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CIVIL PROCEDURE

*P Puneeth**

I INTRODUCTION

IN INTERPRETING and applying the provisions of procedural law, the courts are generally guided by the principle that procedural law exists to subserve the interest of substantive justice but not to supplant it. The Supreme Court expressly stated this policy in several cases. It had reiterated it with renewed emphasis in *Laxmibai* v. *Bhagwantbuva*,[1] where it was observed thus:[2]

> When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best.

This approach is evident in almost all cases dealt with by the court. During the survey year, various issues relating to interpretation and application of the provisions of Code of Civil Procedure, 1908 (hereinafter 'the Code') and other procedural laws have came to be dealt with by the court. The present survey briefly restates the decisions of the court on such issues.

II JURISDICTION

In the survey year, several issues relating to civil courts jurisdiction, more particularly, exclusion of jurisdiction by certain central and state legislations have came up before the court. In addition to such statutory exclusion, in few cases, the court had also dealt with the questions pertaining to exclusion or conferment of jurisdiction by the parties and limitations on the jurisdiction of courts established for special purposes like small cause courts and rent control courts.

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1 (2013) 4 SCC 97. Also see, *Noor Mohammed* v. *Jethanand* (2013) 5 SCC 202.

2 *Id.*, para 49.

Statutory exclusion of civil courts jurisdiction

Under section 9 of the Code, civil courts have jurisdiction to try all suits of civil nature excepting those that are expressly or impliedly barred. In other words, if the jurisdiction of the civil court is ousted, either expressly or impliedly, by any law for the time being in force with respect to any matter, the civil court is barred from entertaining suits with respect to such matters. The position is very clear even on a plain reading of the provision and the apex court's rulings reiterating the same in several cases brought greater clarity to the legal position.

In *Bangalore Development Authority* v. *Brijesh Reddy*,[3] the apex court examined the question as to whether a civil court has jurisdiction to entertain a suit when the suit scheduled lands were acquired under the Land Acquisition Act, 1894? Reiterating the settled legal position, the apex court answered the question negatively and observed thus:[4]

> It is clear that the Land Acquisition Act is a complete code in itself and is meant to serve public purpose. By necessary implication, the power of the civil court to take cognizance of the case under Section 9 CPC stands excluded and a civil court has no jurisdiction to go into the question of the validity or legality of the notification under Section 4, declaration under Section 6 and subsequent proceedings... It is thus clear that the civil court is devoid of jurisdiction to give declaration or even bare injunction being granted on the invalidity of the procedure contemplated under the Act. The only right available for the aggrieved person is to approach the High Court under Article 226 and this Court under Article 136 with self-imposed restrictions on their exercise of extraordinary power.

In *Mutha Associates* v. *State of Maharashtra*,[5] the Mutha Associates did not file any objections till the making of the award by the collector in a land acquisition proceeding. It was only after the collector had made his award and after notice for taking over possession was issued, they rushed to the civil court with a suit in which too they did not assail the validity of the declaration under section 26 (2) of, The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) read with section 6 of the Land Acquisition Act, 1894. The apex court held that the remedy by way of a suit was clearly misconceived. In the opinion of the court, the appellants could and ought to have challenged the acquisition proceedings without any loss of time. Having failed to do so, they were not entitled to claim any relief in the extraordinary jurisdiction exercised by the high court under article 226 of the Constitution as well.

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3 (2013) 3 SCC 66.

4 *Id.*, para 18.

5 (2013) 14 SCC 304.

In *Madhavi Amma* v. *S. Prasannakumari*,[6] the apex court examined the question as to the extent to which section 125 of the Kerala Land Reforms Act, 1963 bars the jurisdiction of the civil courts at first instance as well as at appeal stage.

It is pertinent to refer to the said provision at the outset. Section 125 bars the jurisdiction of civil court (which according to sub – section (8) includes 'rent control court') to settle, decide or deal with any question or to determine any matter which is by or under the Act required to be settled, decided or dealt with or to be determined by the land tribunal or the appellate authority or the land board or the taluk land board or the government or an officer of the government. The proviso to sub-section (1) of section 125, however, excludes such a bar on civil court jurisdiction only in respect of proceedings pending in any court at the commencement of the Kerala Land Reforms (Amendment) Act, 1969. While creating such a bar of jurisdiction of civil courts, provision has been made under sub – section (3) requiring the civil court or authority, before whom any question regarding rights of a tenant or of a *Kudikidappukaran* (including a question as to whether a person is a tenant or of a *Kudikidappukaran*) arise for consideration in any suit or other proceeding, to stay the proceedings temporarily and also simultaneously make a reference to the land tribunal having jurisdiction over the area in which the land or part thereof is situate along with the relevant records for the decision on such question. This provision has been made with a view to ensure that no person is allowed to abuse or misuse the benefits conferred under the Act while claiming rights as a *Kudikidappukaran*.

When such a reference is made by the civil court/rent control court, sub-section (4) enjoins upon the land tribunal to decide the question referred to it and return the records together with its decision back to the .civil court/rent control court. Under sub-section (5) of section 125 the civil court or, as the case may be, the rent control court should then proceed to decide the suit or other proceedings by accepting the decision of the land tribunal on the question referred to it. The civil court/rent control court cannot examine the correctness or otherwise of such decision. The correctness or otherwise of such decision by the land tribunal can, however, be examined in appeal in the respective jurisdictional appellate court of the civil court/rent control court. Such an inference can be clearly drawn from sub – section (6) of section 125, which declares that for the purposes of appeal, the decision of land tribunal on a question referred to it shall be treated as a part of the findings of the civil. In other words, "while the decision of the Land Tribunal on the question referred to it should be accepted by the civil court/Rent Control Court concerned which refers the question, the further determination as to the correctness

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6 (2013) 4 SCC 77.

or otherwise of such decision by the Land Tribunal can be examined in the channel of appeal provided in the respective jurisdictional appellate court of the civil court/ Rent Control Court."[7] Thus, the court held that the bar of jurisdiction under section 125 operates only at the first instance and not at the appellate stage.

In *Jagdish Singh* v. *Heeralal*,[8] the apex court dealt with the question of ouster of jurisdiction of civil courts under section 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Financial Interest Act, 2002 (SARFAESI Act). It bars the jurisdiction of civil courts to entertain any suit or proceeding in respect of any matter which a debts recovery tribunal or the appellate tribunal is empowered by or under the SARFAESI Act to determine.

The apex court was of the opinion that the said provision completely bars the jurisdiction of civil court even in so far as the "measures" taken by a secured creditor under sub-section (4) of section 13 of the SARFAESI Act, against which an aggrieved person has a right of appeal before the debt recovery tribunal or the appellate tribunal, to determine as to whether there has been any illegality in the "measures" taken.

Jurisdiction of small cause courts

The section 23 of the Provincial Small Cause Courts Act, 1887 requires the small cause courts to return plaints in suits involving questions of title to be presented to a court having jurisdiction to determine the title. Section 23 (1) reads as follows:

> Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a court cannot finally determine, the court may at any stage of the proceedings return the plaint to be presented to a court having jurisdiction to determine the title.

In *Nirmal Jeet Singh Hoon* v. *Irtiza Hussain,*[9] the apex court has held that the small cause court has no right to adjudicate upon the title of the property by virtue

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7 *Id.*, para 17.

8 (2014) 1 SCC 479.

9 (2010) 14 SCC 564.

of section 23 of the Provincial Small Cause Courts Act, 1887. In *Ramji Gupta* v. *Gopi Krishan Agrawal,*[10] the court reiterated it. The court also observed thus:[11]

> [T]he procedure adopted in the trial of a case before the Small Cause Court is summary in nature. Clause (35) of Schedule II to the 1887 Act, has made the Small Cause Court a court of limited jurisdiction. Certain suits are such in which the dispute is incapable of being decided summarily.

The court, thus, implied that the suit involving a question of title over immovable property is one such suit, which cannot be decided summarily. It may be noted that in reaching this conclusion, the court also took note of the observation made in *Budhu Mal* v. *Mahabir Prasad,*[12] where it was held that a question of title could also be decided upon incidentally by the small cause court but any finding recorded by a judge in this behalf, could not operate as *res judicata* in a suit based on title. But, the court in the present case did not elaborate on whether it is appropriate for the small cause court to incidentally decide upon the question of title, when, in the first place, such question cannot be decided by adopting summary procedure and secondly, the decision on such question by the small cause court does not have much significance as it cannot operate as *res judicata*. When such question arises, it is appropriate to return the plaint to be presented before the court having jurisdiction as contemplated under section 23 so that it can be settled by the competent court without leaving any scope for multiplicity of proceedings leading, at times, to contradictory decisions.

Determination of a question relating to title over property in an eviction suit

In *Tribhuvanshankar* v. *Amrutlal,*[13] the apex court held that the jurisdiction of the rent controller or a court under the Rent Control Act, is limited to enquire into existence or non – existence of a landlord and tenant relationship. The question of plaintiff's title based on his purchase of suit property or adverse possession thereof by the defendant is beyond the scope of enquiry in an eviction suit. Thus, the court permitted the plaintiff to approach the competent court for determination of title over the suit property.

Exclusion of jurisdiction of a court by agreement

It has been the consistent stand of the apex court that where two or more courts have the jurisdiction to entertain a suit, the parties by agreement can limit

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10 (2013) 9 SCC 438.

11 *Id.*, para 18.

12 (1988) 4 SCC 194.

13 (2014) 2 SCC 788.

the jurisdiction to one such court and exclude the jurisdiction of others. Such an agreement is not opposed to public policy and, thus, does not offend the provisions of section 23 of the Contract Act, 1872.[14]

In *Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*,[15] the apex court considered the question as to whether, in view of clause 18 of the consignment agency agreement in question, the Calcutta High Court has exclusive jurisdiction in respect of the application made by the appellant under section 11 of the Arbitration and Conciliation Act, 1996. The said clause provides that "the agreement shall be subject to the jurisdiction of the courts at Kolkata". The factual matrix giving raise to the question were that a dispute arose between the parties and as there was no amicable settlement, the appellant sent a notice to the respondent, invoking the arbitration clause in the agreement, wherein a name of a retired judge of the high court was proposed as the appellant's arbitrator. The respondents were requested to name their arbitrator within thirty days but they did not respond. Thus, the appellant's made an application under the aforesaid section 11 of the said Act before the Rajasthan High Court. The respondents contested the application, *inter alia*, on the ground of lack of territorial jurisdiction and, thus, the application came to be dismissed. In a civil appeal against the said order, it was contended before the Supreme Court that clause 18 confers jurisdiction to courts at Kolkata but did not specifically bar jurisdiction of courts at Rajasthan. The appellants placed reliance on the absence of the words like "alone", "only", "exclusive, or "exclusive jurisdiction" in the said clause 18 of the agreement. While rejecting the contention, the court held that:[16]

> It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the

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14 See P. Puneeth, "Civil Procedure" XLVIII *ASIL* 101 – 132 (2012).

15 (2013) 9 SCC 32.

16 Per R.M. Lodha, *Id*. para 32. Madan B. Lokur J., in his separate but concurrent judgment, agreed with the said conclusion.

> jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts.

In the present case, the court also held that when it comes to the question of territorial jurisdiction relating to the application under section 11 of the Arbitration and Conciliation Ac, 1996, besides sections 11 (12) (b) and 2 (1) (e) thereof, section 20 of the Code is also relevant.

Conferment of jurisdiction by (implied) consent of parties

In *Jagmittar Sain Bhagat* v. *Health Services, Haryana*,[17] the apex court held that indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable once the forum is found to have no jurisdiction. Similarly, if a court or tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction from any source apart from the statute. In such eventuality the doctrine of waiver also does not apply.

In the instant case, it is pertinent to note, the appellant joined services in the Health Department of the State of Haryana and took voluntary retirement. During the period of service, he stood transferred to another district but he retained the government accommodation for about 14 months. It was the case of the appellant that he had not been paid all his retiral benefits and the penal rent for the said period had also been deducted from his dues without giving him an opportunity to be heard. Aggrieved by the same, he preferred a complaint before the district consumer dispute redressal forum which was dismissed on merits. The state commission, while disposing of the appeal, observed that though the complaint was not maintainable before the district forum as it lacks jurisdiction, but in view of the fact that the opposite party neither raised any issue of the jurisdiction before the district forum nor preferred any appeal, the order of the district forum on jurisdictional issue had attained finality. But it also dismissed the appeal on merits. The national commission also dismissed the revision petition filed against the said order. In appeal before the Supreme Court, the preliminary issue was raised contending that the service matter of a government servant cannot be dealt with by any of the forum in any hierarchy under the Consumer Protection Act, 1986. Accepting the contention, the apex court observed thus:[18]

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17 (2013) 10 SCC 136.

18 *Id.*, para 14.

> [B]y no stretch of imagination can a government servant raise any dispute regarding his service conditions or for payment of gratuity or GPF or any of his retiral benefits before any of the forum under the Act. The government servant does not fall under the definition of a "consumer" as defined under Section 2(1)(d)(ii) of the Act. Such government servant is entitled to claim his retiral benefits strictly in accordance with his service conditions and regulations or statutory rules framed for that purpose. The appropriate forum, for redressal of any of his grievance, may be the State Administrative Tribunal, if any, or the civil court but certainly not a forum under the Act.

III STAY OF SUIT ON THE GROUND OF *RES SUB JUDICE*

Section 10 of the Code provides for stay of suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. It embodies the doctrine of *res sub judice*. For application of the provisions of section 10 of the Code, it is required that the court in which the previous suit is pending is competent to grant the relief claimed. The language of section 10 makes it clear that it is mandatory for the court, in which the subsequent suit has been filed, to stay the suit if the conditions laid down therein are satisfied. The underlying objective of section 10 of the Code is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations between the *same parties* in respect of *same cause of action*, *same subject - matter* claiming the *same relief*. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is also aimed to protect the defendant from multiplicity of proceedings.[19]

The test for applicability of section 10 is whether on a final decision being reached in the previously instituted suit; such decision would operate as *res judicata* in the subsequent suit. If the answer is in the affirmative, the subsequent suit is fit to be stayed. For application of section 10, the matter in issue in the subsequent suit has to be directly and substantially in issue in the previous suit. But the question is what "the matter in issue" exactly means? It means the entire subject - matter of the two suits must be the same. The provision will not apply where a few of the matters in issue are common. It will apply only when the entire subject-matter in controversy is same. The matter in issue is not equivalent to any of the questions in issue.

In *Aspi Jal*,[20] the appellant – plaintiff had filed three suits for eviction against the respondent – defendant in respect of the same suit property. As the third suit

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19 *Aspi Jal* v. *Khushroo Rustom Dadyburjor* (2013) 4 SCC 333.

20 *Ibid.*

was filed during the pendency of the first two eviction suits, the respondent – defendant moved the application for stay of suit under section 10 of the Code. The application was allowed by the trial court and the decision of the trial court was confirmed by the high court in appeal. The apex court set aside the orders passed by the trial court and confirmed by the high court holding that the provisions of section 10 is not attracted in the facts and circumstances of the case. It took note of the fact that the eviction in the third suit has been sought on the ground of non - user for six months prior to the institution of that suit whereas the earlier two suits, though filed on the same ground of non – user but for a different period. Thus, the apex court held that though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them for the decree for eviction.

In *Guru Granth Saheb Sthan Meerghat Vanaras* v. *Ved Prakash*,[21] the appellant filed an FIR against respondents for commission of the offences under sections 420, 467, 468 and 120 – B of the Indian Penal Code alleging that they had executed a false, forged and fabricated will in the name of one late D with the intention to grab his property. Subsequently, the appellant has also filed a civil suit for the same cause against the respondents. In the said suit, respondents filed their written statement and issues were framed. Thereafter, they filed an application under section 10 read with section 151 of the Code in the said suit for staying the civil proceedings during the pendency of the aforesaid criminal cases. The trial court dismissed the said application but the high court allowed it. While allowing the appeal against the decision of the high court and after referring to the constitutional bench decision in *M. S. Sheriff* v. *State of Madras*,[22] the apex court observed:[23]

> The ratio of the decision in *M. S. Sheriff* is that no hard-and-fast rule can be laid down as to which of the proceedings - civil or criminal - must be stayed. It was held that possibility of conflicting decisions in the civil and criminal courts cannot be considered as a relevant consideration for stay of the proceedings as law envisaged such an eventuality. Embarrassment was considered to be a relevant aspect and having regard to certain factors, this Court found expedient in *M.S. Sheriff* to stay the civil proceedings. The Court made it very clear that this, however, was not hard-and-fast rule; special considerations obtaining in any particular case might make some

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21 (2013) 7 SCC 622. Though this case deals with the question of simultaneous trial of civil and criminal cases, it has been discussed under this part since section 10 of the Code (read with section 151) was invoked for stay of suit. It may be noted that it is a settled law, subject only to few exceptions, that a civil and criminal cases can run concurrently.

22 AIR 1954 SC 397.

23 *Supra* note 21, para 8.

> other course more expedient and just. *M.S. Sheriff* does not lay down an invariable rule that simultaneous prosecution of criminal proceedings and civil suit will embarrass the accused or that invariably the proceedings in the civil suit should be stayed until disposal of criminal case.

Taking note of the settled legal position and having regard to the facts and circumstances of the present case, the apex court felt that the high court was not at all justified in staying the proceedings in the civil suit. *Firstly*, because even if there is a possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration. *Secondly*, in the facts of the present case there is no likelihood of any embarrassment to the respondents - defendants as they had already filed the written statement in the civil suit and based on the pleadings of the parties, the issues have been framed. In this view of the matter, the apex court felt, the outcome and/or findings that may be arrived at by the civil court will not at all prejudice the defences of respondents in the criminal proceedings.

IV RES JUDICATA

Section 11 of the Code embodies the principle of *res judicata*. It provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. On a plain reading of the provision, it is clear that even when a question is finally decided in a subsequent suit, it operate as *res judicata* over a pending suit instituted earlier. In order to operate as *res judicata*, the finding must be such that it disposes of a matter that is directly and substantially in issue in the former suit, and that the said issue must have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly in issue in the case cannot be made the basis for a plea of *res judicata*. Thus, in *Ramji Gupta*,[24] it was held that a question regarding title in a small cause suit may be regarded as incidental only to the substantial issue in the suit, and therefore, when a finding as regards title to immovable property is rendered by a small cause court, *res judicata* cannot be pleaded as a bar in the subsequent regular suit for the determination of title over immovable property.

Another interesting question as to whether the parties can be allowed to reagitate issues, which have been decided by a court of competent jurisdiction, on a subsequent change in the interpretation of relevant provision of law arose for consideration in *Kalinga Mining Corporation* v. *Union of India*.[25] The important question involved was whether the application for grant of mining lease would

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24 *Supra* note 10.

25 (2013) 5 SCC 252.

abate on the death of the applicant or can the legal heirs of the deceased applicant be allowed to pursue the application? Whilst the controversy about the abetment of the application was pending, the Mineral Concession Rules, 1960 was amended and rule 25–A was inserted, which permitted the legal representatives to continue pressing an application for grant of mining lease after the death of the applicant. The high court held that the rule 25 – A is only clarificatory in nature and, thus, has retrospective effect. Accordingly, it allowed the legal representatives to pursue the application. The appellant, another applicant for mining lease, challenged the decision of the high court by filing a special leave petition before the Supreme Court, which came to be dismissed *in limine*. Thereafter, the central government approved the recommendation of the state government to grant mining lease in favour of the legal representatives of the deceased applicant. After the grant of lease, the appellant filed another writ petition before the high court challenging the same on the basis that the said grant constituted a new cause of action. In the meantime, the interpretation placed on the rule 25 – A by the high court to the effect that it was clarificatory in nature was reversed by the Supreme Court in *Saligram Khirwal* v. *Union of India*.[26] The Supreme Court held that the said rule has only prospective application. The writ petition filed in the high court was allowed to be amended in view of the judgement in *Saligram Khirwal*. The appellant raised a preliminary objection relating to the maintainability of the application for the grant of mining lease by the legal representatives of the deceased applicant. While rejecting the preliminary objection, the high court held that the controversy regarding allowing the legal representatives to be substituted for the deceased applicant stood concluded between the parties and attained finality by the rejection of the special leave petition by the Supreme Court and the subsequent decision in *Saligram Khirwal* is of no consequence. The said order of the high court came be to be challenged in the present case. While upholding the order of the high court, the apex court observed:[27]

> The subsequent interpretation of Rule 25-A by this Court, that it would have only prospective operation, in *Saligram case*, would not have the effect of reopening the matter which was concluded between the parties. In our opinion, if the parties are allowed to reagitate issues which have been decided by a court of competent jurisdiction on a subsequent change in the law then all earlier litigation relevant thereto would always remain in a state of flux. In such circumstances, every time either a statute or a provision thereof is declared ultra vires, it would have the result of reopening of the decided matters within the period of limitation following the date of such decision. In this case not only the High Court had rejected the objection of the appellant to the substitution of the legal heirs of

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26 (2003) 7 SCC 689.

27 *Supra* note 25, para 44.

> Dr Sarojini Pradhan in her place but the SLP from the said judgment has also been dismissed. Even though, strictly speaking, the dismissal of the SLP would not result in the merger of the judgment of the High Court in the order of this Court, the same cannot be said to be wholly irrelevant. The High Court, in our opinion, committed no error in taking the same into consideration in the peculiar facts of this case. Ultimately, the decision of the High Court was clearly based on the facts and circumstances of this case.

The apex court, thus, reaffirmed the position that "[A] wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides."[28] It clearly implies that after those options are exhausted, the decision, even if it is wrong, would be binding on the parties.

V PLEADINGS

In a civil suit, the pleadings are the foundations of litigation. Plaint or the written statement must contain all the necessary and relevant materials. What is unnecessary and irrelevant shall not be included in the pleadings. If necessary and relevant factors are omitted, a party concerned can seek an amendment to the pleadings and similarly, if the pleading contains unnecessary or irrelevant material, court may be asked to strike out such portions in the pleading. The Code authorizes the court to allow amendment or to strike out pleadings. The Code also contains provisions relating to the manner in which allegations in the plaint shall be denied in the written statement and also as to how the court should proceed if the written statement is not filed by the party. The apex court in the survey year dealt with these provisions and clarified their true import and purport.

Amendment and striking out of pleadings: Distinction between rule 16 and rule 17 of order 6

Rule 16 of order 6 deals with the amendment or striking out of the pleadings, which a party desires to be made in his opponent's pleadings. In other words, the plaintiff or the defendant may ask the court for striking out the pleadings of his opponent on the ground that the pleadings are shown to be unnecessary, scandalous, frivolous or vexatious. This rule is based on the principle of *ex debito justitiae*. The court is empowered under this rule to strike out any matter in the pleadings that appears to be unnecessary, scandalous, frivolous or vexatious or which tends to prejudice, embarrass or delay the fair trial of the suit. Rule 17, on the other hand, empowers the court to allow either party to alter or amend his own pleading and on application the court may allow the parties to amend their pleadings subject to certain conditions enumerated in the said rule.[29]

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28 *State of W. B.* v. *Hemant Kumar Bhattacharjee*, AIR 1966 SC 1061 [Para 14].

29 *S. Malla Reddy* v. *Future Builders Coop. Housing Society* (2013) 9 SCC 349.

Denial of allegations made in the plaint in written statement

Rules 3, 4 and 5 of order 8 of the Code form an integral scheme dealing with the manner in which allegations of fact in the plaint should be denied and the legal consequences flowing from its non-compliance. As per these provisions, it is obligatory on the part of the defendant to specifically deal with each allegation in the plaint and when the defendant denies any such fact; he must not do so evasively but answer the point of substance. It is clearly postulated therein that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiffs but he must be specific with each allegation of fact.[30]

Rule 4 of order 8 clearly stipulates that a defendant must not be evasive in answering the point of substance. If it is alleged, for example, that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received, and that if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. Rule 5 deals with specific denial and clearly lays down that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted against him.[31]

Variance between pleadings in the plaint and evidence adduced

A question as to when can the variance between the pleadings in the plaint and evidence adduced be ignored arose for the consideration of the Supreme Court in *Gian Chand and Bros* case.[32] In this case, there was a variance between the allegations in plaint and the evidence adduced with regard to certain amount. At one time, it is mentioned as Rs. 6, 64, 670 whereas in the pleading, it has been stated as Rs. 6, 24, 670. The apex court was of the opinion that the variance was absolutely very little and such a variance does not remotely cause prejudice to the defendant. Relying on *Celina Coelho Pereira* v. *Ulhas Mahabaleshwar Kholkar,*[33] the apex court held that the true test is whether the other side has been taken by surprise or prejudice has been caused to them. In all circumstances, the court further opined, it cannot be said that because of variance between pleading and proof, the rule of *secundum allegata et probata* [34] would be strictly applicable.

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30 *Gian Chand and Bros.* v. *Rattan Lal* (2013) 2 SCC 606.

31 *Ibid*.

32 *Ibid*.

33 (2010) 1 SCC 217.

34 This maxim literally means "according to pleadings and proofs". In other words, a party recovers in his action only according to his claim as stated and proved.

Omission to file written statement: Power of the court under order 8 rule 10 to pass judgment

Order 8, rule 10 of the Code authorizes the court, if the party fails to present a written statement within the stipulated time, to pronounce the judgement against him, or make such orders in relation to the suit as it thinks fit. In *C.N. Ramappa Gowda* v. *C.C. Chandregowda*,[35] the Supreme Court has held that this provision is aimed at expediting the disposal of suit and is not a penal provision and laid down certain guidelines to be followed while exercising the power under order 8, rule 10.[36] In *Shantilal Gulabchand Mutha* v. *Tata Engg. and Locomotive Co. Ltd.*,[37] the apex court, though not referred to the guidelines issued earlier but by relying on other decisions, has reiterated:[38]

> [I]t appears to be a settled legal proposition that the relief under Order 8 Rule 10 CPC is discretionary, and court has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the court must be satisfied that there is no fact which needs to be proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the court must proceed, and under what reasoning the suit has been decreed.

Having regard to the fact and circumstances of the case, the court observed that the trial court had failed to meet the parameters laid down by the apex court to proceed under the said rule and, thus, referred the matter back to the trial court.[39] In view of this conclusion, the apex court did not answer another question raised in the case as to whether the decree passed under order 8, rule 10 of the Code can be subjected to the application under order 9, rule 13.

VI PARTIES

Non – impleadment of necessary parties

In *State of Rajasthan* v. *Ucchab Lal Chhanwal*,[40] the apex court quashed the orders pertaining to grant of promotion issued by the writ court and the division bench on the ground of non – impleadment of necessary parties. The counsel for the respondents had, in fact, contended before the apex court that they are agitating

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35 (2012) 5 SCC 265.

36 See *supra* note 14.

37 (2013) 4 SCC 396.

38 *Id.*, para 9.

39 *Id.*, para 13.

40 (2014) 1 SCC 144.

the grievance with regard to their promotion and it has nothing to do with the persons junior to them who had been promoted. The court refused to accept the contention and held that once the respondents are promoted, the juniors who have been promoted earlier would become juniors in the promotional cadre, and they being not arrayed as parties to the *lis*, an adverse order cannot be passed against them as that would go against the basic tenet of the principles of natural justice. On this singular ground, the court quashed the directions issued by the writ court as well as the division bench pertaining to grant of promotion to the respondents.

Abetment of suit on failure to substitute LRs of one of the defendants

The question as to whether the suit filed by the respondent-plaintiffs seeking a decree for declaration, partition and injunction against the appellants abated on the failure of the plaintiffs to file an application for substitution of the legal representatives of one of the defendants, who never appeared before the court to contest the suit and, thus, proceeded *ex parte* arose for the consideration of the apex court in *Mata Prasad Mathur* v. *Jwala Prasad Mathur*.[41] Keeping in view the fact that the said defendant never appeared before the court in his life time to contest the suit and relying on order 22 rule 4 (4) of the Code after considering its legislative history, the court answered the above question negatively. It observed thus:[42]

> It would appear from the above that the legislature incorporated the provision of Order 22 Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary the courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant Virendra Kumar. We have no manner of doubt that the view taken by the first appellate court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the courts below under Order 22 Rule 4(4) CPC.

The apex court reiterated the position in *Sushil K. Chakravarty* v. *Tej Properties (P) Ltd.*,[43] where it observed that a trial court can proceed with a suit under order 22, rule 4 (4) without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the court considers it fit to do so.

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41 (2013) 14 SCC 722.

42 *Id.*, para 9.

43 (2013) 9 SCC 642.

Impleadment of transferee *pendente lite* as a necessary party

Order 1 rule 10 empowers the court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary or proper for effective adjudication of the issue involved in the suit. In *Thomson Press (India) Ltd.* v. *Nanak Builders & Investors (P) Ltd.*,[44] the apex court, while dealing with the question of impleadment of transferee *pendente lite*, held that in a suit for specific performance of agreement to sell, no one other than the parties to an agreement to sell is a necessary and proper party to a suit. However, in the instant case, even after finding that the transferee *pendente lite* is not a *bona fide* purchaser, the court allowed the transferee to be impleaded in the suit. T. S. Thakur J in his supplementary judgment, had invoked order 22 rule 10 in support of the decision. He observed thus: [45]

> A simple reading of the above provision would show that in cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. What has troubled us is whether independent of Order 1 Rule 10 CPC the prayer for addition made by the appellant could be considered in the light of the above provisions and, if so, whether the appellant could be added as a party-defendant to the suit. Our answer is in the affirmative. It is true that the application which the appellant made was only under Order 1 Rule 10 CPC but the enabling provision of Order 22 Rule 10 CPC could always be invoked if the fact situation so demanded. It was in any case not urged by the counsel for the respondents that Order 22 Rule 10 could not be called in aid with a view to justifying addition of the appellant as a party-defendant.

Who can file an appeal?

Sections 96 and 100 of the Code make provisions for preferring an appeal from any original decree or from a decree in an appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. It is, however, well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate court and such leave should be granted if he would be prejudicially affected by the judgment. That means, if a judgment and decree prejudicially affects a person, he/she can prefer an appeal with the leave of the court.[46]

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44 (2013) 5 SCC 397.

45 *Id.*, para 54.

46 *Hardevinder Singh* v. *Paramjit Singh* (2013) 9 SCC 261.

VII APPEAL

Certain issues relating to scope of appellate courts' jurisdiction to deal with questions of fact and law and their power to remand the case have been considered by the apex court in the survey year. The court also delineated on when and for what purposes cross – objections can be filed by the parties in appellate proceedings without filing an appeal.

Re-appreciation of evidence by appellate court

It is well settled that the trial court is a best judge of evidence. As the trial court hears the oral evidence and records findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. The general rule is that the appellate court permits the findings of fact rendered by the trial court to prevail unless it appears to be improbable. It is, no doubt, certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial court or conclusions arrived at were not in consonance with law. Reiterating the rule, the apex court observed:[47]

> There is no prohibition in law for the appellate court to reappreciate the evidence where compelling and substantial reasons exist. The findings can also be reversed in case convincing material has been unnecessarily and unjustifiably stood eliminated from consideration. However, the evidence is to be viewed collectively. The statement of a witness must be read as a whole as reliance on a mere line in a statement of a witness is not permissible. The judgment of a court can be tested on the "touchstone of dispassionate judicial scrutiny based on a complete and comprehensive appreciation of all views of the case, as well as on the quality and credibility of the evidence brought on record". The judgment must not be clouded by the facts of the case.

Interference by the appellate court with the discretionary interim order passed by the trial court

In *Mohd. Mehtab Khan* v. *Khushnuma Ibrahim Khan,*[48] the apex court restated the law that ordinarily the appellate courts shall not interfere with the discretionary interim order passed by the trial court unless it is found to be palpably incorrect or untenable or on the ground that the view taken by the trail judge is not a possible view. The court observed that in a situation where the trial court, on a consideration of the respective cases of the parties and the documents laid before it, was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court should not interfere with the exercise of

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47 *Supra* note, para 46.

48 (2013) 9 SCC 221.

discretion by the trial judge unless such exercise was found to be palpably incorrect or untenable. The appellate court should not substitute its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. As long as the view of the trial court was a possible view the appellate court should not interfere with the same.

Second appeal on substantial question of law

Section 100 of the Code provides for second appeal only in cases, which involve substantial question of law. In *Santosh Hazari* v. *Purushottam Tiwari*,[49] the apex court has held that whether a particular question is a substantial question of law or not, depends on the facts and circumstances of each case. Further, in *Chunilal V. Mehta and Sons Ltd.* v. *Century Spg. and Mfg. Co. Ltd.*,[50] it was held that the construction of a document of title or of a document which is the foundation of the rights of parties necessarily raises a question of law. Recently, in *Union of India* v. *Ibrahim Uddin*,[51] the court, after referring to various previous judgments in this behalf, observed that "[T]here is no prohibition to entertain a second appeal even on question of fact, provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse."

Relying on those decisions, the apex court in *M.B. Ramesh* v. *K.M. Veeraje Urs,*[52] refuted the contention that when the trial court and the first appellate court have given a concurrent finding about the invalidity of the will, it was a finding of fact, and the high court could not have disturbed the finding of fact by framing a question of law as to whether the finding was bad in law, and perverse or contrary to the evidence on record. The court held that when the execution of the will and construction thereof was the subject matter of consideration, the framing of the question of law cannot be faulted.

However, in *Baldev Krishan* v. *Satya Narain*,[53] the apex court emphasised that "a second appeal would not entail the determination of questions of fact but must conform to the discipline of only considering questions of law of substantial importance."[54]

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49 (2001) 3 SCC 179.

50 AIR 1962 SC 1314.

51 (2012) 8 SCC 148.

52 (2013) 7 SCC 490.

53 (2013) 14 SCC 179.

54 *Id.,* para 8.

It may be noted that the apex court, in several cases,[55] has consistently maintained that formulation of substantial question of law is a *sine qua none* for the exercise of jurisdiction under section 100 of the Code. The said provision does not permit any departure from the rule. This rule was reiterated in *Baldev Kishan*[56] as well. Thus the observation made in *Ibrahim Uddin*,[57] which was relied upon by the apex court in *M. B. Ramesh*[58] is contrary to the said rule.

Interference by the high court in second appeal with the concurrent findings of the trial court and first appellate court

It is a settled law that the high court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that no reasonable person could have come to that conclusion on basis of the evidence on record. The second appellate jurisdiction of the high court under section 100 of the Code is not akin to the jurisdiction of the first appellate court under section 96. Second appellate jurisdiction is restricted to substantial question or questions of law that may arise from the judgment and decree appealed against.

In *Nasib Kaur* v. *Col. Surat Singh*,[59] interference with the concurrent findings of the courts below by the high court in the second appeal was challenged before the apex court. The high court, in the second appeal, has framed the substantial question as to whether the courts below have failed to consider the material evidence on record? Having framed it as a substantial question of law, the high court has not pointed out in the impugned judgment the material evidence which had not been considered by the first appellate court, which if considered, would have established ownership of the plaintiff to the suit property. Instead of pointing out the material evidence which has not been considered by the first appellate court, the high court has made its own assessment of the entire evidence as if it was the first appellate

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55 See *Panchugopal Barua* v. *Umesh Chandra Goswami* (1997) 4 SCC 713; *Sheel Chand* v. *Prakash Chand* (1998) 6 SCC 683; *Kanai Lal Garari* v. *Murari Ganguly* (1999) 6 SCC 35; *Ishwar Dass Jain* v. *Sohan Lal* (2000) 1 SCC 434; *Roop Singh* v. *Ram Singh* (2000) 3 SCC 708; *Santosh Hazari* v. *Purushottam Tiwari* (2001) 3 SCC 179; *Chadat Singh* v. *Bahadur Ram* (2004) 6 SCC 359; *Sasikumar* v. *Kunnath Chellappan Nair* (2005) 12 SCC 588; *C.A. Sulaiman* v. *State Bank of Travancore* (2006) 6 SCC 392; *Bokka Subba Rao* v. *Kukkala Balakrishna* (2008) 3 SCC 99; *Narayanan Rajendran* v. *Lekshmy Sarojini* (2009) 5 SCC 264; *Municipal Committee, Hoshiarpur* v. *Punjab SEB* (2010) 13 SCC 216, *Umerkhan* v. *Bismillabi* (2011) 9 SCC 684; *Shiv Cotex* v. *Tirgun Auto Plast (P) Ltd.* (2011) 9 SCC 678, and *Hardeep Kaur* v. *Malkiat Kaur* (2012) 4 SCC 344.

56 *Supra* note 53.

57 *Supra* note 51.

58 *Supra* note 52.

59 (2013) 5 SCC 218.

court and held that the plaintiff was the owner of the suit property and was entitled for the possession and also to the relief of permanent injunction. The apex court was of the opinion that under section 100 of the Code, the high court could not have reversed the findings of the trial court and the first appellate court and decreed the suits for declaration of title and for recovery of possession and injunction. Accordingly, the apex court set aside the impugned judgment and restored the decree of the first appellate court.

In *Vanchalabai Raghunath Ithape* v. *Shankarrao Baburao Bhilare*,[60] the apex court appreciated and upheld the decision of the high court, whereby the high court refused to interfere, in second appeal, with pure findings of fact by the courts below.

Power of the appellate court to remand the case with direction to try it differently

The appropriateness of the direction issued by the high court, while remanding the case to the trial court, to try the suit based on tenancy as one based on title was questioned before the apex court in *Kailash Paliwal* v. *Subash Chandra Agrawal.*[61] The apex court was of the opinion that it is not proper to issue such direction. The court upheld the submission made by the counsel for the appellant that since the high court had recorded a specific finding that the relationship of landlord and tenant had not been established by the plaintiff, the only option left for the plaintiff was to sue for possession based on the title of the property. That option could be exercised by way of filing a fresh suit instead of the suit for possession based on tenancy being converted into a suit for possession based on title.

Right to file cross-objection

After the 1976 Amendment, which, *inter alia*, made certain insertions in sub – rule (1) of rule 22 of order 41, it is permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. Relying on *Banarsi* v. *Ram Phal*,[62] the apex court observed, in *Hardevinder Singh* v. *Paramjit Singh*, [63] that the insertion made in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. In such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is

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60 (2013) 7 SCC 173.

61 (2013) 9 SCC 372.

62 (2003) 9 SCC 606.

63 (2013) 9 SCC 261.

against him if he seeks to get rid of the same though he is entitled to support the other part of the decree which is in his favour without taking any cross-objection to it. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of the explanation to sub-rule (1), 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, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent before the amendment.

Applicability of principles underlying order 41 rule 22 to appeals by special leave under article 136 of the Constitution

Order 41 rule 22 provides that a respondent, though has not filed an appeal 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. It also authorizes him to take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection within the stipulated time. In *Sundaram Industries Ltd.* v. *Employees Union*,[64] the apex court, relying on *Jamshed Hormusji Wadia* v. *Port of Mumbai*,[65] has reiterated that the principle underlying order 41 rule 22 of the Code is applicable even to the appeals by special leave under article 136 of the Constitution of India.

VIII REVIEW AND REVISION

Applications seeking review on the pretext of seeking clarification/ modification

In *Cine Exhibition (P) Ltd.* v. *Collector,*[66] the applications were filed for clarification/modification of the judgement passed by the Supreme Court in *Collector* v. *Cine Exhibitors (P) Ltd.*[67] The said applications were rejected by the Registrar of the Supreme Court on the ground that the applicant was in fact seeking review of the judgment on the pretext of application for clarification/modification. The Supreme Court, after considering the prayers made, has upheld the order of the Registrar. The court was of the opinion that generally an application for

64 (2014) 2 SCC 600.

65 (2004) 3 SCC 214.

66 (2013) 2 SCC 698.

67 (2012) 4 SCC 441.

correction of a typographical error or omission *etc*., in a judgment or order would lie, but a petition which is intended to seek review of an order or judgment except on the ground of an error apparent on the face of the record, could not be achieved by filing an application for clarification/modification/recall or rehearing, for which a properly constituted review is the remedy. Further, referring to order 40 of the Supreme Court Rules, 1966, the court observed thus:[68]

> Under Order 40 of the Rules a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without an order giving an oral hearing or whether notice is to be issued to the opposite party. Many a times, applications are filed for clarification/ modification/recall or rehearing not because any clarification/ modification is found necessary but because the applicant in reality wants a review and also wants hearing by avoiding circulation of the same in chambers. We are of the view that a party cannot be permitted to circumvent or bypass this circulation procedure and indirectly obtain a hearing in the open court, what cannot be done directly, cannot be permitted to be done indirectly.

The court in clear terms deprecated the practice of overcoming the provision for review under order 40 of the Supreme Court Rules, 1966 by filing an application for rehearing, modification or clarification.

In *Satya Jain* v. *Anis Ahmed Rushdie*[69] too, the court deprecated such a practice. It reiterated that an application for modification or clarification of a final order passed by the Supreme Court is not contemplated by the provisions of the Supreme Court Rules, 1966 which specifically provides the remedy of review and also lays down the procedure governing the consideration of a review application by the court.

Review of final judgement of the Supreme Court

Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court. The power of the Supreme Court to review its own judgments or orders is subject to the provisions of any law made by Parliament or any rules made under article 145 of the Constitution. Part VIII order 40 of the Supreme Court Rules, 1966 deals with the review. Rule 1 of order 40 of the said Rules stipulates that no application for review will be entertained in a civil proceeding except on the ground mentioned in order 47 rule 1 of the Code. On a combined reading of the said provisions, it can be deduced that the review is maintainable on the following grounds:[70]

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68 *Supra* note 66, para 9.

69 (2013) 8 SCC 147.

70 *Union of India* v. *Sandur Manganese and Iron Ores Ltd.* (2013) 8 SCC 337. Also see, *Kamlesh Verma* v. *Mayawati*, (2013) 8 SCC 320.

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him.

(ii) Mistake or error apparent on the face of the record.

(iii) Any other sufficient reason.

It may be noted that the words "any other sufficient reason" have been interpreted by the privy council in *Chhajju Ram* v. *Neki* [71] and approved by the Supreme Court in *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*,[72] to mean "a reason sufficient on grounds, at least analogous to those specified in the rule".

In addition, in *Kamlesh Verma* v. *Mayawati*,[73] the Supreme Court after referring to several cases has also stated the grounds or circumstances under which review is not maintainable:[74]

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

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71 AIR 1922 PC 112.

72 AIR 1954 SC 526.

73 *Supra* note 70.

74 *Id.,* para 20.2

In *Union of India* v. *Sandur Manganese and Iron Ores Ltd.*,[75] the Union of India filed the review petition before the Supreme Court seeking the review of the judgment passed in *Sandur Manganese and Iron Ores Ltd.* v. *State of Karnataka,*[76] (herein after *Sandur – I*) *inter alia*, on the grounds, *firstly*, that the expert committee's report was misquoted in the judgment and as a result the impugned judgment, which relies on the same, shall stand erroneous on the face of law, and *secondly*, in *Sandur - I*, the court had interpreted various provisions of the Mines and Minerals (Development and Regulation) Act, 1957 and the Mineral Concession Rules, 1960 framed thereunder and the Ministry of Mines, Government of India, could not put forth its view on the interpretation of the said provisions for the reason that the copy of the special leave petition was not served upon the review petitioner which is a necessary and relevant party to the subject-matter in issue/ dispute and the review petitioner did not get an opportunity of being heard.

The apex court partially acceded to the first ground and held that it is true that the Expert Committee's Report has been misquoted (owing to the clerical mistake) to the extent of adding four lines, which was originally not a part of the report. Thus, the court has the power to modify the impugned judgment to the extent of deletion of the misquoted statement under review jurisdiction. However, the court did not agree with the contention that the impugned judgment is erroneous on the face of law merely because the Expert Committee's Report was misquoted. In its view, the impugned judgment stands good of reason even without the misquoted lines as well. Hence, mere deletion of those lines along with removal of certain portion of para 51 of the impugned judgment will, in the opinion of the court, clarify the mistake.

As regards the second ground, the court observed:[77]

> In the present case, the error contemplated in the impugned judgment is not one which is apparent on the face of the record rather the dispute is wholly founded on the point of interpretation and applicability of Sections 11(2) and 11(4) of the MMDR Act. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. Hence, in review jurisdiction, the Court shall interfere only when there is a glaring omission or patent mistake or when a grave error has crept in the impugned judgment, which we fail to notice in the present case.

Accordingly, the review petition was disposed off by the apex court.

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75 *Supra* note 70.

76 (2010) 13 SCC 1.

77 *Supra* note 70, para 35.

In *Khela Banerjee* v. *City Montessori School*,[78] a review petition was filed seeking a review of the judgment passed by the Supreme Court in *Khela Banerjee –I*,[79] *inter alia*, on the ground that the observation made by the court that the Governor had passed an order for restoration of plot in favour of the review petitioner in violation of the Rules of Business are factually incorrect. It was the contention of the review petitioner that because of the imposition of the President's rule under article 356 of the Constitution, the Governor became entitled to exercise all the powers of the state government under the Rules of Business. However, having regard to the facts – in – issue in the case, the apex court refused to entertain the review petition on the said ground. It observed thus:[80]

> Notwithstanding the abovementioned error, which crept in the judgment dated 2-7-20121 because copy of the proclamation issued by the President under Article 356 of the Constitution was not brought to the notice of the Court, we do not find any valid ground to entertain the prayer for review of the judgment dated 2-7-2012.

Further, in *Union of India* v. *Namit Sharma*, [81] the apex court held that review of a judgment or order of the court under article 137 of the Constitution is confined to only errors apparent on the face of the record as provided in order 40 rule 1 of the Supreme Court Rules, 1966. If reasoning in the judgment under review is at variance with the clear and simple language in a statute, the judgment under review suffers from a manifest error of law, an error apparent on the face of the record, and is liable to be rectified. In this case the court in fact allowed the review petition and recalled its earlier directions and issued new directions.

Scope of revision jurisdiction of high courts

In *Jhau Lal* v. *Mohan Lal*,[82] the trial court had dismissed the suit by invoking its powers under section 35-B of the Code for non-payment of costs. Being aggrieved by the said order, the appellant - plaintiffs had filed civil revision petitions. While disposing of the said civil revision petitions, the high court has observed that the suit filed by the appellant - plaintiffs is not maintainable, based on the claim made that they are the owners of the property on the basis of adverse possession. The Supreme Court held that while deciding the civil revision petitions, the high court should have concentrated primarily on the ground on which the trial court had dismissed the suit of the appellant - plaintiffs. There was no reason for the high court to have observed in its order that the suit itself was not maintainable before the trial court. In that view of the matter, the impugned judgments and

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78 (2013) 7 SCC 615.

79 *Khela Banerjee* v. *City Montessori School* (2012) 7 SCC 261.

80 *Id.,* para 17.

81 (2013) 10 SCC 359.

82 (2013) 9 SCC 446.

orders passed by the high court were held to be not sustainable. The matters were, thus, remanded back to the high court for fresh disposal in accordance with law.

IX EXECUTION

In *Satyawati* v. *Rajinder Singh*,[83] the appellant – plaintiff obtained a judgement and decree in her favour in 1996. It is not in dispute that the judgement and decree became final as it was not challenged before the high court. She filed an execution petition in 1996 and the executing court rejected the execution petition by observing that the decree was not executable because of certain contradictory reports. It is pertinent to note that the judgment in favour of the appellant - plaintiff was passed by considering a report dated 17.9.1989 and a sketch of land in question, which were made by the local commissioner. Some other reports were considered by the executing court and after considering all the reports, the executing court, by its order dated 16.3.2009 came to the conclusion that the decree was not executable. Aggrieved by the same, the appellant approached high court by filing a civil revision petition and the same was rejected and the order of the executing court was confirmed. While confirming the order of the executing court, the high court took into consideration the subsequent demarcation report dated 26.7.2010 and after discussing both the reports, it came to the conclusion which had been arrived at by the executing court. While allowing the appeal, the apex court observed:[84]

> Looking to the facts of the case and upon hearing the learned counsel, we are of the view that the order passed by the executing court dated 16.3.2009, which has been confirmed by the High Court is not correct for the reason that the executing court ought not to have considered other factors and facts which were not forming part of the judgment and the decree passed in favour of the appellant - plaintiff. Once the decree was made in favour of the appellant - plaintiff, in pursuance of the judgment dated 19.1.1996 delivered by the District Judge, Faridabad, in our opinion, the executing court should not have looked into other reports which had been submitted to it afterwards.

The apex court set aside the orders passed by the executing court and the high court and directed the executing court to do the needful for execution of the decree by taking into account the local commissioner's report and sketch dated 17.9.1989. The court felt that it is unfortunate that the appellant is unable to enjoy the fruits of her success even today *i.e.*, in 2013 though she had finally succeeded in 1996. The court recalled the observation made by the Privy Council that "… the difficulties of a litigant in India begin when he has obtained a decree"[85] and observed that "[E]ven today, in 2013, the position has not been improved and still the decree - holder faces the same problem which was being faced in the past."[86]

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83 (2013) 9 SCC 491.

84 *Id.*, para 9.

85 *General Manager of the Raj Durbhunga* v. *Coomar Ramaput sing* (1871 – 72) 14 MIA 605.

The court strongly felt that there should not be unreasonable delay in execution of a decree because if the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain.

In *Land Acquisition Collector* v. *Surinder Kaur*,[87] the respondent, after dissatisfied with the award of compensation made by the Land acquisition collector, filed an application under section 18 of the Land Acquisition Act, 1894. Thereafter, the collector made reference to the court for determination of the amount of compensation. The additional district judge decided the reference. After about two years, the respondent filed an execution petition seeking direction to the appellant to pay the compensation. The appellant filed the objection under section 47 of the Code pleading that the determination made by the reference court was erroneous. The objection was rejected by the execution court as well as by the high court. The apex court dismissed the appeal filed by the appellant and held that while deciding the objections filed under section 47 of the Code, the additional district judge did not have the jurisdiction to go into the legality or correctness of the judgment by which compensation was awarded to the respondent. If the appellants felt aggrieved by judgment, then they should have filed appeal under section 54 of the Act. Having failed to do that, the appellants cannot seek modification of the judgment in an execution petition.

In *ONGC Ltd.* v. *Modern Construction and Co.*,[88] the apex court again reiterated that there can be no quarrel with the settled legal proposition that the executing court cannot go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution.

X MISCELLANEOUS

Seeking leave of court for exemption from serving notice under section 80 (1)

Clause (1) of section 80 provides that no suit shall be instituted against the government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity without serving a notice and until the expiration of two months thereafter. However, clause (2) carves out an exception that a suit to obtain an urgent or immediate relief against the government or any public officer may be instituted, with the leave of the court, without serving any notice as required by clause (1).

In *State of Kerala* v. *Sudhir Kumar Sharma,*[89] the apex court delineated on the power of the court under clause (2) to grant leave for exemption. In this case, a suit was filed by the respondent against the appellant state and in the said suit an

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86 *Supra* note 83 at 493.

87 (2013) 10 SCC 623.

88 (2014) 1 SCC 648.

89 (2013) 10 SCC 178.

interlocutory application (IA) was filed seeking leave of the court under clause (2) of section 80. Appellant state also filed an IA under order 7 rule 11 of the Code for rejection of plaint for non – compliance with clause (1) of section 80. The appellant's IA was heard and rejected by the trial court. In an appeal high court held that in view of the fact that the trial court had heard the appellant's IA even though the respondent's application under section 80 (2) is pending for decision, it could be presumed that the application under section 80 (2) was allowed and hence plaint is not liable to be rejected for non–compliance with section 80 (1). The Supreme Court reversed the order of the trial court and the high court. It was of the opinion that a suit filed without complying with section 80 (1) cannot be regularised simply by filing an application under section 80 (2) of the Code. Upon filing an application under section 80 (2), the court is supposed to consider the facts and look at the circumstances in which the leave was sought for filing the suit without issuance of notice under section 80 (1) to the government authorities concerned. For the purpose of determining whether such an application should be granted, the court is supposed to give hearing to both the sides and consider the nature of the suit and urgency of the matter before taking a final decision. By mere filing of an application, by no stretch of imagination can it be presumed that the application is granted. If such a presumption is accepted, it would mean that the court has not to take any action in pursuance of such an application and if the court has not to take any action, then it is not understandable as to why such an application should be filed.

Inherent powers of civil courts

In *Ram Prakash Agarwal* v. *Gopi Krishan,*[90] the apex court delineated on the scope of inherent powers of civil courts enshrined under section 151 of the Code. The court stated that section 151 is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The court under section 151 of the Code may adopt any procedure to do justice, unless the same is expressly prohibited. The court further stated, by way of illustration, the cases or circumstances under which exercise of inherent power is justified and cases or circumstances in which it is not. They are as follows:

(i) Inherent powers cannot be used to re-open settled matters. The inherent powers of the court must, to that extent, be regarded as abrogated by the legislature. A provision barring the exercise of inherent power need not be express, it may even be implied.[91]

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90 (2013) 11 SCC 296.

91 *Id.* at 302.

(ii) Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit.[92]

(iii) The consolidation of suits can be done in exercise of the inherent power since the same has not been provided for under any of the provisions of the Code. It can be done in exercise of the powers under section 151 of the Code, where a common question of fact and law arise therein, and the same must also not be a case of misjoinder of parties. The non - consolidation of two or more suits is likely to lead to a multiplicity of suits being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits that are sought to be consolidated. Non - consolidation may, therefore, prejudice a party, or result in the failure of justice.[93]

(iv) In exceptional circumstances, the court may exercise its inherent powers, apart from order 9 of the Code to set aside an *ex parte* decree. An *ex parte* decree passed due to the non - appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of a mistake of the court. An application under section 151 will be maintainable, in the event that an *ex parte* order has been obtained by fraud upon the court or by collusion. The provisions of order 9 may not be attracted, and in such a case the court may either restore the case, or set aside the *ex parte* order in the exercise of its inherent powers. There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of court, the injustice so done must be remedied, in accordance with the principle of *actus curiae neminem gravabit* - an act of the court shall prejudice no person.[94]

(v) Inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in Code. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law. In view of the several decisions of the Supreme Court reiterating it, the law on this issue stands crystallised to the effect that the inherent powers enshrined under section 151 can be exercised only where no remedy has been provided for in any other provision of the Code. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot

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92 *Ibid.*

93 *Id.,* para 14.

94 *Id.,* para 15.

be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of Code.[95]

(vi) In the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised.[96]

In the present case, the respondents were claiming their right over certain lands on the basis of being a vested reminder under the judgment and decree dated 23.4.1958. The respondents were not parties to the land acquisition proceedings concerning the said land. In the reference under section 18 of the Land Acquisition Act, 1894, the tribunal enhanced the compensation of the appellants. When the respondents have learnt about it, they filed an application under order 9 rule 13 read with section 151 of the Code for the purpose of setting aside the said award enhancing the compensation. The tribunal rejected the application. A writ petition was filed in the high court challenging the same. The high court allowed the writ holding that while an application under order 9 rule 13 was not maintainable, the said award should have been set aside in exercise of its power under section 151 of the Code, as the same was required to be done in order to do substantial justice between the parties. Allowing the appeal against the decision of the high court, the apex court held thus:[97]

> Permitting an application under Order 9 Rule 13 CPC by a non-party, would amount to adding a party to the case, which is provided for under Order 1 Rule 10 CPC, or setting aside the ex parte judgment and decree i.e. seeking a declaration that the decree is null and void for any reason, which can be sought independently by such a party. In the instant case, as the fraud, if any, as alleged, has been committed upon a party, and not upon the court, the same is not a case where Section 151 CPC could be resorted to by the court, to rectify a mistake, if any was made.

While setting aside the impugned judgment and order of the high court, the court summarized its findings on legal issues involved therein as follows:[98]

(i) An application under order 9 rule 13 of the Code cannot be filed by a person who was not initially a party to the proceedings.

(ii) Inherent powers under section 151 can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under the Code.

(iii) In the event that an order has been obtained from the court by playing fraud upon it, it is always open to the court to recall the said order on the application

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95 *Id. at* 303-308. Also see, *Mohit* v. *State of U.P.* (2013) 7 SCC 789 [Para 32].

96 *Id.,* para 19.

97 *Id.,* para 22.

98 *Id.,* para 28.

of the person aggrieved, and such power can also be exercised by the appellate court.

(iv) Where the fraud has been committed upon a party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit.

(v) A person aggrieved may maintain an application before the land acquisition collector for reference under section 18 or 30 of the Land Acquisition Act, 1894, but cannot make an application for impleadment or apportionment before the reference court.

Adjudication upon application for grant of interim relief: Relevant considerations

The apex court in *Mohd. Mehtab Khan* v. *Khushnuma Ibrahim Khan*,[99] deliberated upon the judicial dilemma in dealing with the applications for grant of interim relief. While explaining how it becomes very delicate in most cases, the court made the following observation:[100]

> Given the ground realities of the situation it is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the courts is neither feasible nor practicable. Courts, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any straitjacket formula or any precise laid down norms. The courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though experience has shown that observations and clarifications to the effect that the findings recorded are prima facie and tentative, meant or intended only for deciding

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99 (2013) 9 SCC 221.

100 *Id.*, para 17.

> the interim entitlement of the parties have not worked well and interim findings on issues concerning the main suit has had a telling effect in the process of final adjudication it is here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that may have a close connection with those arising in the main suit.

Further, while recalling the governing principles laid down in *Dorab Cawasji Warden* v. *Coomi Sorab Warden*[101] for grant of mandatory interim relief, the court reiterated that the grant of mandatory interim relief requires the highest degree of satisfaction of the court; much higher than a case involving grant of prohibitory injunction.

Recording of evidence prior to the commencement of trial

Order 18 rule 16 provides for taking evidence *de bene esse*. It authorizes the court to take the evidence of the witness at any time after the institution of the suit, even before the commencement of the trial, if the witness is about to leave the jurisdiction of the court or other *sufficient cause* is shown to the satisfaction of the court. Mere apprehension of death of a witness cannot be considered a sufficient cause for the purpose of invoking rule 16 of order 18 of the Code. Apprehension of death applies to each and every witness, young or old, as nobody knows what will happen at the next moment. It is the discretion of the court to come to a conclusion as to whether there is a sufficient cause or not to examine the witness immediately.[102]

Out-of-court settlement

The question relating to the validity of out-of-court settlement arose for consideration of the Supreme Court in *Ghulam Nabi Dhar* v. *State of Jammu and Kashmir*.[103] The dispute between the parties related to certain piece of land declared as evacuee property by the Custodian of Evacuee Property under section 6 of the J & K State Evacuees' (Administration of Property) Act, 2006. The appellants herein, claiming themselves to be the tenants-at-will of a portion of the said land, filed writ petition before the high court challenging, *inter alia*, declaration of their property as evacuee property. An injunction order was granted. However, the Custodian started construction of a shopping complex in violation of the said injunction order. Therefore, the high court, through another injunction order, restrained the parties from raising any construction. Aggrieved thereby, the custodian filed a letters patent appeal (LPA). While the matters were pending, the parties reached an out-of-court settlement. It was duly signed by the Custodian,

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101 (1990) 2 SCC 117.

102 *Supra* note 1.

103 (2013) 3 SCC 353.

the writ petitioners and their counsel. The same was filed before the high court by way of CMP for disposing of the LPA and the writ petition in terms thereof. However, subsequently, the Custodian filed another CMP for withdrawal of the settlement. Both the CMPs came up before the division bench and the two judges comprising the division bench differed on the question of validity of the settlement. The matter was referred to the third judge, who referring the Rules framed under the above Act and section 23 of the Contract Act,1872 upheld the right of the custodian to withdraw from the settlement unilaterally. The apex court, while holding that the rules referred to have no application to the facts of the case, set aside the decision of the high court. With reference to the settlement, the apex court observed:[104]

> The special facts of the case set the present agreement/settlement apart from the cases of grant of lease of vacant lands in terms of Rule 13-C and has, therefore, to be treated differently. Firstly, as the lands were not vacant, the very first criterion of Rule 13-C, was not satisfied and the lease of the lands were to be granted as part of the settlement packet, which included surrender of 22 kanals of prime land. We are inclined to agree with the views expressed by Mansoor Ahmad Mir, J. that in the special facts of this case, Rule 13-C of the 2008 Rules would have no application to the settlement arrived at between the parties and the same was not, therefore, vitiated for not putting the lands to auction to determine the premium to be paid for the leases to be granted in respect thereof. As observed by His Lordship, it was nobody's case that the settlement was the outcome of any fraud or was unlawful and the same, having been signed and acted upon, was binding on the parties and could not be withdrawn unilaterally.

The apex court was clearly of the opinion that the settlement arrived at between the parties and filed before the high court for acceptance is lawful and within the scope of rule 3 of order 23 of the Code.

Abuse of process of the court

Delay in dispensation of justice through the court of law is a matter of serious concern. There are many factors responsible for it. Deliberate procrastination of litigation by non - prosecution or by seeking adjournments after adjournments on some pretext or the other is also one of the important factors responsible for inordinate delay in judicial process. The Supreme Court of India, time and again, castigated this practice of seeking and granting adjournments at the drop of the hat.[105] Taking note of the anguish expressed in the past and hoping that a reminder serves as a propeller for keen introspection and paves the path of needed

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104 *Id.,* para 46.

105 See, for example, *Shiv Cotex* v. *Tirgrun Auto Plast (P) Ltd.* (2011) 9 SCC 678.

rectification, the court, in *Noor Mohammed* v. *Jethanand,*[106] observed:[107]

> [T]he role ascribed to the Judges, the lawyers and the litigants is a matter of perpetual concern and the same has to be reflected upon every moment. An attitude of indifference can neither be appreciated nor tolerated. Therefore, the serviceability of the institution gains significance. That is the command of the Majesty of Law and none should make any maladroit effort to create a concavity in the same. Procrastination, whether at the individual or institutional level, is a systemic disorder. Its corrosive effect and impact is like a disorderly state of the physical frame of a man suffering from an incurable and fast progressive malignancy. Delay either by the functionaries of the court or the members of the Bar significantly exhibits indolence and one can aphoristically say, borrowing a line from Southwell "creeping snails have the weakest force."

The court also observed that in a democracy, where intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern, delay gradually declines the citizens' faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect –potentiality to bring in a state of cataclysm where justice may become a casualty. Thus, it felt that "everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be Herculean, the same has to be performed with solemnity, for faith is the "élan vital" of our system."[108]

Maintainability of SLP filed only against the order rejecting review petition

An important question as to the maintainability of special leave petition filed under article 136 of the Constitution challenging only the order rejecting the review petition without any challenge to the order passed in the writ appeal against which a review is filed came up before the Supreme Court in *State of Assam* v. *Ripa Sarma*.[109] There are contradictory previous decisions on the question. In *Shanker Motiram Nale*,[110] *Suseel Finance and Leasing Co.,*[111] and *M. N. Haider*[112] the apex court had earlier ruled against the maintainability of such petitions. In those cases

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106 (2013) 5 SCC 202.

107 *Id.,* para 29.

108 *Id.,* para 31.

109 (2013) 3 SCC 63.

110 *Shanker Motiram Nale* v. *Shiolalsing Gannusing Rajput* (1994) 2 SCC 753.

111 *Suseel Finance and Leasing Co.* v. *M. Lata* (2004) 13 SCC 675.

112 *M.N. Haider* v. *Kendriya Vidyalaya Sangathan* (2004) 13 SCC 677.

it was held that the special leave petition which has been filed against the order rejecting the review petition would be barred under order 47 rule 7 of the Code. The apex court, *per contra*, had taken a different stand in *Eastern Coalfields Ltd.*,[113] wherein it dismissed the objection raised on the maintainability of SLP against the review petition.

In the present case, after taking note of the contradictory decisions, the apex court reiterated the earlier view that in the absence of a challenge to the main judgment, the special leave petition filed challenging only the subsequent order rejecting the review petition, would not be maintainable. The court declared the contradictory decision rendered in *Eastern Coalfields Ltd.* case as *per incuriam.*

Recalling of witnesses

In *Bagai Construction* v. *Gupta Building Material* Store,[114] the respondent initially filed a suit against the appellant for recovery of certain dues along with the interest accrued thereon. Arguments in the suit were concluded on 27.10.2009 and the matter was adjourned for judgment on 3.11.2009. In the meantime, on 31.10.2009 the respondent moved two applications, one under order 7 rule 14 read with section 151of the Code and the other under order 18 rule 17 read with section 151 of the Code seeking permission to recall PW – 1 for proving certain documents by leading his additional evidence. The trial court dismissed both the applications against which a revision petition was filed. The high court allowed the revision petition and set aside the order of the trial court. The Supreme Court allowed the appeal against the order of the high court and set aside the same and restored the order of the trial court. While allowing the appeal, the court observed thus:[115]

> After change of various provisions by way of amendment in CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the

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113 *Eastern Coalfields Ltd*. v. *Duggal Kumar* (2008) 14 SCC 295.

114 (2013) 14 SCC 1.

115 *Id.,* para 15.

> applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still the plaintiff has not placed those bills on record. It further shows that final arguments were heard on a number of times and the judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

Deposition by the power - of - attorney holder in place of the principal

It is a settled law that the power - of - attorney holder cannot depose in place of the principal. The provisions of order 3 rules 1 and 2 of the Code empower the holder of the power of attorney to "act" on behalf of the principal. The word "acts" employed therein is confined only to "acts" done by the power - of - attorney holder, in exercise of the power granted to him by virtue of the instrument. The term "acts", would not include deposing in place and instead of the principal. In other words, if the power - of - attorney holder has performed any "acts" in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is liable to be cross-examined.[116]

Withdrawal and adjustment of suits

Order 23 of the Code deals with withdrawal and adjustment of suits. In *Mahalaxmi Coop. Housing Society Ltd.* v. *Ashabhai Atmaram Patel*,[117] the apex court elucidated the scope and implications of rules 1 and 3 of the said order. Rule 1 of the said order speaks of withdrawal of suit or abandonment of part of claim. It covers two types of cases: (i) where the plaintiff withdraws a suit or part of a claim with the permission of the court to bring in fresh suit on the same subject – matter, and (ii) where the plaintiff withdraws a suit without the permission of the court. Rule 3, on the other hand, speaks of compromise of suit. It refers to distinct classes of compromise in suits. The first part refers to lawful agreement or compromise arrived at by the parties out of court, which is required to be in writing and signed by the parties. The second part of the rule deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from the first part of rule 3. The apex court quoted with approval the observation made in *Pushpa Devi Bhagat* v. *Rajinder Singh*,[118] where distinction between first part and second part of rule 3 was highlighted. The court held that

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116 *S. Kesari Hanuman Goud* v. *Anjum Jehan* (2013) 12 SCC 64.

117 (2013) 4 SCC 404.

118 (2006) 5 SCC 566.

the expression "agreement" or "compromise" refer to the first part and not the second part. The second part gives emphasis to the expression "satisfaction". This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfies' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it.

Further, the court also made it clear that the word "satisfaction" has been used in contradistinction to the word "adjustment" by agreement or compromise by the parties. The requirement of "in writing and signed by the parties" does not apply to the second part where the defendant satisfies the plaintiff in respect of whole or part of the subject-matter of the suit. The proviso to rule 3 enjoins the court to decide the question where one party alleges that the matter is adjusted by an agreement or compromise but the other party denies the allegation. It expressly and specifically mandates that the court shall not grant such adjournment for deciding the question unless it thinks fit to grant such adjournment by recording reasons.

In *Mahalaxmi Coop. Housing Society Ltd.*,[119] the apex court considered another question as to whether transfer or consolidation of suit does take away the right of parties to invoke rule 3 of order 23. While answering the question negatively, it was observed thus:[120]

> The transfer of the suits from one court to another to be tried together will not take away the right of the parties to invoke Order 23 Rule 3 and there is also no prohibition under Order 23 Rule 3 or Section 24 CPC to record a compromise in one suit. Suits always retain their independent identity and even after an order of consolidation, the court is not powerless to dispose of any suit independently once the ingredients of Order 23 Rule 3 have been satisfied.

Withdrawal of suit filed in a representative capacity

A suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court, therefore, must not normally grant permission to withdraw the suit unilaterally. Rather, the court must advise the plaintiff to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the court may pass such an order. If the court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware

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119 *Supra* note 117.

120 *Id.,* para 46.

of the same, the said order would be an unjustified order.[121] It is well settled that this principle applies to the company petitions made in representative capacity as well. While reiterating the position, the apex court observed thus:[122]

> [W]here the company petition is filed with the consent of the other shareholders, the same must be treated in a representative capacity, and therefore, the making of an application for withdrawal by the original petitioner in the company petition would not render the petition under Sections 397 or 398 of the 1956 Act, non-existent, or non-maintainable. The other persons i.e. the constructive parties who provide consent to file the petition, are in fact entitled to be transposed as petitioners in the said case. Additionally, in case the petitioner does not wish to proceed with his petition, it is not always incumbent upon the court to dismiss the petition. The court may, if it so desires, deal with the petition on merit without dismissing the same. Further, there is no requirement in law for the shareholder himself, to give consent in writing. Such consent may even be given by the power-of-attorney holder of the shareholder. If the shareholder who had initially given consent to file the company petition to help meet the requirement of 1/10th shareholding, transfers the shares held by him, or ceases to be a shareholder, the same would not affect the maintainability and continuity of the petition.

Filing an undated affidavit

In a case,[123] in reply to the order passed by the Supreme Court, the chief secretary to the state government had filed an undated affidavit, which was, of course, attested by a joint secretary to the government. The court took strong exceptions to filing such an affidavit. It said that the attestation of the undated affidavit is in utter disregard to the provisions of section 139 of the Code. The Supreme Court Rules, 1966 under order 11 rule 7 also require adherence to the provisions of said section 139. It is an essential characteristic of an affidavit that it should be made on oath or affirmation before a person having authority to administer the oath or affirmation, and thus, duty to state on oath on the part of the deponent is sacrosanct. Hence, the court held that the reply filed by the chief secretary is not worth taking on record and being undated, renders the same to be a piece of waste paper. The court did not consider it to be an excusable mistake. It passed stricture against the chief secretary in the following words:[124]

121 *Bhagwati Developers (P) Ltd.* v. *Peerless General Finance Investment Co. Ltd.* (2013) 5 SCC 455.

122 *Id.,* para 17.

123 *Umesh Kumar* v. *State of A. P.*, (2013) 10 SCC 591.

124 *Id.,* para 41.

> [w]e have no hesitation to hold that the Chief Secretary had the audacity not to ensure the compliance with the order of this Court dated 24-7-2013, and we have no words to express our anguish and condemn the attitude adopted by the Chief Secretary. More so, holding such a responsible post in the State, he must have some sense of responsibility and should have been aware of what are the minimum requirements of law, and even if he did not know he could have consulted any law officer of the State before filing the undated affidavit.

Election petitions: Requirement of verification and filing of affidavit

A reading of section 83 (1) (c) of the Representation of People Act, 1951 (RP Act) makes it clear that what is required of an election petitioner is only that the verification should be carried out in the manner prescribed in Code. A plain reading of order 6 rule 15 of the Code suggests that a verification of the plaint is necessary. In addition to the verification, the person verifying the plaint is "also" required to file an affidavit in support of the pleadings. In other words, rule 15 requires an affidavit "also" to be filed. It does not mean that the verification of a plaint is incomplete if an affidavit is not filed. The affidavit, in this context, is a stand-alone document.[125]

A plain and simple reading of section 83(1) (c) of the RP Act clearly indicates that the requirement of an additional affidavit is not to be found therein. While the requirement of "also" filing an affidavit in support of the pleadings filed under Code may be mandatory in terms of order 6 rule 15 (4), the affidavit is not a part of the verification of the pleadings - both are quite different. While the RP Act does require a verification of the pleadings, the plain language of section 83 (1) (c) of the RP Act does not require an affidavit in support of the pleadings in an election petition. The requirement that does not exist in section 83(1) (c) of the RP Act cannot be read into it.[126]

While the necessity of filing an affidavit in support of the facts stated in a plaint may be beneficial and may have salutary results, the court has to go by the law as it is enacted and not go by the law as it ought to be. The Code no doubt requires that pleadings be verified and an affidavit "also" be filed in support thereof. However, section 83 (1) (c) of the RP Act merely requires an election petitioner to sign and verify the contents of the election petition in the manner prescribed by the Code. There is no requirement of the election petitioner "also" filing an affidavit in support of the averments made in the election petition except when allegations of corrupt practices have been made.[127]

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125 *G.M. Siddeshwar* v. *Prasanna Kumar* (2013) 4 SCC 776.

126 *Ibid.*

127 *Ibid.*

Further, a defect, if any, in the verification can be removed in accordance with the principles of the Code, and that it is not fatal to the election petition.[128]

Raising a new plea with regard to the fact before the appellate court

It is a settled law that the issue with regard to the fact cannot be raised before the appellate court for the first time. The question whether the suit property in fact belongs to an individual *i.e.*, whether he is a beneficial owner or is a *benami*, is a question of fact. If there was no averment made in the plaint with regard to that and no issue is raised before the trial court, the said issue cannot be raised for the first time before the appellate court.[129]

Condition precedent for claiming set – off under order 8 rule 6

On a reading of the rule 6 of order 8, it is evident that certain conditions precedent are to be satisfied for application of the said rule. Two primary conditions are that it must be a suit for recovery of money and the amount sought to be set - off must be a certain sum. Apart from the aforesaid parameters there are other parameters to sustain a plea of set-off under this rule.[130] As far as equitable set-off is concerned, it is different than the legal set-off in many respects, *viz*., that it is independent of the provisions of the Code; that the mutual debits and credits or cross - demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due.[131]

Condonation of delay

The courts should always take liberal approach in the matter of condonation of delay, particularly when the appellant is the state but in a case where there are serious laches and negligence on the part of the state in challenging the decree passed in the suit and affirmed in appeal, the state cannot be allowed to wait to file objection under section 47 of the Code till the decree-holder puts the decree in execution. In *Amalendu Kumar Bera* v. *State of W.B.*,[132] the decree was passed in the year 1967 in respect of declaration of title and permanent injunction restraining

128 *Neena Vikram Verma* v. *Balmukund Singh Gautam* (2013) 5 SCC 673.

129 *Narinder Singh Rao* v. *Air Vice-Marshal Mahinder Singh Rao* (2013) 9 SCC 425.

130 *Jitendra Kumar Khan* v. *Peerless General Finance & Investment Co. Ltd.,* (2013) 8 SCC 769.

131 *Ibid.*

132 (2013) 4 SCC 52.

the respondent state from interfering with the possession of the suit property of the appellant-plaintiff. When the state tried to interfere with possession, the decree-holder had no alternative but to file the execution case for execution of the decree with regard to interference with possession. Then the revision petition was filed by the respondent state. The court rejected the same by holding that the delay in filing the execution case cannot be a ground to condone the delay in filing the revision against the order refusing to entertain objection under section 47 of the Code. The court held that merely because the respondent is the state, delay in filing the appeal or revision cannot and shall not be mechanically considered and in the absence of "sufficient cause" delay shall not be condoned.

The expression "sufficient cause" employed by the legislature under section 5 of the Limitation Act, 1963 is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice. The courts have always adopted a liberal but cautious approach in dealing with an application for condonation of delay. As the issue of condonation of delay crop – up in several cases, the Supreme Court enunciated certain principles in dealing with such cases. On the basis of the decisions in such cases, the Supreme Court, in *Esha Bhattacharjee* v. *Raghunathpur Nafar Academy,*[133] culled out certain broad principles applicable to an application for condonation of delay. They are as follows:[134]

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of *bona fides* imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

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133 (2013) 12 SCC 649.

134 *Id.,* para 21.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts is to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The state or a public body or an entity representing a collective cause should be given some acceptable latitude.

To the aforesaid principles culled out on the basis of previous decisions, the court added some more guidelines taking note of the present day scenario. They are:[135]

(xiv) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a *lis* on merits is seminal to justice dispensation system.

(xv) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(xvi) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(xvii) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

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135 *Id.,* para 22.

On a closer scrutiny of these principles and guidelines, it seems they can hardly minimize the judicial discretion that exists in entertaining applications for condonation of delay. Thus, it continues to be an area, where there is enough scope for subjectivity.

XI CONCLUSION

In the survey year, it is evident from the discussion above that the court did not allow the provisions of the procedural law to overpower substantive rights and substantive justice. In most of the cases, the court reiterated the earlier positions. In some cases, the court has formulated certain guidelines, principles and provided illustrations to guide the exercise of judicial discretion. Illustrations of grounds and circumstances under which review of the final decision of the Supreme Court shall be permitted or rejected;[136] illustrations of cases and circumstances under which exercise of inherent power of civil court is justifiable and cases and circumstances, under which such exercise in not justifiable,[137] and formulation of principles and guidelines to be followed in entertaining applications for condonation of delay[138] are noteworthy.

The observation made in *M. B. Ramesh*,[139] relying on *Ibrahim Uddin*,[140] to the effect that there is no prohibition to entertain a second appeal even on question of fact needs to be revisited and clarified in view of its inconsistency with the settled legal proposition that formulation of substantial question of law is a *sine qua non* for entertaining second appeal.

On the whole, it can be stated that the judicial decisions rendered during the year have indeed contributed for development and bringing greater clarity in the area of civil procedural law.

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136 Kamlesh Verma, *Supra* note 70.

137 Ram Prakash Agrarwal, *Supra* note 90.

138 Esha Bhattacharjee, *Supra* note 133.

139 *Supra* note 52.

140 *Supra* note 51.