not tenable because it is a cross-objection filed against art appellate order. The grant or refusal of a temporary injunction is expressly appealable under the Code of Civil Procedure. Under section 104 an appeal lies against an order granting or refusing a temporary injunction. Section 108 makes Chapter VII apply to all appeals, irrespective of whether they arise from decrees or orders. Order XLIII rule 2, clearly lays down that

[19] 1957 SCC OnLine MP 148

> the rules of Order XLI shall apply, so far as they can be made applicable to appellate orders and that the intention is to allow all matters covered by Order XLI so far as they can be made applicable to appellate orders and appeals therefrom as well. It is quite clear therefore that a cross-objection in an appeal against an appellate order can be made. Shri A.P. Sen contends that in a cross-objection the cross-objector cart only support the order made in the lower Court but cannot ask for any further relief. This is an erroneous assumption because in cross-objection a decree can be passed. The cross-objection takes the place of an appeal after it is filed and a decree from an order can be made, just as in an appeal. This is clear from a reading of Order XLI, rule 22, itself. I, therefore, overrule the contention that the cross-objection in this case is not tenable."

60. The issue again arose for consideration of that High Court in *Vijay Prakash*. Ruling on the aspect of whether a cross-objection would lie bearing in mind the provisions contained in Order XLII Rule 2 of Code, the High Court held as follows:

> "**16.** The amendment introduced in Order 42, Rule 2 and section 100, C.P.C. by the Act No. 104 of 1976 brought radical changes in hearing second appeals as well as cross-objections. Before this amendment, substantial question of law was not required to be framed in second appeal and once a second appeal is admitted for hearing parties, the entire decree impugned could be attacked by the appellant. But after the amendment referred to above, the entire situation has changed. The appellant now is required to mention the substantial question of law, so that the appellant may address the Court on that ground alone and the respondent may not be given surprise to reply the arguments advanced by the appellant.
>
> **17.** Similarly, in the opinion of this Court, while filing the cross-objection, the respondent also has to mention the substantial question of law in the memorandum of cross objection and the same is required to be formulated by the appellate Court so as to allow the respondent to advance argument on that substantial question of law alone and the appellant may not be given surprise in attacking the decree impugned which is in favour of the appellant so as to avoid any discrimination between the parties litigating in Second Appeal.
>
> **18.** It is noteworthy that as laid in *Keshav's case* (supra) that — 'it is not that each and every rule and each and every part of each rule under Order 41 would apply to second appeals' clearly means that Order 41, Rule 22 is only an enabling provision for filing the cross-objection in Second Appeal, but the prohibition prescribed for Second Appeal under section 100 read with Order 42, Rule 2, C.P.C. must be adhered to."

61. Again, in *Chandrawati*, the issue came to be raised before that High Court in a second appeal. Dealing with the said question, the High Court held:

> "**13.** It is relevant here to state that Order 41 of the Code of Civil Procedure provides for procedure for hearing of appeals from original decrees. Section 96 of the Civil Procedure Code gives right of appeal from original decrees whereas section 100, Civil Procedure Code provides for second appeal from appellate decrees. As stated earlier, Order 41, Civil Procedure Code provides for procedure for hearings of appeals from original decrees, commonly described as first appeal and by virtue of Order 42, Rule 1, Civil Procedure Code, rules of Order 41 has been made applicable *so far as may be* to appeals from appellate decrees. Section 100, Civil Procedure Code provides for appeal from an appellate decree, i.e. second appeal which can be heard by the High Court, if it is satisfied that in the appeal substantial question of law is involved. Order 42, Rule 2 Civil Procedure Code provides for formulating the substantial question of law at the time of making an order under Rule 11, Order 41 of the Code of Civil Procedure. According to Shri Agrawal, in appeal from an appellate decree, the respondent can be heard on question of fact when the same involves substantial question of law.
>
> **14.** Question, therefore, is as to whether in appeal from appellate decree, i.e., second appeal the respondents can be heard to say that the findings against them in the Courts below in respect of any issue ought to have been in his favour notwithstanding the rider of section 100 or Order 42, Rule 2, Civil Procedure Code? In other words whether involvement of substantial question of law shall or shall not operate against respondent. It is worthwhile mentioning here that the rules of Order 41, apply in the case of appeal from appellate decrees so *far as may be*, in view of Order 42, Rule 1, Civil Procedure Code. I am of the opinion that different yard stick cannot be applied in the case of appellants and respondent on an issue of fact. In case, the appellant in second appeal from an appellate decree cannot be heard on an issue of fact, unless the same involves substantial question of law, for parity of reasons respondents will also have to pass the same test and satisfy to the Court that the decision on an issue involves substantial question of law. In my opinion, provisions of Order 41, Rule 22, Civil Procedure Code shall be applicable in the case of appeal from appellate decree only when the appellate Court is satisfied that the issue decided against the respondents is fit to be gone into as it involves substantial question of law. I am of the considered opinion that when the appellants in appeal from appellate decree has to pass through a prescribed test and satisfy to the second appellate Court that the appeal involves substantial question of law,

> respondent in such appeal cannot be heard to say that the finding against him in the Courts below on any issue ought to have been in his favour without facing the same rigor i.e. to satisfy to the second appellate Court that it involves substantial question of law. In my opinion, same yardstick has to be applied in case of the respondent as that of the appellant when the respondent questions the finding of the Court below in second appeal."

62. Thus, and from the extracts of the decisions noted above, the proposition which appears to emerge is of the Madhya Pradesh High Court while accepting that a cross-objection could be filed in a second appeal, their Lordships pertinently observed that the objection so filed would still have to meet the rigorous tests which accompany the institution of a second appeal and that being of those objections involving a substantial question of law.

63. The Madras High Court in **V. Ramasamy v. M. Ranganathan**[20] was faced with the issue of the limitation that would apply to a cross-objection and the time from which that period would commence. It was while dealing with this principal question that the Madras High Court held as under:

> "21. Therefore, it is evident that very lying of the second appeal before the High Court would commence and take effect only when such appeal is entertained by the High Court after framing substantial question of law. In other words, issuing a notice to the respondent before admission of a second appeal in some cases, shall not be construed either as the notice after entertaining the second appeal or to mean that such appeal has been laid before the High Court in satisfaction of the requirement made under Section 100 CPC. Needless to say, hearing the second appeal for admission is one thing and hearing the same after framing the substantial question of law is another thing. In the case of former, the respondent does not have a say on admission, while in the case of latter, the respondent has got a vested right to put forth his case and contest the matter. Therefore, right to file a cross objection, even before admission, does not arise since the second appeal has not been entertained by the High Court by framing the substantial question of

[20] 2016 SCC OnLine Mad 11343

> law. In the eyes of the respondent, pendency of the second appeal before admission has not given him the right to file the cross objection, as the cause of action to do so has not arisen. Let us assume that the appeal is dismissed at the admission stage itself on the reason that there is no substantial question of law. This is what the position similar to the dismissal of the appeal under Order 41 Rule 11 CPC. Only when the second appeal is admitted, the respondent will be called upon to answer the substantial question of law so framed. Therefore, I am of the considered view that there is no necessity for the respondent to file the cross objection within 30 days from the date of receipt of notice in the second appeal before admission and on the other hand, he can wait for the second appeal to be admitted based on the substantial questions of law framed and thereafter, file the cross objection within 30 from the date of such admission."

64. The only other decisions which merit notice are those of the Punjab & Haryana High Court in **CIT v. Punjab State Cooperative Agricultural Development Bank**[21] and of the Chhattisgarh High Court in **CCE v. Chhattisgarh State Industrial Development Corp. Ltd.**[22]

65. The Punjab & Haryana High Court in *Punjab State Cooperative Agricultural Development Bank* was faced with a situation where the assessee by virtue of a cross-objection had sought to contend that it was engaged in banking business, and which question the Tribunal thought fit to leave undecided since it found the assessee was liable to succeed on other grounds. *Punjab State Cooperative Agricultural Development Bank* was thus a case where the Tribunal had failed to return a finding in respect of an issue that was raised. Of equal significance is the fact that the failure on the part of the Tribunal to rule on that aspect was indelibly connected with the questions of law on which the appeal ultimately came to be admitted. In view of the above, and while disposing of the appeal, the High Court observed as follows:

> "**15.** The assessee's case is stronger for there is no finding by the

[21] 2016:PHHC:113325-DB
[22] 2018 SCC OnLine Chh 722

> Tribunal against it on the issue as to whether it is engaged in the business of carrying on banking. The Tribunal, as we noted earlier, did not think it necessary to decide this issue as it found that the assessee was entitled to succeed on another basis. There is in fact, therefore, nothing in the order of the Tribunal on this issue. In such a situation, there is no question of requiring the assessee to file cross-objections or an independent appeal. It often happens that certain issues are not dealt with by a Court or Tribunal although they may have been pressed especially where the Court holds in favour of a party on a different basis. This, as is apparent, is what has happened in the present case. The submission, therefore, that the assessee is not entitled to raise this point in the absence of cross- objections or a separate appeal is rejected."

66. That only leaves us to examine the decision of the Chhattisgarh High Court in *Chhattisgarh State Industrial Development Corp. Ltd.* The said judgment was rendered in the backdrop of an appeal which came to be instituted before that High Court under Section 35G of the **Central Excise Act, 1944**[23]. One of the questions that came to be raised was whether the cross-objection filed by the respondent would be maintainable in light of Section 35G(9) of the Central Excise Act and which is *pari materia* to Section 260A(7) of the Act.

67. However, it becomes pertinent to note that the appeal itself arose from a judgment of the **Customs Excise & Service Tax Appellate Tribunal**[24], and which had partly allowed the appeal of the Department while confirming the demand of service tax along with interest. It is this part of the order of the Tribunal that led to the filing of a cross-objection. The assessee in that case was thus faced with part of the demand of service tax having been upheld. The observations thus rendered by that High Court would have to be appreciated in the aforesaid light. In *Chhattisgarh State Industrial Development Corp. Ltd.*, the Chhattisgarh High Court thus held as follows:

[23] Central Excise Act
[24] CESTAT

"**2.** Thereafter, on the respondents filing cross-objection, the maintainability of which was objected by the appellant, this Court framed the following additional substantial question of law on 22-3-2018:

> Whether the cross-objection filed by the Respondent is maintainable by virtue of Section 35G(9) of the Central Excise Act, 1944?"

xxxx xxxx xxxx

13. The additional question of law framed at the time of final hearing is about maintainability of the cross-objection filed by the respondent by virtue of Section 35G(9) of the Act, 1944, which provides for appeal to the High Court against an order passed in appeal by the Appellate Tribunal. Sub-section (9) of Section 35G provided that "save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

14. Bare reading of this provision, it is apparent that in appeal under Section 35G of the Act, 1944 the provisions of the CPC relating to appeals to the High Court shall apply, therefore, by necessary consequence the provisions contained in Order 41 Rule 22 of the CPC would also apply because the said provision otherwise applies to appeals to the High Court under the CPC. The Hon'ble Supreme Court in *Bhanu Kumar Shastri* v. *Mohanlal Su-khadia*, (1971) 1 SCC 370 : AIR 1971 SC 2025, while dealing with the similar objection in an appeal against the order of High Court passed in an election petition has held thus in para 52:

> "52. Under Section 116C of the Representation of the People Act the procedure in an appeal is that subject to the provisions of the Act and of the Rules, if any, made thereunder every appeal shall be heard and determined by this Court as nearly as may be in accordance with the procedure applicable to the hearing and determination of an appeal from the final order passed by a High Court in the exercise of its original jurisdiction and of the provisions of the Code of Civil Procedure and the Rules of the Courts shall as far as possible apply in relation to such appeal. There are no rules of this Court which have any bearing on this m atter. The provisions contained in Order 41, R. 22 of the Code of Civil Procedure are attracted by the words of Section 116C of the Representation of the People Act with the result that the respondent may support the decision and judgment on any ground decided against him. This Court in *Rnmanbhai Ashabhoi Patel* v. *Dobhi Ajitkutnar Fulsinji*, (1965) 1 SCR 712 = (AIR 1965 SC 669) negatived the

> contention that the respondent was not competent to challenge the correctness of a finding as he had not preferred an appeal and said "We cannot lose sight of the fact that normally a party in whose favour the judgment appealed from has been given will not be granted special leave to appeal from it. Considerations of justice, therefore require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived in that judgment".
>
> **15.** We have, thus, no hesitation in answering the second question that cross-objection filed by the respondent is maintainable, however, at the time of hearing of appeal respondent's counsel failed to persuade us to frame any other question of law touching upon its liability to pay service tax on the ground that the Corporation having providing services in the sovereign capacity, it is not liable to pay service tax. Even otherwise we have already dealt with the circular issued by the C.B.D.T. (Central Board of Direct Taxes) holding that the maintenance services and other services provided by the respondent CSIDC to the industries within its industrial area, on payment of charges/fees, is liable to pay service tax, therefore, even if the second question of law is answered in favour of the respondent, it does not effect the merits of the cross-appeal/crossobjection."

68. Tested on the aforesaid precepts, we have no hesitation in affirming the principal propositions that we have culled out hereinabove. The various judgments that were cited by Mr. Kantoor and noticed above, have principally focused on the provisions of the Code and had interpreted the phrase "as far as may be" as being sufficient to hold that a cross-objection would lie even in an appeal from an appellate decree. However, here we are not only faced with the restrictive stipulation enshrined in Section 260A(6) of the Act but also by the prominent absence of a right to prefer cross-objections having been incorporated in Section 260A despite that avenue having been accorded statutory recognition in Section 253(4) of the Act.

69. In our considered opinion and bearing in mind the language of

Section 260A(6)(b), the right of a respondent can at best stretch to advancing a contention in relation to any finding returned by the Tribunal adverse to that party and which has an indelible connect with the question of law on which the appeal may be admitted.

70. We thus find ourselves unable to countenance sub-sections (6) and (7) of Section 260A as conferring an independent right in a respondent to maintain or continue an apparent challenge in respect of a finding rendered by the Tribunal *de hors* or disconnected with the substantial question of law on which such an appeal may be entertained.

71. In summation, we would hold that absent a specific adoption of a right to prefer cross-objections and the same being statutorily acknowledged to be part of the appeal procedure laid out in Section 260A of the Act, a cross-objection would not be maintainable. Section 260A(6) is merely an enabling provision and which empowers a respondent to agitate an issue that may have been decided against it by the Tribunal subject to the condition that the same is indelibly connected with the decision which gives rise to the question of law on which we admit an appeal. The said provision cannot be construed as conferring an independent right upon a respondent to raise a challenge divorced or isolated from the question on which the appeal comes to be admitted.

72. This would also be in line with the decisions rendered in the context of the Code and the maintainability of cross-objections in a second appeal and where it was held that in case the objection be indelibly coupled to the main question, there would be no legal requirement of preferring cross-objections separately. This since the

same would merely entail the respondent seeking to press an issue though decided against it, in support of the ultimate decision rendered.

73. We also bear in mind the indisputable fact that the present applicants had preferred cross-objections before the Tribunal which came to be partly allowed. For instance, while Ground Nos. 1 and 2 thereof came to be rejected, Ground No. 3 came to be partly allowed alongside Ground No. 6 of the Revenue. The cross-objections thus came to be partly allowed. It was the stand of the respondent itself that a cross-objection is akin to an appeal. If that were so, the applicant could have possibly taken appropriate steps to assail the order of the Tribunal to the extent that it was so aggrieved. However, and for reasons assigned above, the remedy was clearly not that of a cross-objection.

74. We would thus and for all the aforesaid reasons uphold the objection of the appellant on the point of maintainability. The cross-objections being C.M. APPL. Nos. 9854/2025, 9852/2025, 9857/2025 and 9849/2025 are held to be not maintainable and thus dismissed.

75. The appeals be now called for consideration on 03.04.2025.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

MARCH 03, 2025/DR