THE CODE OF CIVIL PROCEDURE, 1908. By A.N. Saha 1978. Eastern Law House, Calcutta. Pp 73+1065 Rs. 120/-

THE CODE of Civil Procedure of 1908 is verily the well laid rail on which the administration of civil justice has run so long and so efficiently for meeting out justice to the common man in India in his disputes with persons, corporations, public bodies, municipalities and the government. It is a pretty longish code of 158 sections and 51 orders with as many rules as 775 in number—quite a formidable array of provisions that will dismay any author who ventures to write out a commentary on this prodigiously interesting subject. May be the late D.F. Mulla succeeded in penning his great white book on this difficult taxing subject in two voluminous volumes. There are scores of commentaries of lesser dimension and quality. It is in this context that the author of the book under review has to be complimented in having furnished a laborious task within one volume of just over one thousand pages. As stated in the preface of the book the objective appears to be "a crisp commentary so designed that the desired point may flash on the eyes of a busy practitioner even when he is on legs without groping in a labyrinth." To put it more pointedly the book is a rapid referencer with notes on the innumerable case laws on the several facets of the law of civil procedure. In achieving his objective the author has abandoned in many places the narrative style in its fulness and has resorted to what may be euphemistically called telegraphic English.

In his rather rapid survey, the author has not failed to point out the drafting lacunae in the 1976 Amendment of the code. The original Act of 1908 was done with excellent care and good draftsmanship. But modern drafting of laws in India is so careless that it only multiplies litigation and magnifies confusion in the minds of the judges and lawyers. There can be no gainsaying that one of the major causes for the proverbial laws delays is the bad drafting of laws which is made worse by the sad tinkering of it at the select committee stage. Very often the law as drafted is not the law that emerges from the legislature. Not only is the objective changed but grammatical and technical errors are the result of the ponderous deliberations of our legislators, making the badly drafted laws worse. Contradictions galore appear to tease the lawyers when they see the lacuna, as A.N. Saha rightly points out, in very many places. To state only a few :

(1) In order 14, rule 2(2) the court's power to dispose of a suit on an issue of law is circumscribed. This provision lays down that such issues of law must relate to jurisdiction of the court or should relate to a bar to the suit created by any law for the time being in force. But the drafting experts forgot to amend order 20, rule 5 to run in tune with order 14, rule 2. The result is that under order 20, rule 5 the

court may dispose of a suit by finding on an issue, whether of law or fact, when such decision appears to the court to be sufficient for the decision of the suit. The fetters laid down by clauses (*a*) or (*b*) of order 14, rule 2 (2) is absent in order 20, rule 5. This is hardly fair to the judge to be placed in such dilemma.

(2) The dilemma is not only to the judge. It extends to the litigant in attachment proceedings in execution of decrees under order 38, rule 7. The court is enjoined to observe the formalities of order 21, rule 54 and use form No. 24 in appendix E in cases of attachment before judgment. Paradoxically the new provision in order 21, rule IA prescribes that the order of attachment shall also require the judgment debtor (defendant in the case of attachment before judgment) to attend court on a specified date to take notice of the date to be fixed for the settlement of the terms of sale proclamation. The aforesaid form No. 24 appears to have suffered consequential amendment due to the insertion of sub-rule 1 A in order 21, rule 54. Does it not seem terribly absurd and ludicrous to call upon the defendant to attend the court to take notice of such a date of attachment before judgment stage. A.N. Saha eloquently points out these absurdities in his book.

(3) Further if one wants to punish a plaintiff who has the audacity to resort to litigation, an unwholesome imposition is levied on that poor chap by the provisions in order 7, rule 9 and order 5, rule 19-A. The 1976 Amendment of the code instead of reducing causes for delay and reducing the cost of litigation has only increased the horrors of litigation. The provision in order 7, rule 9, as amended, requires a plaintiff to file along with the plaint as many copies as there are defendants. For summons without a copy of plaint is no summons. But bewilderingly order 5, rule 19-A also provides that *simultaneously* with the issue of summons through court, there should also be summons by the registered post. The net result is that the plaintiff if he has the misfortune to sue fifteen defendants should file into court thirty copies of the plaint. For a summons through the post should also be accompanied by a copy of the plaint.

(4) When one reads order 41, rule 30(2) the words 'made available' suggest that there is an obligation on the court to make a copy of judgment available to parties soon after the judgment is pronounced. Nothing is stated as to the charges therefor. It will indeed be a nice gesture to the litigant suffering from the delay and cost of litigation that he should at least get a free copy of judgment and that *too at once.* If the copy is given at once, he can rush to the appellate court. One great cause for the much discussed laws delays is the enormous delay in the grant of copies of judgments and orders. In many cases it takes six months or even more. The unsuccessful litigant in the trial court cannot move for stay in the appellate court unless he produces a copy of the judgment. But what we narrated *vis-a-vis* order 41, rule 30 (2)

appears a dream as order 20, rule 6 B clearly provides that fees are to be levied for the furnishing of copies. What then is the meaning of order 41, rule 30 (2)? Is the party to whom the court gives a copy *at once* as soon as the judgment is delivered to peruse the copy and return it to the court? It will indeed be an utopian justice if the court gives *at once* a copy even if it charges fees for it. Will the office of the court gear itself to efficiency by furnishing a copy *at once* as soon as the judgment is delivered? But the office may well say "Under the Limitation Act, time consumed in the grant of copies has to be deducted in the computation of time for filing an appeal or revision. Ergo, we will take our own time. You the litigant will not be the worse for it!"

These and other problems arise for the lawyer and the litigant after the so called reforms engineered under the Amending Act of 1976. Quite often the Civil Procedure Code is mocked at by many for its inordinate length. Persons like Justice R.V. Krishnayyar, in his inimitable hyperbolic and rather disastrous language characterised procedures of court as a sort of havoc galore. To exactly quote him :

> One of the greatest *enemies* of quick and fair justice in this country is the *trinity of procedural lagislations* namely The Civil Procedure Code, The Criminal Procedure Code, and the Indian Evidence Act. *The sooner they are obliterated from the statute book the better for the country's administration of justice.*[1]

It is a great pity that such an utterance was made by a judge. If the procedures and rules of evidence are obliterated how do you fill up the vacuum ! Are people's courts (Soviet type) or the village tamarind tree *panchayats* (Indian type) the alternatives for quick and speedy justice! The three maligned ancient Acts—Civil Procedure Code, Criminal Procedure Code and Evidence Act—have stood the test of time for nearly eighty years. The answer to Justice Krishnayyar's devastating obiter is the oft quoted *dictum* of Chief Justice Varadachari of the Federal Court. He quipped to the protogonist of short procedure thus "It does not matter how longish the Procedure Code is. *It matters much as to who administers the Code.*" Yes, the sovereign remedy is in the recruitment of meritful judges with high sense of probity and fervour to mete out real justice. The vexed problem of delays and high cost of litigation is mostly due to the recruitment of incompetent judges particularly in the last forty years. Factors other than merit and character appear to be the criteria and as the Law Commission's Report under the chairmanship of the late M. C.

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1. Justice Krishnayyar, Penal Discussion of Judicial Process—A social Audit, *The Hindu*, 31 May 1979.

Setalvad pointed out, nepotism and favouritism are more on the ascendant. What matters it if the codes are long or short. A meritful judge has umpteen intelligent and just ways of cutting short needless prolongation of the trial of a suit or the arguments *ad infinitum* galore in an appeal. If merit and probity are the only criteria for recruitment to the judiciary from the posts of district munsif upto a judge of the Supreme Court, laws delays, or failure of justice will indeed become a rare phenomenon.

A. N. Saha has in his treatise given very useful comments on matters of trial procedures, appeals, execution, *etc.* But his methodology of presentation creates difficulties and mistakes. For instance at page 49 (Addenda) he refers to *Chander Kali Bail* v. *Jagdish Singh*[2] *vis-a-vis* appeal provision in section 100 and states "No amount of evidence can be *booked upon is* support of a plea having no foundation in the pleading." It must be *looked upon in* instead of *booked upon is*. Again at p. 197 citing *State of Gujarat* v. *Vora Solebhai*[3] the author states :"Whether or not trees are immovable property *being standing timbers* in a question of fact." Obviously the author seeks to convey that whether standing timbers are movable or immovable property is a question of fact. Apart from the spelling mistake or printing errors not duly verified by the author, the latter's tendency to use telegraphic phrases just to shorten the length of the treatise, leads the reader into great difficulties. It is better to make the treatise not as a referencer and digest but as a running commentary. The reader should be helped with continuity of thoughts of the author running through regulated sentences. To cite the name of the case law and citation in the text itself further disturbs the narrative. To put them all as footnotes will not increase the size of the book at all.

It may be salutory for the author to give at any rate with reference to important provisions *e.g.* section 11 or 80, an elucidation of the principles narrated in the relevant provision instead of straight away proceeding to give notes of case law under the several headings formulated by the author. That would help the reader to grasp the basic tenets posited by the provision. As to section 80 it has to be mentioned that many text book writers, as well as the Law Commission of India and the proceedings of the seminars conducted by the Indian Law Institute, New Delhi, have recommended the total deletion of that provision. It is farcical that in suits against the government no action could be laid without the prior two months notice to it. In effect no litigant can institute successfully a suit for an injunction against governmental action without the prior notice which virtually helps the government to complete the impugned act

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2. A.I.R. 1977 S.C. 2262.
3. A.I.R. 1977 S.C. 1815.

(e.g. raising a building or a wall) before the suit is filed. Furthermore the provision enables the government to non-suit a plaintiff with meritful pleadings and evidence, merely on the technical plea of want of notice or illegal notice. It is notorious that in more than forty per cent of the big cases in all the courts the governments or their agencies are the parties. Laws delays are thus fomented by the most litigious litigant—the government. When such is the case all that the Amending Act of 1976 has done is to insert in section 80 a provision as clause 2 whereby notice is dispensed with only regarding urgent reliefs (*e.g.* injunction) prayed for against the government and that too with the leave of the court. If at the trial no such relief can be given and the court returns the plaint for presentation after complying with the requirements of notice under section 80 (1), is this a proper reform? It only adds to delays in suit, multiplication of proceedings and keeps alive the technical Sword of Damocles as to legality of notice hanging over the poor plaintiff.

It would have been apposite if the author adverted to these in his comments, and in the citation of authorities. One would expect that the Supreme Court decision in *State of Punjab* v. *Geeta Iron and Brass Works Limited*[4] should have drawn the attention of the author for inclusion in the addenda where 1978 cases are also noticed. In that case the Supreme Court has pithily observed :

> Government must be made accountable by Parliamentary social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed section under S.80, C.P.C. is intended to alert the State to negotiate a just settlement or at teast have the courtesy to tell the potential outsider why the claim is being resisted. Now S. 80 has become a ritual because the administration is often unresponsive and hardly lives upto the Parliament's expectation in continuing S. 80 in the Code despite the Central Law Commission's recommendations for its deletion.[5]

Likewise the author should have given a good elucidative analysis of the principles of *res judicata* as adumbrated in section 11 of the code. This is sadly wanting in the book under review. Though not a regular analytical table of the provision in section 11 and the explanations 1 to VII, as given in D.F. Mulla's treatise, a narration of those principles *seriatum* is a must to make the reader to properly digest all the case law. The Supreme Court decisions of 1977 and 1978 which throw fresh light on important facets of section 11 are left unnoticed by the author : Thus, in *Narayana Prabhu Venkateswara* v. *Narayana Prabu Krishna Prabhu*[6] the

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4. A.I.R. 1978 S.C. 1608.
5. *Id.* at 1609.
6. A.I.R. 1977 S.C. 1268.

legal maxims on which section 11 is based are detailed. It is also there pointed out that the bar of *res judicata* does not depend upon the existence of a right of appeal of the same nature against each of the two decisions but on the question whether the same issue under the circumstances given in section 11 has been heard and finally decided. Further decisions given on issues which are beyond the jurisdiction of the court cannot operate as *res judicata*.

Yet again another case that should have been noticed in the book under review is *State of U.P.* v. *Nawab Hussain*[7] which deals with the principle of constructive *res judicata*. Such a plea will be available to a defendant in a suit when the plaintiff could well have raised the plea in the writ petition filed by him earlier and which was dismissed. *Workmen of Cochin Port Trust* v. *Board of Trustes of Cochin Port Trust*[8] is another citable decision on the applicability of the doctrine of *res judicata* to proceedings other than in the civil courts.

The provision in section 100 of the Civil Procedure Code as to appeal is clearly important. The amended provision in section 100 (1) allows an appeal only on a substantial question of law. The author has properly noted that this renders nugatory a large body of case law concerning what a question of law exactly is. But it must be noted that under secton 103 the High Court has yet the power to determine any issue of fact not determined by the lower appellate court. Legislative drafting has failed to note that this keeps alive to some extent the case law as to questions of fact and questions of law. The author should have given some comment under section 103. He has indeed given none. There is Supreme Court decision in *Jadu Gopal Chakravarthy* v. *Pannalal Bhadwick*[9] which the author should have discussed under section 103. There neither the trial court nor the first appellate court gave a finding that the impugned compromise decree was obtained by practising fraud on the High Court. The Supreme Court held that the High Court in a later suit for setting aside the compromise decree can exercise its powers under section 103 and give a finding. The author could also have noticed *Hindustan Lever Ltd.* v. *Monopolies and Restrictive Trade Practices Commission*[10] which adverts to the powers of the Supreme Court under section 55 of the Monopolies and Restrictive Trade Practices Act. Such power would be analogous to that of the High Court under section 100 of the Civil Procedure Code. That the High Court must accept concurrent findings of the two courts of fact is posited in *Bhagwan Vishwanath* v. *Bhaskar Digamber*.[11] The case of *Chander Kali* v. *Jagdish Singh*[12] postulates that a new plea could not be

7. A.I.R. 1977 S.C. 1680.
8. A.I.R. 1978 S.C. 1283.
9. A.I.R. 1978. S.C. 1329.
10. A.I.R. 1977 S.C. 1285.
11. A.I.R. 1977 S.C. 2183.
12. *Supra* note 2.

entertained at any appellate stage.

These are cases too useful to be omitted by the author particularly in modern times where there is a cry that there should only be one appeal in any case. This opinion that has recently been voiced by the highest judicial officer of the realm requires deep consideration. It is good that so far no conference of the Chief Justices of India have voiced forth such an opinion. One can understand that no more than two appeals should lie. Our point is that a court of record as the High Court must have the deciding voice at least in second appeal. Nothing should be final unless the High Court or the Supreme Court gives the decision. The theory that the first court is often right and its error if any can only be corrected by the next superior court (district court) is not fool proof particularly with the kind of present recruitment to the subordinate judiciary. That laws delays may be minimised if there is no second appeal at all, is most unfair to the cause of justice. The remedy lies in proper recruitment of judges and not in the artificial resort of only one appeal doctrine. Laws delays are due to many causes. Justice Krishna Iyer[13] referred to the menace of the *adjournment lawyer*. But there are also *adjournment judges* who for some reason or other postpones speedy disposal even when both sides are ready! Then there is the litigious litigant who also delights in taking adjournment just to annoy his opposite party and put him to more expenses. The lawyer, the judge and the litigant should cease to be the culprit *vis-a-vis* adjournments if laws delays are to be reduced to the minimum.

The maximum delay in the administration of justice appears to be due to the government itself as it figures as a confirmed litigant in more than 40 per cent of the cases. This litigant, it is sad to record, entrenches itself in revelling on technical plea as court fees, limitation, want of proper notice, *etc.* Why should not the government solely rest its case on merits? Why should it not resort to arbitration or pre-trial compromises? The worst part of it is when the courts of record as the Supreme Court and the High Court give directions or state the position of law or suggest legislative amendment, the two wings of the government the executive and the legislative ignore or bypass the court's directions, suggestions or opinions. This leads to multiplication of litigation and maximisation of law's delays.

These observations this reviewer has to make since the court, the lawyer and the government appear to thwart in diverse ways the objectives and intendment of a wholesome law as the law of civil procedure.

The author has done well in giving a copious index to help the reader to refer quickly to any facet of the law in the text. It would have been whole-

13. Judicial Process—A Social Audit, *The Hindu*, dated 31 May 1979, Outlook column.

some if a table of cases also were given as it would have enabled the reader to pick out the exact pages wherein the relevant cases are commented upon. In big treatises extending over thousand pages a good general index and an exhaustive table of cases are a *must*. The treatise under review is priced Rs. 120/- which may be lessened so as to be within the reach of the average lawyer of average means.

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