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Reserved On : 29/07/2026
Pronounced On : 07/08/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3925 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

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Approved for Reporting	Yes	No
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IBRAHIMBHAI KADVABHAI VORA BY HIS HEIRS AND LEGAL REPRESENTATIVE & ORS.
Versus
ASHRAFKHAN HAFIJKHAN

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Appearance:
MR CHINMAY M GANDHI(3979) for the Appellant(s) No. 1
MR ARIF A SHEKH(5040) for the Defendant(s) No. 1
MR MA KHARADI(1032) for the Defendant(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J. C. DOSHI**

CAV JUDGMENT

1. The instant First Appeal under Section 96 of the Code of Civil Procedure, 1908 (for short the "Code"), assails the judgment and decree dated 04.07.2007 passed in Civil Suit No.55 of 2004, by which, the learned City Civil Court, Ahmedabad, dismissed the plaintiff's suit and partly allowed the defendant's counter-claim (Ex.31).

1.1 By the impugned judgment, it was declared that the plaintiff has no right whatsoever to encroach, in any manner, on the suit passage/public road/public street which is situated on the southern side of the plaintiff's property and the western side of the defendant' property. It was further

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declared that the plaintiff has no legal right to cause any kind of hurdle, interference, or interruption in the right of the suit passage/ right of way of the defendant on the suit public street/public road/suit passage.

1.2 The learned City Civil Court also granted a decree of perpetual injunction restraining the plaintiff from raising any construction or causing any encroachment, obstruction, interruption, or interference with the right of the defendant and his family members to pass and repass through the suit passage/public street/public road.

1.3 The learned City Civil Court further directed that, in the event the plaintiff failed to restore the status quo ante, a Court Commissioner be appointed to carry out the necessary work for restoration of the status quo ante.

2. For the sake of convenience and brevity, the parties are referred to their original status and position to the learned City Civil Court.

FACTUAL MATRIX:

3. The brief facts emerging from the record are that the plaintiff instituted the suit seeking two principal reliefs. Firstly, he sought a decree of perpetual injunction restraining the defendant from removing the *Chowkdi* and demolishing the brick wall situated in the rear passage of the plaintiff's residential premises bearing Survey No.2511-A, opposite Survey Nos.2521 and 2522, by taking the law into his own hands, forcibly, and without following the due process of law.

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3.1 In addition thereto, the plaintiff also sought a decree of perpetual injunction restraining the defendant from causing any hindrance, obstruction, interruption, or interference with the plaintiff's alleged exclusive possession, peaceful enjoyment, and easementary rights over the suit property.

3.2 The plaintiff claims to be the lawful owner of the immovable property bearing Survey No. 2511-A, Municipal Census No. 1827-1, situated at Jamalpur Ward, Modanivad, opposite Machhi Pir Dargah, Jamalpur Darwaja, Ahmedabad. According to the plaintiff, his brother, Shri Musabhai, executed a registered deed of assignment in his favour, thereby conferring valid title upon him.

3.3 The defendant is residing in the same locality in a house bearing Survey No. 2509, situated on the rear side of the plaintiff's property. A passage measuring approximately 6 feet and 7 inches exists behind the plaintiff's residence. Adjacent to the said passage are residential properties bearing Survey Nos. 2521 and 2522.

3.4 According to the plaintiff, the said passage is used for ingress and egress by the plaintiff as well as the occupants of Survey Nos. 2521 and 2522. At the corner of the suit passage adjoining the plaintiff's residence, a *Chowkdi* has allegedly existed since the year 1965 ("suit *Chowkdi*"). Beyond the *Chowkdi*, the passage is stated to be closed by a brick wall. Behind the said wall lies a portion of the defendant's residential premises bearing Survey No. 2509 ("suit wall").

3.5 The plaintiff contends that his house has two means of ingress and egress, one from the public road and

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another through the interior portion. According to him, the defendant requested him to remove the suit brick wall and the suit *Chowkdi*. The plaintiff declined the request, asserting his lawful rights over both structures. Apprehending that the defendant would take the law into his own hands and forcibly demolish the suit *Chowkdi* and the suit wall, the plaintiff instituted the present suit seeking the aforesaid reliefs.

3.6 Upon service of summons, defendant appeared and filed his written statement at Exhibit 15. He also preferred a counterclaim under Order VIII Rule 6A of the Code of Civil Procedure, 1908, at Ex.31. While admitting that he is the owner and occupier of Survey No. 2509, the defendant denied the averments made in the plaint, including the plaintiff's alleged easementary rights. It was specifically pleaded that the suit *Chowkdi* and the suit wall were illegal constructions raised upon the public passage.

3.7 According to the defendant, the passage had always remained open, but the plaintiff illegally obstructed the same by raising the disputed constructions so as to deprive the defendant of his right of way. Accordingly, by way of the counterclaim, the defendant sought removal of the suit *Chowkdi* and the suit wall by treating them as illegal encroachments upon the public passage, and also prayed for a perpetual injunction restraining the plaintiff from making any further encroachment.

3.8 The plaintiff filed his written statement in reply to the counterclaim at Exhibit 32, denying all the averments made therein.

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3.9 Both the parties led oral as well as documentary evidence. After framing the Issues (Ex.30) and appreciating the evidence on record, the learned City Civil Court dismissed the plaintiff's suit and partly allowed the defendant's counterclaim in the aforesaid terms.

3.10 Being aggrieved, the original plaintiff has preferred the present First Appeal.

APPEARANCE OF LEARNED ADVOCATES FOR THE PARTIES:

4. Heard learned advocate Mr. Chinmay Gandhi for the appellant-original plaintiff and learned advocate Mr. M.A.Kharadi for the respondent-original defendant. Both the learned advocates have filed written submissions, which are taken on record.

SUBMISSIONS OF LEARNED ADVOCATE FOR THE APPELLANT:

5. The sum and substance of the submissions advanced by learned advocate Mr. Chinmay Gandhi for the appellant-plaintiff are as under:

5.1 That the learned City Civil Court committed a serious error in appreciating the oral and documentary evidence on record.

5.2 That the learned City Civil Court failed to properly consider the evidence of the plaintiff (Ex.33), the testimony of neighbour Mohammad Abdulraheman Shaikh (Ex.75) and Sakirmiya Noornbai Shaikh, all of whom consistently deposed that the plaintiff had been using the suit *Chowkdi* for more than fifty years with the permission of the Ahmedabad

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Municipal Corporation (for short "Corporation") and the suit wall had existed since the year 1965.

5.3 That Mohammad Abdulraheman Shaikh (Ex.75), though a tenant of the defendant, admitted the existence of the suit *Chowkdi* and the suit wall since 1965. The learned City Civil Court committed a serious error in ignoring this material admission.

5.4 That the learned City Civil Court erred in concluding that Survey No. 2509 had a right of way through the suit passage.

5.5 That the learned City Civil Court misread the evidence of the defendant, particularly the testimony recorded at Ex.96. It also misconstrued Exs. 71 and 72, which, according to the appellant, demonstrate that the plaintiff had constructed the suit *Chowkdi* on municipal land with the permission of the Corporation. These documents further establish that there was no access to Survey No.2509 through the suit passage and the suit *Chowkdi* did not obstruct anyone's right of passage.

5.6 That the learned City Civil Court further failed to appreciate the voluminous evidence regarding the long-standing existence and user of the suit wall. Consequently, it was submitted that the impugned judgment and decree are contrary to the City Survey records, the evidence available on record, and the settled principles governing appreciation of evidence.

5.7 In view of the aforesaid submissions, learned advocate Mr. Gandhi prayed that the appeal be allowed and

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the impugned judgment and decree be quashed and set aside.

SUBMISSIONS OF LEARNED ADVOCATE FOR THE RESPONDENT:

6. The sum and substance of the submissions advanced by learned advocate Mr.M.A.Kharadi for the respondent-defendant are as under:

6.1 That, even the plaintiff's own evidence, particularly his cross-examination, establishes that the permission granted for the *Chowkdi* was only temporary and remained operative between the years 1971 and 1975, and not thereafter.

6.2 That PW-2 admitted in his cross-examination that the suit passage is a public street owned by Corporation and every member of the public has a right to use the same. PW-3 (Ex.76) admitted in his cross-examination that although the suit passage is reflected in the relevant documents, there is no reference whatsoever to the suit wall allegedly constructed by the plaintiff.

6.3 That the evidence adduced by the defendant conclusively establishes the true factual position. The official of the Corporation examined at Ex.96 categorically deposed that the disputed construction standing upon Corporation land is illegal. His testimony, read together with the documentary evidence on record, clearly establishes that both the suit *Chowkdi* and the suit wall are unauthorized constructions raised by the plaintiff upon the public street without obtaining any permission from the Corporation.

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6.4 In view of the aforesaid submissions, learned advocate Mr.Kharadi, appearing for respondent-defendant, prayed that the present appeal be dismissed.

THE ANALYSIS:

7. Regard being had to the rival submissions of learned advocates of both sides and upon careful consideration of the impugned comprehensive judgment and decree as well as the record and proceedings, it appears that the learned City Civil Court, after considering the rival pleadings in the plaint and the counterclaim, framed the issues at Ex. 30, which read as under:

> *(1) Whether plaintiff proves that he is sole and exclusive owner of a residential house bearing survey no.2511/A, Municipal Census no.1827/1 admeasuring 46.72 square meters near Jamalpur Darwaja?*
>
> *(2) Whether plaintiff proves that at the back side his house there is a six to seven feet open space under his possession known as chowkdi which he was using since 1965?*
>
> *(3) Whether plaintiff proves that after this chowkdi there is a brick wall closing to this open space right from 1965?*
>
> *(4) Whether plaintiff proves that the defendant who is the occupant of survey no.2509 is trying to break and demolish the back wall of his property with a view to damage his proprietary rights ?*
>
> *(5) Whether plaintiff's easements, proprietary and civil rights are likely to endangered by the apprehended threats given by the defendants if, such attempt of the defendant is not stopped by way of permanent injunction?*
>
> *(6) Whether plaintiff is entitled for permanent injunction in respect of the suit property?*
>
> *(7) Whether defendant proves that behind the property of the plaintiff there is an open public street way meant for public at large and used by the defendant since 1960?*

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(8) Whether defendant proves that plaintiff is wrong doer and he has committed illegal act by making illegal wall to the western side of the defendant's house and hence not entitled for relief?

(8-A) Whether defendant proves that he is entitled get relief incorporated to in para 5-A & 5-B of counter claim?

(9) What order and decree ?

8. Issue Nos.1 and 8 answered in affirmative. Issue Nos.7 and 8A answered in partly affirmative, whereas the remaining issues were answered in the negative. Issue No.9 what order and decree.

9. Upon determination of the aforesaid issues, the learned City Civil Court dismissed the plaintiff's suit and allowed the counterclaim preferred by the defendant.

10. Considering the submissions of learned advocates for the parties, the controversy between the parties lies within a narrow compass. The following questions arise for consideration:

(i) Whether the suit *Chowkdi* and the suit wall constructed by the plaintiff were erected with the permission of the Corporation?

(ii) Whether the plaintiff had any legal right to construct the suit *Chowkdi* and the suit wall on a public street?

(iii) Whether the learned City Civil Court

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committed any error in dismissing the plaintiff's suit and decreeing the defendant's counterclaim by the impugned judgment and decree?

(iv) Whether single first appeal is maintainable challenging two separate decree, one passed in suit and another passed in counter claim?

(v) What order?

11. Going straight to evidence on record it appears that the plaintiff entered into the witness box as PW-1 (Ex.36). In paragraph 5 of his Cross-examination, he admitted that he had not read Exhibits 60 and 61 before producing them in evidence and neither of the said documents contained any reference to the suit *Chowkdi*. He further admitted that the suit wall had been constructed on land belonging to the Corporation. In paragraph 9 of his Cross-examination, plaintiff further admitted that the suit *Chowkdi* had also been constructed on Corporation land and it had originally been constructed by his predecessor-in-title.

12. The plaintiff examined Shri Mohammad Gulshan Sheikh as PW-2 (Ex.75). During his cross-examination, he admitted that he was a tenant in the defendant's premises. He further admitted that there was open land on the southern side of the premises where he resided, having a door providing ingress and egress. He categorically admitted that the said open land belonged to the Corporation that several residential houses surrounded the said land, and every

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member of the public had a right of passage over it. He also admitted that the plaintiff had requested him to appear before the Court and depose in the matter. The plaintiff further examined Shri Shakil Ahmad as PW-3 (Ex.76). In his cross-examination, he admitted that his residential house is situated adjacent to the disputed passage. He further admitted that his sale deed contains no reference whatsoever to the suit wall. He also admitted that the suit passage is a public passage belonging to the Municipality and every member of the public has a right to pass through it.

13. The defendant examined Shri Gurumukh Gopichand Rizwani, an employee of the Corporation as DW-2 (Ex.96). In his Examination-in-chief, he categorically stated that the suit passage belongs to and is owned by the Corporation. He further deposed that every person residing adjacent to or abutting the public street has a right of ingress and egress through the said passage. He also stated that the plaintiff had carried out unauthorized construction on Corporation land. In his Cross-examination, while referring to Exhibit 71, the witness stated that the Corporation had merely collected fees permitting the use of the suit *Chowkdi* for the period from 1st April 1970 to 31 March 1975. The witness further clarified, on his own, that the construction of the *Chowkdi* constituted an illegal construction and encroachment upon public land. He explained that the person who had paid the prescribed fees was merely permitted to use the *Chowkdi* during the specified period and that no right accrued thereafter. He further deposed that the entire construction

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shown as Mark 'E' in Exhibit 101 on the public passage was unauthorized. He also stated that the Corporation had not constructed the wall shown as Mark 'F' in Exhibit 101 and, therefore, the said wall was also an unauthorized construction.

14. Exhibits 71 and 72, upon which considerable reliance has been placed by learned advocate Mr. Gandhi, do not advance the case of the plaintiff. On the contrary, those documents merely establish that the plaintiff or his predecessor was granted temporary permission to use the *Chowkdi* for a specified period upon payment of fees. They do not confer any legal authority to permanently construct or retain the suit *Chowkdi* or the suit wall on public land.

15. Apropos upon re-appreciation of the entire oral and documentary evidence on record, this Court is of the considered opinion that the present First Appeal is devoid of merit and deserves to be dismissed.

16. There is yet another legal aspect which goes to the root of the matter. By the impugned judgment and decree, the learned City Civil Court dismissed the plaintiff's suit and simultaneously allowed the defendant's counterclaim at Exhibit 31.

17. Order VIII Rule 6A of the Code, which governs counterclaims, reads as under:

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> ***6A. Counter-claim by defendant**.—(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:*
>
> *Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court.*
>
> *(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pro-nounce a final judgment in the same suit, both on the original claim and on the counter-claim.*
>
> *(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court.*
>
> *(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.*

18. A conjoint reading of Sub-rules (2) and (4) of Rule 6A makes it abundantly clear that a counterclaim has the effect of a cross-suit and is required to be treated as a plaint. Consequently, where the plaintiff's suit is dismissed and the defendant's counterclaim is decreed, two separate decrees necessarily come into existence; one dismissing the plaintiff's suit and the other decreeing the defendant's counterclaim.

19. Section 96 of the Code of Civil Procedure provides for an appeal against a "decree" and not against "decrees." Section 96 of the Code, which provides the remedy of First Appeal from original decree, reads as under:

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> ***96. Appeal from original decree*** *.- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.*
>
> *(2) An appeal may lie from an original decree passed ex parte .*
>
> *(3) No appeal shall lie from a decree passed by the Court with the consent of parties.*
>
> *(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees.*

20. In the present case, the unsuccessful plaintiff by filing a single appeal, sought to challenge both the decree dismissing his suit and allowing the defendant's counterclaim. Such a course is not permissible in law, as two separate decrees cannot be challenged by way of a single appeal under Section 96 of the Code.

21. A perusal of the opening paragraph of the memo of appeal further reveals that the appellant has purported to challenge both decrees by way of the present appeal. Significantly, however, the prayer clause does not clearly specify the relief sought. It is, therefore, wholly ambiguous whether the appellant seeks to set aside the decree passed in the plaintiff's suit and the decree passed on the defendant's counterclaim, or both. The memo of appeal, therefore, suffers from a fundamental defect.

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22. At this stage, it would be apposite to refer the decision of the Division Bench of this Court in ***Darayas Bamanshah Medhora v. Nariman Bamansha Medhora***, reported in ***2002(0)AIR(Guj) 166***, wherein the Division Bench considered the question whether a single appeal is maintainable against two separate decrees. Relevant paragraphs 7 to 13 and 18 read as under:

> *"7 Apart from the question as to whether one appeal can lie from two decrees or not, which question being the centre of the controversy will be considered hereinafter, certain factual aspects in the context of this submission require to be noted and dealt with. The fact that the memo of appeal contains grounds arising from the common judgement and findings from the common issues in the two suits is irrelevant. Whether the appellant has paid court fees on a composite valuation, as if they were two appeals, and/or on a composite valuation of the two suits, is again irrelevant. The fact remains that ground (vv) as contained in the memo of appeal refers to only one decree as being the subject matter of challenge. Similarly, the decree which forms the basis of challenge in the appeal is only one, as can be seen from the decree which is annexed to the memo of appeal. This decree is at Exh.146 in Special Civil Suit No.700/2000. No other decree is annexed to the memo of appeal. Therefore, no matter what grounds may be urged in support of the appeal, whether it is treated as an appeal from one decree or an appeal from both the decrees, the fact remains that this appeal cannot be treated factually to be an appeal challenging both the decrees. This is irrespective of the question of law as to whether one appeal could lie and/or be maintainable when the appeal challenges only one of the decrees arising from the common judgement.*
>
> *8. Learned counsel for the appellant has sought to place reliance upon numerous decisions, including decisions of various High Courts, in support of his contention. These decisions include the following: 1. AIR 1927 Lahore 289, in the case of Mt. Lachhmi Vs. Mt. Bhulli. 2. AIR (30) 1943 Madras 139, in the case of Pappammal Vs Meenammal. 3. AIR 1969 Allahabad 504, in the case of Jai Narain Vs. Bulaqi Das. 4. 4 GLR 282, in the case of Haji Gulamnabi Vs. Abasbhai 5. AIR (34) 1947 Nagpur 248, in the case of*

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Manohar Vinayak Vs. Laxman Anandrao. 6. AIR 1954 Travancore-Cochin 235, in the case of Subramonian Vs. Nagarama. 7. ILR 29 Madras 333, in the case of Panchanada Velan Vs. Vaithinatha Sastrial.

9. In our opinion, it is not necessary to examine seriatim each of these decisions inasmuch as they have been considered, evaluated, discussed, noted, distinguished, approved or dissented from, by several subsequent decisions of the Supreme Court which we shall discuss hereinafter.

10. However, we may note only in brief the distinction, and the departure from the earlier point of view, created by subsequent decisions of the Supreme Court, from the aforesaid decisions. The controversy considered by the aforesaid decisions has been examined mainly on whether the principles of res judicata as enshrined in section 11 of CPC would be applicable in such cases. It appears to us that the line of reasoning first enunciated by the Full Bench in the case of Mt. Lachhmi (AIR 1927 Lahore 289) and adopted by different High Courts in India subsequently, appear to flow from a generalised principle laid down by the Full Bench to the effect that the principle of res judicata which created a bar to subsequent agitation of the same issue, is created by the judgement and not by the decree.

10.1 In our opinion, it would be a loose generalisation to hold that the bar of res judicata is created only by the judgement and not by the decree. This generalisation would hold the field only if the question under consideration was in respect of only, or merely, "issue estoppel", and not in respect of a common judgement resulting in two decrees.

10.2 In this context we cannot overlook the fact that an appeal under section 96, CPC lies only from a decree and not from a judgement. It cannot be overlooked that these are not merely loose concepts, but have a very specific meaning and connotation inasmuch as each of these has been independantly defined under the CPC.

10.3 Section 2(9) defines a "judgement" as the statement given by the Judge on the grounds of a decree or order. As against this, a "decree" is defined by section 2(2) of CPC as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the

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rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It is not necessary, in our opinion, to refer to numerous authorities on the distinction between these two phrases and concepts, as used in law. The short substance of the distinction is that the judgement constitutes the opinion of the Court, wherein it encompasses the pleadings of the parties, the issues, the evidence led by the respective parties, the interplay of different pieces of evidence upon each other, the conclusions drawn and the findings of fact recorded by the Court. In short, the judgement reflects merely the justification of the court for passing the decree in question. On the other hand, the decree is the crystallisation of the rights in controversy between the parties, as declared by the court, on the basis of the judgement. Consequently, in our opinion, a judgement and a decree are not phrases or concepts which can be used in the alternative to each other, neither do the two concepts overlap each other. In our opinion, it is precisely for this reason that section 96 of CPC contemplates an appeal only from a decree, and by necessary implication, not from a judgement. Furthermore, when the rights of a party crystallised in a decree are sought to be enforced by due process of law, by execution proceedings under Order 21, CPC, such proceeding would lie only on the basis of a decree, and not on the basis of a judgement.

10.4 The entire controversy in law as to whether a single appeal would lie from one of the decrees arising from a common judgement has been considered in the various decisions aforesaid, only by testing against and applying the principle of res judicata. In the context of these decisions it is necessary to bear in mind that a reference to the common judgement, and consequently a reference to a supposed judgement resulting in one of the decrees, is only necessary to ascertain whether "the question substantially in issue" was common in both the suits.

11. While considering the aforesaid decisions, which, as aforesaid, have also been considered by the subsequent decisions of the Supreme Court, it also requires to be kept in mind that the principle of res judicata is not the only principle upon which this legal controversy can be reflected upon. Another principle which, in our opinion, would have a bearing on this controversy is the principle of acquiescence and/or estoppel. This principle would also apply to the controversy in issue, inasmuch as it could be urged that when only one decree is challenged in the singular appeal, the other decree which is not the subject matter in appeal, is

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a decree which is acquiesced to. Ultimately it makes no difference whether the same set of reasons and the same set of findings justify both the decrees. This may perhaps appear to be similar to calling a glass half full or also calling it half empty. It may be that such a description carries different concepts, although the factual result is the same. The distinction in law lies in the real and substantive distinction between an appeal from a judgement and an appeal from a decree. Once this distinction is established and kept in mind, it becomes a simpler exercise to appreciate the view expressed by the Supreme Court in the decisions hereinafter discussed.

12. In the case of Sheodan Singh Vs. Daryao Kunwar, reported in AIR 1966 SC 1332, the Supreme Court specifically found that where there were two suits having common issues, and the suits were decided by the trial court on merits which resulted in two appeals therefrom, and one of the appeals was dismissed (although not on merits), the decision of the appeal court will be res judicata. It is pertinent to note that in the said decision, the Full Bench decision in the case of Mt. Lachhmi (supra) has been specifically considered, as also the supreme Court decision in the case of Narhari Vs. Shanker, reported in AIR 1953 SC 419.

12.1 The aforesaid decision of the Supreme Court viz. Sheodan Singh, has been referred to, considered and relied upon by the Supreme Court in its subsequent decision in the case of Premier Tyres Limited V. The Kerala State Road Transport Corporation, reported in AIR 1993 SC 1201. This decision also takes into consideration the earlier decision of the Supreme Court in the case of Ramagya Prasad Vs. Murli Prasad, reported in AIR 1974 SC 1320, and distinguishes the earlier decision of the Supreme Court in the case of Narhari Vs. Shanker, reported in AIR 1953 SC 419.

12.2 In the said decision (viz. Premier Tyres Ltd. (supra) there were two suits which were connected and tried together inasmuch as the nature of the dispute in both the suits were same. The issues framed were also common. In this case, the appellant did not file any appeal against the dismissal of the suit for part of its claim, but an appeal was filed against the decree granted in favour of the respondent in the appeal in the suit filed by it. The High Court of Kerala in its decision dismissed the appeal of the appellant as barred by res judicata since the finding recorded in the connected suit had become final inasmuch as the same was

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not challenged in the appeal. In the appeal before the Supreme Court it was urged, as is urged in the appeal before us, that both the suits were connected and decided by common order, and therefore the issues in neither suit can be said to have been decided in a former suit, and consequently the basic ingredient of section 11 of CPC would not be satisfied. This submission was sought to be supported by the earlier decision of the Supreme Court in the case of Narhari Vs. Shanker (supra). However, the Supreme Court observed that the decision in the case of Narhari Vs. Shanker (supra) has been distinguished in the case of Sheodan Singh (supra), inasmuch as it related to only one suit and therefore the observations extracted therefrom were not relevant in a case where more than one suit was decided by a common order. The Supreme Court then observed that in the present case before it, there were different suits from which different appeals had to be filed. (emphasis supplied). In paragraph 4 of the said decision the Supreme Court therefore concluded that where an appeal arising out of connected suits is dismissed on merits, the other cannot be heard and has to be dismissed.

12.3 The question which was also considered by the Supreme Court was as to what happens where no appeal is filed, as in the case before the Supreme Court from the decree in the connected suit. The Supreme Court specifically found that the effect of non-filing of an appeal against a judgement or decree is that it becomes final. This finality can be taken away only in accordance with law. The same consequences follow when a judgement or decree in a connected suit is not appealed from. These observations of the Supreme Court, which were further fortified by the findings recorded by it in para 6 of the said decision, are as under: "Thus, the finality of finding recorded in the connected suit, due to non filing appeal, precluded the Court from proceeding with appeal in other suit."

12.4 In the context of the observations made by the Supreme Court in the said decision, and particularly the observations in paras 4 and 6 of the said decision, we are also of the view that the Supreme Court has, to some extent, departed from the earlier principles of relying and referring to only the principles of res judicata, by also considering and incorporating the principles of acquiescence and issue estoppel. As discussed hereinabove, the principle of acquiescence and issue estoppel are also relevant and can be applied to the consideration of examining the legality and validity of the contentions raised for and against the maintainability of such an appeal.

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13. The decision of the Supreme Court in the case of Ram Prakash Vs. Charan Kaur, reported in AIR 1997 SC 3760 is also relevant and pertinent.

13.1 This decision is based on facts which are identical to the facts before us. The Supreme Court specifically held that where the findings in one suit had been allowed to become final in the absence of an appeal, an appeal filed against the findings in another suit would be barred by principles of res judicata.

13.2 In para 2 of the said decision the Supreme Court observed as under:

"*2. It would be obvious that since the claims of the petitioner and the respondents have arisen from the same cause of action and the finding of the appellate Court that damages had accrued to the respondents due to misfeasance or malfeasance having been allowed to become final, the decree which is subject matter of the special leave petition cannot be assailed. The self-same question was directly in issue and was the subject matter of both the suits. The same having been allowed to become final, it cannot be gone into since the same had attained finality, the petitioner having not filed any appeal against the appeal dismissing the suit. In view of this situation, the High Court was right in concluding that the decree of dismissal of the suit against the petitioner would operate as res judicata under section 11, CPC in the appeal against which the petitioner has filed the second appeal.*"

13.3 We may also observe in passing that in the present decision the Supreme Court has applied not only the principles of res judicata, but has also decided the facts from the alternate perspective, by applying the principles of acquiescence and issue estoppel.

18. In the premises aforesaid, we are of the opinion that the present appeal is not maintainable and is consequently dismissed with no order as to costs.

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23. In view of the aforesaid settled legal position, the present appeal, which seeks to challenge two separate decrees by way of a single appeal, is not maintainable. Apart from being devoid of merits, the appeal also fails on the ground of maintainability.

THE CONCLUSION:

24. For the foregoing reasons, the present First Appeal fails and is accordingly dismissed. The judgment and decree dated 04.07.2007 passed by the learned City Civil Court, Ahmedabad, in Civil Suit No.55 of 2004, are hereby confirmed. Interim relief, if any, stands vacated. R&P, if any be sent back to the concerned Court. No order as to costs. Decree be drawn accordingly.

25. Connected Civil Application, if any, does not survive and stands disposed of accordingly.

(J. C. DOSHI,J)

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