would be found where adoption of married person amongst Jats has been held to be valid. The lower appellate Court was also forced to come to this conclusion but it merely held the adoption to be bad on the ground that the ceremony of giving and taking had not been proved. On the facts of the present case that ceremony had no meaning and the question of its taking place could not arise.

(10) I am, therefore, clearly of the view that the Courts below were in error in holding that the adoption was bad. In my opinion, it was a perfectly valid adoption and I hold accordingly.

(11) I have already observed that the lower appellate Court did not decide the remaining issues. It will, therefore, be proper to remit this case to the lower appellate Court for decision of the same. The parties are directed to appear before the lower appellate Court on 7th August, 1972.

N.K.S.

FULL BENCH

Before Harbans Singh, C.J., Bal Raj Tuli and Prem Chand Jain, JJ.

M/S. SADHU RAM-BALI RAM,—*Petitioners.*

versus

M/S. GHANSHAM DASS-MADAN LAL,—*Respondents.*

Civil Revision No. 688 of 1971.

October 17, 1973.

Code of Civil Procedure (Act V of 1908)—Section 115—Evidence Act (1 of 1872)—Sections 101, 102 and 103—Order of a subordinate Court refusing to change the onus of an issue—Revision against—Whether lies to the High Court.

Held, that placing of onus of an issue in the light of the provisions of sections 101 to 103 of Indian Evidence Act, 1872 is of great importance. When the plaintiff alleges existence of certain facts on which he bases his claim, an obligation is cast on him to prove the existence of those facts and it is he who would lead evidence to

prove the alleged facts and thereafter it would be the right of the other party to lead evidence in rebuttal. If the plaintiff on whom the onus of proving the existence of certain facts lies, does not lead any evidence at all or leads evidence which is not sufficient to prove his claim, then the defendant is not obliged to lead any evidence and the suit would be liable to be dismissed; but in case onus of an issue is wrongly placed, then the party on whom the onus is placed would be required to disprove the existence of facts which have not been proved by the party who has alleged them. Thus a decision given by the trial Court on the placing of onus of an issue wrongly, certainly adjudicates, for the purposes of the suit, some right or obligation of the parties in controversy. Such an order falls within the words "case decided" of section 115 of Code of Civil Procedure. Grave injustice may be caused to a party on whom wrong onus of an issue is placed, if the eroneous decision is not set aside in exercise of the revisional powers. However, the powers of revision are not unfettered and are controlled by the provisions of clauses (a), (b) and (c) of section 115 of the Code. Hence a revision lies to the High Court against an order of a subordinate Court refusing to change the onus of an issue. Merely because a person aggrieved from an interlocutory order can make it a ground of appeal after the final decision of the case, is no ground to refuse to entertain a revision petition against the order.

(Para 9).

Editor's note.—This full bench judgment is being reported late because it was referred to the Reporter after the decision in the main case by the learned Single Judge.

Case referred by Hon'ble Mr. Justice Prem Chand Jain on 20th October, 1971 to a Full Bench for decision of important question of law involved in the case. The Full Bench consisting of Hon'ble the Chief Justice Mr. Harbans Singh, the Hon'ble Mr. Justice B. R. Tuli and the Hon'ble Mr. Justice Prem Chand Jain, after deciding the question referred to, returned the case to the Single Judge for decision on the merit. The Hon'ble Mr. Justice Prem Chand Jain, finally decided the case on 28th October, 1974.

Petition under section 115 C.P.C. for revision of the order of Shri Niranjan Singh, Subordinate Judge, 1st Class, Patiala (D), dated 27th May, 1971, disallowing the application for amendment of the issue.

G. C. Mittal, and Parkash Chand Jain, Advocates, *for the petitioners.*

Mr. D. S. Nehra and K. N. P. Singh, Advocates, *for the respondents.*

JUDGMENT

Judgment of the Court was delivered by:—

P. C. JAIN, J.—On the reference that has been made by me, the question of law that requires determination in this case, may be formulated thus:—

> Whether a revision lies to this Court against an order of a subordinate Court, refusing to change the onus of an issue?

This Court in a Division Bench decision in *L' Union Fire, Accident and General Insurance Co. Ltd., New Delhi* v. *Shri O. P. Kapur and other* (1) held that the placing of the onus of an issue on one party or the other in the course of a suit by a subordinate Court is not a matter on which the High Court is entitled to interfere in revision under section 115 of the Code of Civil Procedure and that the ordinary method to be adopted by a party for contesting an order passed in the course of a suit, which that party considers to be wrong, but against which no appeal lies, is to challenge it in an appeal filed after the suit, in which the order has been passed, is decided. The decision in *L' Union Fire, Accident and General Insurance Co. Ltd. case* is based mainly on a Full Bench decision of the Rajasthan High Court in *Nagori Ibrahim and others* v. *Shahji Babumal and others* (2) which in turn is based on an earlier Full Bench decision of the same Court in *Purohit Swarupnarain* v. *Gopinath and another* (3). In *Purohit Swarupnarain's case*, the question that had been referred to the Bench for decision was in the following terms:—

> "Whether where it is open to a party to raise a ground of appeal under section 105, Civil P.C., from the final decree or order with respect to any order which has been passed during the pendency of the case, it should be held that an appeal from that order lies to the High Court in the meaning of the term "in which no appeal lies thereto, appearing in S. 115, Civil P.C."

Chief Justice Wanchoo who prepared the main judgment and with whom the other four learned Judges agreed, returned the answer

(1) A.I.R. 1963 Pb. 397.
(2) A.I.R. 1954 Raj. 83.
(3) A.I.R. 1953 Raj. 137 (F.B.)=I.L.R. (1953) 3 Raj. 483.

in the negative and held that in such a case revision would not be competent. During the course of discussion, it was observed thus:—

> "Therefore, the revisability of the order depends on whether an appeal lies in the suit or proceeding. If an appeal lies in the suit or proceeding, and if the order in question can be challenged in the appeal, whether it be first or second appeal, no revision would be competent to the High Court. It is only when the order in question cannot be challenged at all, in first or second appeal, and even by way of a ground under S. 105, that it can be said that no appeal lies to the High Court, and it should, therefore, exercise its extraordinary jurisdiction under section 115 to look into the correctness of the order, as required by clauses (a), (b) and (c) of the section."

As earlier observed, relying on *Purohit Swarupnarain's case,* the learned Judges of the Full Bench in *Nagori Ibrahim's case* held that the aggrieved party could take a ground under section 105 of the Code of Civil Procedure from the decree that may be finally passed on the basis that wrong allocation of burden of proof had resulted in prejudice to the person on whom the burden was wrongly put and had adversely affected the decision of the case on the merits and in this view of the matter, no revision would lie to the High Court merely because burden of proof was wrongly allocated in the sense that wrong party was required to lead his evidence just on the particular issue in respect of which the burden was wrongly placed on him.

(2) From the tenor of the decisions referred to above it is clear that all those decisions have proceeded mainly on the ground that as the aggrieved party could challenge the decision prejudicial to him, under section 105 of the Code of Civil Procedure, from the decree that may finally be passed, no revision lay to the High Court. The learned counsel for the petitioners challenged the correctness of the view taken in the aforesaid decisions on the ground that merely this fact that in an appeal a ground could be taken challenging the legality of an order passed by a subordinate Court during the course of the suit, would by itself be no ground to hold that no revision could lie against that decision. The contention, in view of the decision of their Lordships of the Supreme Court in *Major S. S.*

Khanna v. *Brig. F. J. Dhillon* (4), to which our attention was drawn, is well-founded and the following observations of their Lordships may be read with advantage:—

> "The next question which falls to be determined is whether the High Court has power to set aside an order which does not finally dispose of the suit, and when from the decree or from the final order passed in the proceeding an appeal is competent. Relying upon the use of the expression 'in which no appeal lies thereto' in S. 115, Code of Civil Procedure, it was urged that the High Court's jurisdiction to entertain a petition in revision could be exercised only if no appeal lay from the final order passed in the proceeding. But once it is granted that the expression 'case' includes a part of a case, there is no escape from the conclusion that revisional jurisdiction of the High Court may be exercised irrespective of the question whether an appeal lies from the ultimate decree or order passed in the suit. Any other view would impute to the Legislature an intention to restrict the exercise of this salutary jurisdiction to those comparatively unimportant suits and proceedings in which the appellate jurisdiction of the High Court is excluded for reasons of public policy. Nor is the expression 'in which no appeal lies thereto' susceptible of the interpretation that it excludes the exercise of the revisional jurisdiction when an appeal may be competent from the final order. The use of the word 'in' is not intended to distinguish orders passed in proceedings not subject to appeal from the final adjudication, from those from which no appeal lies. If an appeal lies against the adjudication directly to the High Court, or to another Court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded. The judgment of the Rajasthan High Court in *Swarupnarain* v. *Gopinath* (3), on which strong reliance was placed by the appellant does not, in our judgment, correctly interpret S. 115 of the Code. In that case the Court relying upon

(4) A.I.R. 1964 S.C. 497=(1964) 4 S.C.R. 409.

an earlier judgment of a Division Bench *Pyarchand* v. *Dungar Singh* (5), held that "where it is open to a party to raise a ground of appeal under S. 105 of the Code from the final decree or order, with respect to any order which has been passed during the pendency of a suit, it should be held that an appeal in that case lies to the High Court within the meaning of the term 'in which no appeal lies thereto' appearing in section 115, Civil Procedure Code, and the exercise of revisional jurisdiction of the High Court is excluded. It was observed in that case that the use of the word 'in' instead of the word 'from' in S. 115, Code of Civil Procedure, indicated an intention that if the order in question was one which could come for consideration before the High Court in any form in an appeal that may reach the High Court in the suit or proceeding in which the order was passed, the High Court has no revisional jurisdiction. But the argument is wholly inconclusive, if it be granted that the word "case" includes a part of a case. Again on the footing that the use of the expression "in" and not "from" indicates some discernible legislative intent, it must be remembered that the word "in" has several meanings as a preposition and as an adverb. The use of the preposition "from" in the sense of a source or point of commencement or distinction would not in the context of the clause, yield to greater clarity because the relation established thereby would be between "case" and appeal, and not "decided" and appeal. If the use of the expression "in" is inappropriate to express the meaning that orders not appealable to the High Court were subject to the revisional jurisdiction, this substitution of "from" for "in" does not conduce to greater lucidity".

(3) From the observations of their Lordships of the Supreme Court, reproduced above, it is clear that the view taken in *Purohit Swarupnarain's case*, has been expressly overruled. That being so, there cannot be any gain saying that the subsequent decision of the Full Bench of the Rajasthan High Court in *Nagori Ibrahim and others'* case and that of the Division Bench of this Court in *L' Union Fire Accident and General Insurance Co. Ltd. case* do not lay down

(5) I.L.R. (1952) 2 Raj. 608=A.I.R. 1953 Raj. 90.

the correct law. In this view of the matter, the petitioners have been able to overcome one hurdle in their way that merely this fact that a person aggrieved from an interlocutory order could make it a ground of attack in appeal, would be no ground to refuse to entertain a revision petition.

(4) The only other point that requires determination in order to answer the question referred to us is the nature of orders against which a revision would lie to this Court. Section 115 of the Code of Civil Procedure which gives jurisdiction to the High Court on revisional side, reads as under:—

> "115. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—
>
> (a) to have exercised a jurisdiction not vested in it by law, or
>
> (b) to have failed to exercise a jurisdiction so vested, or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
>
> the High Court may make such order in the case as it thinks fit."

(5) In the opening part of this section, it is provided that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court. What has to be now found out is as to what is the meaning of the words "any case which has been decided." If a decision given by the trial Court falls within the four corners of the words "any case which has been decided", then certainly revision would lie against such an order. The matter as to what meaning should be attached to the words "any case which has been decided" is not *res integra*. In *Major S. S. Khanna's case* (4) (supra), on this aspect of the matter, their Lordships of the Supreme Court, observed thus:—

> "The jurisdiction of the High Court to set aside the order in exercise of the power under S. 115, Code of Civil Procedure, is challenged by Khanna on three grounds—
>
> (i) that the order did not amount to "a case which has been decided" within the meaning of S. 115, Code of Civil Procedure;

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

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

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

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

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

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

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e., there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction may be exercised. But the power of the High Court is exercisable in respect of 'any case which has been decided'. The expression 'case' is not defined in the Code, nor in the General Clauses Act. It is undoubtedly not restricted to a litigation in the nature of a suit in a Civil Court: *Balakrishna Udayar* v. *Vasudeva Aiyar* (6), it includes a proceeding in a Civil Court in which the jurisdiction of the Court is invoked for the determination of some claim or right legally enforceable. On the question whether an order of a Court which does not finally dispose of the suit or proceeding amounts to a "case which has been decided", there has arisen a serious conflict of opinion in the High Courts in India and the question has not been directly considered by this Court. One view which is

(6) 44 I.A. 261=A.I.R. 1917 P.C. 71.

accepted by a majority of the High Courts is that the expression "case" includes an interlocutory proceeding relating to the rights and obligations of the parties, and the expression record of any case includes so much of the proceeding as relates to the order disposing of the interlocutory proceedings. The High Court has therefore power to rectify an order of a subordinate Court at any stage of a suit or proceeding even if there be another remedy open to the party aggrieved, i.e., by reserving his right to file an appeal against the ultimate decision, and making the illegality in the order a ground of that appeal. The other view is that the expression "case" does not include an issue or a part of a suit or proceeding and therefore the order on an issue or a part of a suit or proceeding is not a "case which has been decided", and the High Court has no power in exercise of its revisional jurisdiction to correct an error in an interlocutory order.

* * * * *

* * * * *

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

It may be observed that the majority view of the High Court of Allahabad in *Buddhulal* v. *Mewa Ram* (7), founded upon the supposition that even though the word "case" has a wide signification, the jurisdiction of the High Court can only be invoked from an order in a suit, where the suit and not a part of it is decided, proceeded upon the fallacy that because the expression "case" includes a suit, in defining the limits of the jurisdiction conferred upon

(7) I.L.R. 43 All. 564=A.I.R. 1921 All. 1 (F.B.).

the High Court the expression "suit" should be substituted in the section, when the order sought to be revised in an order passed in a suit. The expression "case" includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for equating it with a suit alone."

(6) Again on this question in a recent decision in *Baldevdas Shivlal and another* v. *Filmistan Distributors (India) Pvt. Ltd. and others* (8), their Lordships observed thus:—

"The expression "case" is not limited in its import to the entirety of the matter in dispute in an action. This Court observed in *Major S. S. Khanna* v. *Brig. F. J. Dillon* (4), that the expression "case" is a word of comprehensive import: it includes a civil proceeding and is not restricted by anything contained in S. 115 of the Code to the entirety of the proceeding in a civil Court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But it was not decided in *Major S. S. Khanna's case* (4), (Supra) that every order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of section 115 of the Code of Civil Procedure."

Even earlier to the decisions of the Supreme Court referred to above, the matter had come up for consideration before a Full Bench of the Lahore High Court, consisting of seven Hon'ble Judges in *Bibi Gurdevi represented by Prithvi Raj Khosla* v. *Chaudhri Mohammad Bakhsh and others* (9), wherein Bhide J. who wrote the main judgment observed thus:—

"I would accordingly hold that from the standpoint of language alone, the word 'case' is wide enough to include

(8) A.I.R. 1970 S.C. 406.
(9) A.I.R. 1943 Lah. 65.

decision of any matter in controversy affecting the rights of the parties to a suit. This interpretation is supported by the dictionary meaning of the word, by the sense in which it is used in some other sections of the Code itself and by the rule of interpretation which requires that a beneficial construction should be placed upon the provisions of a statute, when this appears to be consonant with its object."

(7) It is in the light of the principle of law enunciated in the above authorities that the question has to be decided whether an order of a subordinate Court refusing to change the onus of an issue falls within the words "case decided"? In our view the answer has to be in the affirmative.

(8) At this stage, it would be appropriate to reproduce sections 101 to 103 of the Indian Evidence Act, which would be relevant, for the determination of the point in issue. The sections read as under:—

"101. Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

"102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

"103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Section 101 is based on the rule that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for a negative is usually incapable of proof. Section 102 embodies a test for ascertaining on which side the burden of proof lies meaning thereby that when the

burden of proof lies on a party, that party must fail if he does not discharge the burden by giving evidence. Section 103 amplifies the general rule in section 101 that the burden of proof lies on the person who asserts the affirmative of the issue. It lays down that if a person wishes the Court to believe in the existence of a particular fact, the onus of proving that fact is on him, unless the burden of proving it is cast by any law on any particular person.

(9) Placing of onus of an issue, in the light of the provisions of sections 101 to 103 of the Indian Evidence Act, assumes great importance. When the plaintiff alleges existence of certain facts on which he bases his claim, an obligation is cast on him to prove the existence of those facts and it is he who would lead evidence to prove the alleged facts and thereafter it would be the right of the other party to lead evidence in rebuttal. In a given case, if the plaintiff on whom the onus of proving the existence of certain facts lies, does not lead any evidence at all or leads evidence which is not sufficient to prove his claim, then the defendant is not obliged to lead any evidence and the suit would be liable to be dismissed; but in case onus of an issue is wrongly placed, then the party on whom the onus is placed would be required to disprove the existence of facts which have not been proved by the party who has alleged them. When the matter is looked at keeping in view the provisions of the Evidence Act, then a decision given by the trial Court on the placing of onus of an issue wrongly, certainly adjudicates, for the purposes of the suit, some right or obligation of the parties in controversy, and according to the law enunciated by their Lordships of the Supreme Court, such an order would fall within the words "case decided". In a given case grave injustice may be caused to a party on whom wrong onus of an issue is placed, if the erroneous decision is not set aside in exercise of the revisional powers. However, the powers of revision are not unfettered and are controlled by the provisions of clauses (a), (b) and (c) of section 115.

(10) For the reasons recorded above, we hold that a revision lies to this Court against an order of a subordinate Court refusing to change the onus of an issue. This case shall now go back to the learned Single Judge for decision on merits. In the circumstances of the case, we make no order as to costs.

K.S.K.