

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU**

Reserved on 13.08.2024  
Pronounced on 09.10.2024

**OW104 No. 130/2017 (O&M)**

1. J&K State Forest Corporation .....Appellant(s)/Petitioner(s)  
through its Managing Director  
J&K State Forest Corporation,  
Narwal, Gladani, Jammu
2. Managing Director, J&K State  
Forest Corporation, Narwal,  
Gladani, Jammu
3. General Manager (Ext), J&K  
State Forest Corporation,  
Narwal, Gladani, Jammu
4. Divisional Manager, J&K State  
Forest Corporation, Narwal,  
Gladani, Jammu

Through: Mr. Vipin Gandotra, Advocate

**Vs**

1. Sher Singh S/o. Sh. Sham Lal, R/o ..... Respondent(s)  
H. No. 306/11, Shakti Nagar, Jammu

Through: Mr. R. K. S. Thakur, Advocate

**OWP No. 385/2013 (O&M)**

1. J&K State Forest Corporation .....Appellant(s)/Petitioner(s)  
through its Divisional Manager,  
Rajouri
2. General Manager (Ext),  
J&K State Forest Corporation,  
Vikram Chowk, Jammu

Through: Mr. Vipin Gandotra, Advocate

**Vs**

1. Sher Singh S/o. Sh. Sham Lal, ..... Respondent(s)  
R/o. H. No. 306/11, Shakti Nagar,  
Jammu
2. Managing Director, J&K State Forest  
Corporation, Narwal, Gladani, Jammu

3. Divisional Manager,  
J&K State Forest Corporation,  
Narwal, Gladani, Jammu
4. Munsiff, Jammu

Through: Mr. R. K. S. Thakur, Advocate

**Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE**

**JUDGMENT**

1. The petition bearing OW104 No. 130/2017 has been filed by the petitioners under section 104 of the Constitution of the erstwhile State of Jammu and Kashmir (now Article 227 of the Constitution of India) for setting aside the orders dated 16.03.2017 and 04.10.2017 passed by the court of learned Munsiff Jammu in execution application titled "Sher Singh Vs. J&K State Forest Corporation & Ors".
2. Initially, a suit for permanent prohibitory injunction was filed by the respondent against the petitioners for restraining them from terminating the contract executed between the plaintiff (respondent) and the defendants (petitioners) in respect of the activities of felling, hand sawing and pathroo /head cartage of the timber in compartment No. 76-Ghulabgarh, Forest Division Mahore, of the market volume of 1.457 lac CFT standing (72,800/- CFT Sawn) and allotting the same to any other contractor or doing the aforesaid activities departmentally, with a further relief in the nature of mandatory injunction directing the petitioners to grant extension for further period of two years to the respondent for completing the aforesaid activities.
3. The said suit came to be objected to by the petitioners by filing a written statement and an application under Section 34 of the Arbitration Act for staying the proceedings of the suit. Thereafter, the suit was amended by the

respondent and prayer for mandatory injunction commanding the petitioners to grant an extension for a period of two years for completing the execution of work and further direction to the petitioners to release the payments for the work done by him indicated in para-4 of the plaint as per the rates agreed upon in the agreement as well as the CDR of Rs. 50,000/- with interest at the rate of 24% per annum, was also made. The amended suit was also objected to by the petitioners by filing written statement. The petitioners, thereafter, did not choose to contest the suit and ultimately, the court of learned Munsiff, Jammu vide its judgment dated 31.08.2009 decreed the suit in *ex parte* and the respondent was held entitled to amount of Rs. 3,50,550/- with interest at the rate of 9% with effect from October 1993 till its realization. The respondent was also held entitled to release of CDR of Rs. 50,000/-. After the suit was decreed, the respondent filed an execution application before the court of learned Munsiff, which was objected to by the petitioners by raising the following objections:

“1. That the judgment is a nullity and as such, is not executable. It is also submitted that the judgment and decree has been passed by the court which did not possess the jurisdiction to decide the case/suit.

2. That it is also submitted that the judgment has been passed without taking into consideration the facts of the case and ignoring all the legal positions on the subject. Otherwise also, the judgment and decree has been passed in violation of statutory and legal provisions, and, in any situation, the judgment and decree is null and void and cannot be enforced in law. The judgment has been passed by relying upon irrelevant facts and relying upon inadmissible evidence which is impermissible under law and against the statutory provisions, as such, the judgment and decree is nullity in the eyes of law.

3. That the Hon'ble court while passing the judgment failed to consider the written statement filed, that the petitioner has executed the work of Rs. 97,253/- and the same payment has been made to the petitioner. It was also mentioned in the written statement that the petitioner has executed the work of Rs. 2.00 lacs.

4. That otherwise also, it is submitted that the release of payment cannot be granted by mandatory injunction, and the same can be

done only when the suit for recovery is filed after annexing the requisite court fees under the relevant statute. This has also not been done in the present case, violating the mandatory statutory provisions, as such, the judgment and decree is nullity, and is not enforceable.

5. That otherwise also, it is submitted that even the relief which has been granted, travelled beyond the scope of issues which were framed. It is so submitted that in the issue No. 03, it only talks of Rs. 2.00 lacs but the Hon'ble Court has awarded an amount of Rs. 3,50,550/- with interest @ 9% w.e.f. Oct. 1993 till realization. The Judgement and decree is a nullity as it violates all the mandatory provisions of law including statutory provisions. The judgment has been passed not keeping in view of the provisions regarding the passing of the judgment.”

4. The court of learned Munsiff, Jammu vide its order dated 16.03.2017 rejected the objections by observing that the objections pertained to the validity of the decree and as such, cannot be looked into by the Executing Court because the Executing Court can go behind the decree only in case the decree is nullity in the eyes of law, whereas the grounds urged by the petitioners do not make the decree nullity in the eyes of law.
5. Another motion was laid by the petitioners for recall/review of order dated 16.03.2017 but the petitioners failed in endeavour to get the order dated 16.03.2017 recalled or reviewed, resulting into dismissal of their application vide order dated 04.10.2017.
6. The petitioners have filed this petition, thereby assailing both the orders each dated 16.03.2017 and 04.10.2017 on the grounds that the Executing Court i.e. the court of learned Munsiff, Jammu had no jurisdiction to pass the decree, as the provisions of Section 21 of the J&K Civil Courts Act and provisions of Civil Procedure Code (for short 'the Code'), were also not taken note of by the learned Executing Court. It is also urged that the learned Executing Court committed the same mistake by passing the order dated 04.10.2017 by ignoring the judicial precedents cited by the petitioners.

7. The response has been filed by the respondent stating therein that the petition filed under section 104 of the Constitution of the erstwhile State J&K is not maintainable and the petitioners have filed another petition bearing OWP No. 385/2013, which is clubbed with the present petition. The respondent has given the details of the proceedings which may not be relevant for the purpose of the disposal of the present petition. It is, however, stated that the objections in respect of territorial and pecuniary jurisdiction are required to be raised at the earliest possible opportunity and in any case at or before the settlement of the issue, and if such objections are not raised at the earliest, it cannot be raised at the subsequent stage of the proceedings of the suit.
8. Mr. Vipin Gandotra, learned counsel for the petitioners has argued that the court of learned Munsiff Jammu lacked the pecuniary jurisdiction to decree the suit and holding the respondent entitled to sum of Rs. 3,50,550/- and Rs. 50,000/- on account of CDR and once the court of learned Munsiff lacked the pecuniary jurisdiction to entertain and adjudicate the suit, any decree passed by the court of learned Munsiff Jammu is nullity in the eyes of law. His main emphasis is that the court of learned Munsiff Jammu, had no competence to pass decree. He has also urged that the petitioner had raised an objection in respect of the valuation of the suit but the same has not been considered by the Executing Court and proper valuation of the suit would have ousted the jurisdiction of the court of learned Munsiff to try the suit. He has placed reliance upon the judgments of the Hon'ble Apex Court in '**Hira Lal Patni Vs. Kali Nath**', 1962 AIR (SC) 199.
9. *Per contra*, Mr. R. K. S. Thakur, learned counsel for the respondent has vehemently argued that in terms of Section 21 of the Code, once the

objection in respect of the territorial or pecuniary jurisdiction of the trial court is not raised at the earliest possible opportunity before the court of first instance, no such objection can be raised before the appellate court or revisional court. He has also urged that the present petition is not maintainable at all. In support of his contentions, he has relied upon the various judgments of the Supreme Court i.e. **Harshad Chiman Lal Modi v. DLF Universal Ltd. (2005) 7 SCC 791, Subhash Mahadevasa Habib v. Nemasa Ambasa Dharmadas, (2007) 13 SCC 650, Om Prakash Agarwal v. Vishan Dayal Rajpoot, (2019) 14 SCC 526.**

10. Heard learned counsel for the parties and perused the record.
11. The suit for permanent prohibitory injunction initially filed by the respondent was amended subsequently, and relief of mandatory injunction directing the petitioners to release the payments for the work done by the respondent and to release the amount of Rs. 50,000/- on account of CDR was also sought. The petitioners in their written statement to the suit never objected to the pecuniary jurisdiction of the court of learned Munsiff, Jammu to try the said suit and rather chose to absent themselves after filing the written statement. The learned trial court decreed the suit in *ex parte*, as referred above.
12. The main contention raised by the petitioners is that once the learned trial court lacked the pecuniary jurisdiction, the decree passed in the suit is nullity in the eyes of law. Before this Court proceeds ahead to appreciate this contention, it is apt to extract Section 21 of the Code:

**“21. Objections to jurisdiction.** -[(1)] No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where



issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

**[(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.]**

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.]

13. Sub-section (2) of section 21 of the Code provides that no objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice.
14. A perusal of the written statement reveals that no objection was raised by the petitioners in respect of the pecuniary jurisdiction before the court of learned Munsiff, Jammu, after the suit was amended by the respondent. In order to succeed before the appellate or the revisional court in respect of lack of pecuniary jurisdiction of the trial court to try the suit, the following conditions must co-exist:
- (i) Objection was taken in the court of the first instance
  - (ii) It was taken at the earliest possible opportunity and in cases where the issues are settled at or before such settlement.
  - (iii) There has been a consequent failure of justice.

15. So far as the present case is concerned, the condition Nos. 1 and 2 were never fulfilled by the petitioners at all, by raising objection in respect of the pecuniary jurisdiction of the court of the first instance.
16. In '**Hira Lal Patni v. Kali Nath, 1962 AIR (SC) 199**', the Hon'ble Supreme Court has held that the objection as to the local jurisdiction does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction.
17. Lack of competence of the court to try the suit would mean when the jurisdiction of the court is barred by a statute or where the suit is barred by any law for the time being in force, or decree against dead person etc. In **Harshad Chimam Lal Modi v. DLF Universal Ltd., (2005) 7 SCC 791**, it has been held as under:

**“30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.”**

**(emphasis added)**

18. In **Subhash Mahadevasa Habib v. Nemasa Ambasa Dharmadas, (2007) 13 SCC 650**, the Hon'ble Apex Court has held as under:

**“33. What is relevant in this context is the legal effect of the so-called finding in OS No. 4 of 1972 that the decree in OS No. 61 of 1971 was passed by a court which had no pecuniary jurisdiction**



to pass that decree. **The Code of Civil Procedure has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied.**

(emphasis added)

19. In **Om Prakash Agarwal v. Vishan Dayal Rajpoot, (2019) 14 SCC 526**, an objection was raised in respect of pecuniary jurisdiction of the ADJ to decide the case and it was held by the Supreme Court as under:

**“63. Now, reverting back to the facts of this case it is apparent from the judgment dated 22-10-2016 of the Additional District Judge, that no objection to the competence of the Additional District Judge to decide the case was taken by any of the parties. No objection having been taken to the pecuniary jurisdiction of the Additional District Judge, Section 21 of the Civil Procedure Code comes into play. Sub-section (2) of Section 21 provides that no objection as to the competence of the court with reference to the pecuniary limits of the jurisdiction shall be allowed by any appellate or Revisional Court unless conditions mentioned therein are fulfilled. No objection has been raised by the respondent tenant regarding competence of the court. Sub-section (2) precludes the revisionist to raise any objection regarding competence of the court and further Revisional Court ought not to have allowed such objection regarding competence of Court of Additional District Judge to decide the suit. The respondent tenant did not raise any objection regarding competence of the court and took a chance to obtain judgments in his favour on merits, he cannot be allowed to turnaround and contend that the Court of Additional District Judge had no jurisdiction to try the small cause suit and the judgment is without jurisdiction and nullity. Section 21 has been enacted to thwart any such objection by unsuccessful party who did not raise any objection regarding competence of court and allowed the matter to be heard on merits. Further, in deciding the small cause suit by the Additional District Judge, the tenant has not proved that there has been a consequent failure of justice.”**

(emphasis added)

20. It was also urged by the petitioners that the petitioners had raised objection in respect of the valuation of the suit and the proper valuation of the suit would have taken the lis away from the pecuniary jurisdiction of the court. The argument though appears to be attractive but the same deserves rejection

as the Hon'ble Supreme Court in '*Subhash Mahadevasa Habib v. Nemasa Ambasa Dharmadas*', (2007) 13 SCC 650, has held as under:

**“39.** But the fact that Section 21(2) or Section 21-A of the Code may not apply would not make any difference in view of the fact that the position was covered by the relevant provision in the Suits Valuation Act, 1887. **Section 11 of the Suits Valuation Act provided that notwithstanding anything contained in Section 578 (Section 99 of the present Code covering errors or irregularity) of the Code of Civil Procedure, an objection that a court which had no jurisdiction over a suit had exercised it by reason of undervaluation could not be entertained by an appellate court unless the objection was taken in the court of first instance at or before the hearing at which the issues were first framed or the appellate court is satisfied for reasons to be recorded in writing that the overvaluing or undervaluing of the suit has prejudicially affected the disposal of the suit.** There was some confusion about the content of the section.

**40.** The entire question was considered by this Court in *Kiran Singh* [AIR 1954 SC 340]. Since in the present case, the objection is based on the valuation of the suit or the pecuniary jurisdiction, we think it proper to refer to that part of the judgment dealing with Section 11 of the Suits Valuation Act. Their Lordships held:

**“7. ... It provides that objections to the jurisdiction of a court based on overvaluation or undervaluation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on overvaluation or undervaluation can be raised otherwise than in accordance with it. With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits.” ---**

21. In **OWP No. 385/2013**, the petitioners have challenged the order dated 30.01.2013, whereby the court of learned Munsiff, Jammu has dismissed an application filed by the petitioners for condoning the delay in filing the application for setting aside the *ex parte* judgment and decree dated

31.08.2009, *inter alia* on the grounds that the learned trial court has failed to consider the import of Order IX Rule 13 of the Code and other legal provisions including the provisions relating to the condonation of delay.

22. The respondent No. 1 has filed the response stating therein that the present petition is not maintainable and has also narrated the factual facts of the case, thereby stating that the suit was filed by him on 04.04.1994 and after the issues were framed, the petitioners deliberately did not appear in the case, and they were set *ex parte* on 11.03.2005. Thereafter, the court of learned Munsiff, Jammu decreed the suit in *ex parte* vide judgment and decree dated 31.08.2009. It is further stated that the execution application was filed and the petitioners were served through registered post for their appearance on 03.05.2011 but they did not choose to appear on 03.05.2011. On 08.06.2011, the learned counsel for the petitioners sought time to file power of attorney and on 03.10.2011, last opportunity was granted to the petitioners to file objections to the execution application and the same were filed only on 10.01.2012. The application for setting aside *ex parte* decree was filed on 06.03.2012 and in such circumstances, the delay could not have been condoned.

23. Learned counsel for the respondent No. 1 has raised the preliminary objections with regard to the maintainability of the present petition, on the ground that the remedy of appeal was available to the petitioners which was never availed by them, therefore, the petitioners could not have filed the present petition under Section 104 of the Constitution of erstwhile State of J&K (now Article 227 of the Constitution of India). Learned counsel for the respondent has placed reliance upon the judgment of the Hon'ble Supreme

Court in case, titled, **Sham Sunder Sharma vs Panna Lal Jaiswal, 2005 AIR SC 226.**

24. *Per contra*, the learned counsel for the petitioners has argued that the remedy of appeal was not at all available, as only the application for condonation of delay in filing the application for setting aside ex-parte decree was dismissed and Order 43 of the Code does not provide remedy of appeal against any such order. He has placed reliance upon the judgments of this Court in ‘**State of J&K & Ors. Vs. Gh. Mohd. Khuroo, 2004(2) JKJ 305 (HC)**’ and ‘**Rishi Raj Chopra & Anr. Vs. State & Ors, 2006 (2) JKJ 589 (HC)**’.
25. Heard learned counsel for the parties and perused the record.
26. In terms of Order 43 Rule (1) (d) of the Code, the remedy of appeal is available against dismissal of the application for setting aside ex-parte decree and no appeal is provided against the rejection of an application for condonation of delay in filing the application for setting aside ex parte decree. It was submitted by the learned counsel for the respondent that once an application seeking condonation of delay in filing the application for setting aside *ex parte* decree is dismissed, it would amount to dismissal of application under Order 9 Rule 13 of the Code, therefore, the remedy of appeal was available to the petitioners. In ‘**Shyam Sundar Sarma v. Pannalal Jaiswal**’, (2005) 1 SCC 436, the Hon’ble Apex Court has held as under:

“10. The question was considered in extenso by a Full Bench of the Kerala High Court in *Thambi v. Mathew* [(1987) 2 KLT 848 (FB)]. Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of the law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3-A of Order 41 introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered

under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. **Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.”**

(emphasis added)

27. In ‘**Koushik Mutually Aided Coop. Housing Society v. Ameena Begum**’, 2023 SCC OnLine SC 1662, the Hon’ble Apex Court has held as under:

**“16. Against the order passed under Order IX Rule 13 CPC rejecting an application for seeking setting aside the decree passed *ex parte*, an appeal is provided. When an application is filed seeking condonation of delay for seeking setting aside an *ex-parte* decree and the same is dismissed and consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) CPC is maintainable.** Thus, an appeal only against the refusal to set aside the *ex-parte* decree is maintainable whereas if an order allowing such an application is passed, the same is not appealable.

**17.** Thus, when an application or petition filed under Order IX Rule 13 CPC is dismissed, the defendant can avail a remedy by preferring an appeal in terms of Order XLIII Rule 1 CPC. Thus, Civil Revision Petition under Section 115 of the CPC would not arise when an application/petition under Order IX Rule 13 CPC is dismissed. Thus, when an alternative and effective appellate remedy is available to a defendant, against an *ex-parte* decree, it would not be appropriate for the defendant to resort to filing of revision under Section 115 of the CPC challenging the order refusing to set aside the order of setting the defendant *ex-parte*. In view of the appellate remedy under Order XLIII Rule 1(d) CPC being available, revision under Section 115 of the CPC filed in the instant case was not maintainable.

**18. When there is an express provision available under the CPC or any statute under which an appeal is maintainable, by-passing the same, a Revision Petition cannot be filed.** It is needless to observe that in the absence of an appellate remedy, a revision may be maintainable.

**19.** It is clarified that once the Trial Court dismissed the application seeking condonation of delay in filing petition under Order IX Rule 13 CPC, and consequently, the main petition under Order IX Rule 13 CPC also stood dismissed which is also noted by the trial Court as “In the result, the petition is dismissed”.

(emphasis added)

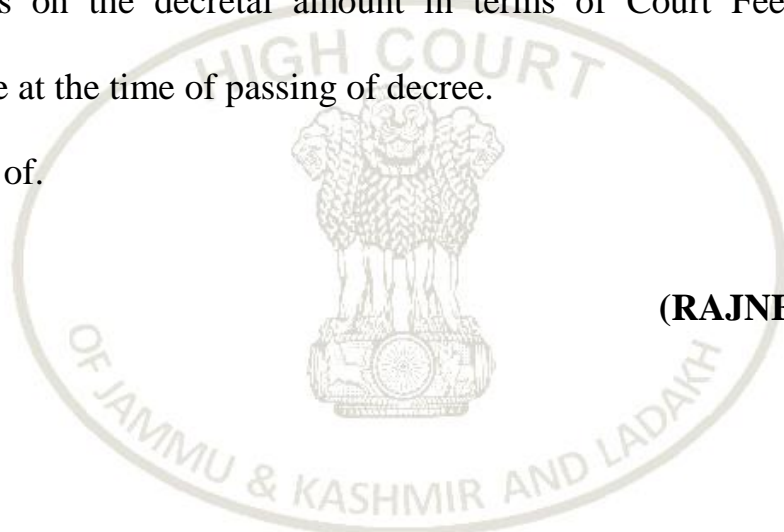
28. Thus, in view of the law laid down by the Hon’ble Apex Court, the remedy of appeal was available to the petitioners against the order of dismissal of application seeking condonation of delay in filing application for setting



aside *ex parte* decree and once an efficacious remedy is available to the petitioners, the petition under section 104 of the Constitution of erstwhile State of J&K is not maintainable.

29. In view of the above discussion, both the petitions are dismissed, and the petitioners are left free to avail appropriate remedy as available under law in terms of the judgment of the Hon'ble Apex Court in **Koushik Mutually Aided Coop. Housing Society (supra)** against the order of dismissal of application seeking condonation of delay in filing the application for setting aside *ex parte* decree. Besides, the respondent is also directed to pay the court fees on the decretal amount in terms of Court Fees Act, as was applicable at the time of passing of decree.

30. Disposed of.



**(RAJNESH OSWAL)**  
**JUDGE**

**Jammu:**  
05.10.2024  
Rakesh PS

Whether the order is speaking:	Yes/No.
Whether the order is reportable:	Yes/No.