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CIVIL PROCEDURE

*Vishnu Konoorayar**

I INTRODUCTION

CIVIL PROCEDURE CODE is an adjunctive law to facilitate justice and further its ends. Though equally important, procedural laws are generally applied in a tolerant manner when compared to substantive laws.¹ This survey is an endeavour to explain certain important topics in the Civil Procedure Code, 1908 (CPC) in the light of cases decided by the Supreme Court and various high courts during the year 2006. There were no statutory changes in the CPC during the year under survey.

II JURISDICTION OF CIVIL COURT

In the matter of jurisdiction there have been no major shift from the law expounded by the code² whereas parties' attempt to speedy disposal of cases has resulted in the frequent use of *ouster clauses* in contracts and agreements. Another change that happened in recent years, but not in the year 2006 alone, is the development of the law that jurisdiction is a bargain of the parties. This position has diluted the application of sections 15 and 16³ of the CPC to a great extent.

Bar of jurisdiction of civil court

In *Sudhir G. Angur & Ors v. M. Sanjeev & Ors*,⁴ an appeal from the order of the Karnataka High Court, the apex court held that in a case where there is a serious allegation of fraud and forgery, the bar of jurisdiction of the civil court would not apply. In this case the respondents, who were people having interest in a trust, instituted a suit in principal city civil judge of Bangalore under section 92, CPC against fraud and forgery committed in the management

* Assistant Research Professor, The Indian Law Institute, New Delhi.

1 For example see *infra* notes 50-60.

2 S. 9 of CPC.

3 S. 15 of the Code says: "Every suit shall be instituted in the court of lowest grade competent to try it." S. 16 says that subject to the pecuniary or other limitations prescribed by any law, suits...shall be instituted in the Court within the local limits of whose jurisdiction the property is situated.

4 AIR 2006 SC 351.



of trust property.⁵ Overruling the objections raised by the defendants, the court granted leave to the plaintiffs. The appellants (defendants in the original suit) applied for rejection of plaint under Order VII Rule 11 CPC. Their argument was that jurisdiction of the civil court was barred as per section 40 of the Mysore Religious and Charitable Institutions Act, 1927. They also argued that as per section 18 of the said Act only a *mazuari officer* had power to conduct an enquiry and deal with any such disputes in a summary manner. The trial court rejected the application and held that the issue was one, which could be decided only at the stage of evidence. The high court also dismissed a revision filed by the appellants against this order of the trial court.

Before the Supreme Court the appellant argued that the Mysore Religious and Charitable Institutions Act is a complete code and the civil courts do not have any jurisdiction as per sections 17 and 18 of the Act. Rejecting the argument, the court ruled that an enquiry contemplated under section 7 of the Mysore Act is a summary enquiry and it does not bar jurisdiction of the civil courts. The court also added that where there is serious allegation of fraud and forgery, the jurisdiction of the civil court cannot be barred as the whole outline of section 18 shows that these provisions are not meant to be a substitute for judicial proceedings.

Ousting jurisdiction by a contractual agreement

When the parties enter into an agreement confining themselves to the jurisdiction in respect of a suit, basically the parties are restraining themselves from approaching other civil courts whose jurisdiction has been excluded by agreement.⁶ In *M/s P.R. Transport Agency v. Union of India*⁷ the question was whether the territorial jurisdiction of any court could be ousted without any exceptions. The court answered that the territorial jurisdiction of the civil court can be ousted but not the territorial jurisdiction of the high court under article 226 if part of the cause of action has arisen within its jurisdiction.

The court made it clear that jurisdiction of other civil courts gets ousted, only subject to one restriction, which is provided in section 28 of the Contract Act, 1872. However, even a statute cannot curtail the power of the high courts under article 226, it being a basic feature of the Constitution. Therefore, ouster clauses can oust the territorial jurisdiction of only civil courts and not of high courts in respect of powers under article 226.⁸

Ousting jurisdiction by an arbitration clause

In *Bal Kishan Bansal v. Pramit Bansal & Anr*⁹ two partners filed a suit against the third partner in opposition to him managing the firm. The partnership deed contained an arbitration clause, providing for referring any

5 Under s. 92 a suit can only be filed by the advocate general or by two or more persons having an interest in the trust after obtaining leave of the court.

6 S. 28 of the Contract Act, 1872.

7 AIR 2006 All. 23.

8 *Id.*, paras 18-20.

9 AIR 2006 All 305.



future disputes among the partners to arbitration. In the written statement filed by the defendant, there was no specific prayer for referring the matter to arbitration even though an express prayer was made therein for dismissing the suit on the basis of existing arbitration clause. The court held that since the written statement did not contain any express prayer to refer the matter to arbitration, the jurisdiction of the civil court was not ousted.

Similar situation arose in *Mahesh Kumar v. Rajasthan State Road Transport Corporation, Jodhpur*¹⁰ wherein the Rajasthan High Court held that mere existence of an arbitration clause in an agreement does not bar jurisdiction of a civil court automatically. To take benefit of an arbitration clause, party to contract has to apply for that relief under section 8(1) of the Arbitration and Conciliation Act, 1996 within the specified period. A plea taken in the written statement cannot be treated at par with an application under section 8 (1) of the Arbitration and Conciliation Act.

In another case¹¹ an arbitration agreement excluded the jurisdiction of courts except those situated at Bangalore. The district judge at Bhubaneswar after hearing the parties held that jurisdiction of courts at Bhubaneswar are not excluded since part of the cause of action had taken place there. The high court following the decision of the apex court in *A.B.C. Laminart Ltd v. A.P Agencies Salem*¹² upheld the view taken by the district judge. The court clarified that jurisdiction of civil courts could be ousted only if the ouster clause in the contract specifically did so. In this case the ouster clause stated that the disputes arising shall be tried by courts in Bangalore without specifically excluding any other court from trying the case. Hence, courts in Bhubaneswar have jurisdiction in respect of disputes in question.

Territorial jurisdiction under the Copyright Act, 1957

The Supreme Court in *M/s Dhodha House v. S.K Maingi*¹³ held that to entertain a suit for infringement of copyright the civil court must have territorial jurisdiction. Plaintiff must actually voluntarily reside to carry on business or personally work for gain at the place of filing of suit. Merely because its goods are sold at said place would not mean that it carries on business at that place. Hence, a civil court at that place has no jurisdiction to try a suit filed by the plaintiff in regard to the infringement of its copyright.

Ousting of jurisdiction under the Industrial Disputes Act, 1947

In *State of Haryana & Ors v. Bikar Singh*,¹⁴ a bus conductor was dismissed from service for some service indiscretion. The trial court upheld the dismissal on merits but without examining the issue of jurisdiction of the court. Before the Supreme Court, the order of the High Court of Punjab and

10 AIR 2006 Raj 56.

11 *Bhaskar Bhatt(Manager Director) Titan Industries Ltd Golden Enclave and Ors v. M/s Crescent Art Times Ltd.*, AIR 2006 Ori 55.

12 AIR 1989 SC 1239.

13 AIR 2006 SC 730.

14 AIR 2006 SC 2473.



Haryana setting aside trial court's order was upheld after relying on the well established and settled principle that a decree without jurisdiction is a nullity.

Ousting of jurisdiction of civil courts under the Muslim Women (Protection of Rights on Divorce) Act, 1986

In *Amirshah v. Salimabi*¹⁵ a suit was filed for recovery of dowry articles by a divorced Muslim woman, which was allowed by the civil court. Later in a revision petition before the high court, the appellants argued that the civil court does not have jurisdiction as per section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The high court, relying on *N.D.M.C v. Satishchand (deceased) by L.R Ramchand*¹⁶ held that if a right and a consequential remedy under common law, recognized by a statute conflicts with a similar right and remedy under a specific statute, which does not expressly exclude the common law remedy, both these remedies can act as concurrent remedies. Under such circumstances the person can elect or select the remedies. Hence the revision petition failed.

The apex court clarified the law relating to ousting of jurisdiction in another case¹⁷ and stated that when civil court's jurisdiction is ousted under a specific law¹⁸ alleging that notice of acquisition of land was not served upon plaintiffs has to be examined in a writ petition under article 226 of the Constitution of India and not in a civil suit as the jurisdiction of the civil court is clearly barred.

Ouster of jurisdiction of civil court under the Companies Act, 1956

In *Sahara Fabrics Pvt Ltd v. Kailash R Mehra and Anr*¹⁹ the shareholders filed a civil suit to exercise their common law right to seek rectification of register of members. The plaint also contained allegations regarding the appointment of directors, their subsequent actions, resolutions etc. Against the argument that the civil courts do not have jurisdiction to try the case, the high court upheld the jurisdiction of civil courts and ruled that the provisions of the Companies Act do not hint at any ouster of jurisdiction of civil courts.

III RES JUDICATA

The principle of *res judicata*²⁰ is based on the need to give finality and certainty to judicial decisions. What it says is that once an issue is adjudicated, it shall not be opened up again. Primarily it applies as between past litigation and future litigation. The principle of *res judicata* includes

15 AIR 2006 Bom 302.

16 AIR 2003 SC 3187.

17 *Commissioner, Bangalore Development Authority v. K. S Narayan*, AIR 2006 SC 3379.

18 In the instant case Bangalore Development Authority Act, 1976, ss. 17, 19.

19 (2006) 134 Comp Cas 472 (Bom).

20 S. 11 of CPC.



constructive *res judicata*²¹ also. There have been during the year a few decisions both by the Supreme Court and by the high courts wherein this principle was discussed and they are analysed below.

Choice of issues

In *Nariman Point Association & Anr v. Union of India*²² the plaintiffs challenged government granting permission for construction of commercial complexes. The writ petition was dismissed by the high court. Later the same parties filed a second writ petition wherein they challenged few issues other than those which were in the first writ petition. The court held that the litigant could not selectively address grounds of challenge at his choice in successive petitions. Hence, the subsequent writ petition was barred by the principle of constructive *res judicata*.

In another case²³ after the passing of an arbitral award a suit was filed regarding the same subject matter. The court held that the suit is barred by the principle of *res judicata*²⁴ and the appropriate option for the plaintiff would be to file an appeal challenging the arbitral award in a court of law.

In *Bishwnath Prasad Singh v. Rajendra Prasad and Anr*²⁵ the court held that an order passed in an application filed under section 83 of the Transfer of Property Act, 1881 seeking permission to deposit an amount due under mortgage did not operate as *res judicata* in a subsequent suit filed for declaration that the transaction in question was a usufructory mortgage and not a sale deed. The court clarified the law and stated that section 83 is only a procedural provision.

Res judicata in tax matters

In *Bharat Sanchar Nigam Ltd. v. Union of India*²⁶ the apex court has held that in a tax matter decision given for one assessment year does not operate as *res judicata* for the subsequent years on the premise that *res judicata* applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The court made it clear that a court of superior jurisdiction overruling a decision of a lower authority cited before it, would not operate to upset the binding nature of that decision on the parties to the case and to whom the principle of *res judicata* would continue to operate.

Res judicata in public interest litigation

Public interest litigation or social action litigation is fought with the objective to make good the grievances of public at large. In *State of Karnataka*

21 Explanation IV to s. 11 of CPC.

22 AIR 2006 Bom 50.

23 *Sardar Harnam Puri v. Union of India*; AIR 2006 Raj 36.

24 *Id.* at 38.

25 AIR 2006 SC 2965.

26 AIR 2006 SC 1383.



& *Anr v. All India Manufacturers Organizations & Ors*²⁷ the court has stated that in a public interest litigation the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is *bona fide* the judgment in previous public interest litigation would be a *judgment in rem*. It binds the public at large and bars any member of the public from coming to the court and raising any connected issue which had been raised or should have been raised on an earlier occasion by way of public interest litigation, if the issues were directly and substantially in issue in the previous proceedings. Hence principles of *res judicata* and constructive *res judicata* are applicable to public interest litigations also.

IV APPEAL

The expression appeal²⁸ is generally understood as the judicial examination of the decision by a higher court of the decision of a lower court. It means removal of a cause from an inferior court to a superior court for the purpose of testing the soundness of the decision of the inferior court. The year under survey has witnessed some cases wherein the procedural regularities in filing of an appeal, principles of appeal and rules of second appeal etc. were examined.

Filing of appeal memorandum

In *Uday Shankar Triyar v. Ram Kalewar Prasad Singh*²⁹ the court has said that signing of memorandum is mandatory but at the same time it is only a procedural provision. Non-compliance does not entail automatic rejection of appeal without giving an opportunity to rectify the defect. If and when the defect is pointed out the court should, either on an application by the appellant or *suo motu* permit the appellant to rectify the defect. The court has stated that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal or the omission to file *vakalatnama* executed by the appellant, along with the appeal, will not invalidate the memorandum of appeal if such an omission or defect is not deliberate and the signing of the appeal memorandum or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relating to procedure can subsequently be rectified.

The scope of questions of fact in second appeal

The true ambit of section 100 of CPC has been examined by the apex court in *Gurdev Kaur & Ors v. Kaki & Ors*.³⁰ The court held that it was compelled to interfere because the true legislative intent and scope of section 100 CPC

27 AIR 2006 SC 1846.

28 Ss. 96-112 of CPC.

29 AIR 2006 SC 269.

30 AIR 2006 SC 1975.



have neither been appreciated nor applied. This is because a class of high court judges believes that in a second appeal brought before them, if they are satisfied that courts below have grossly misappropriated the evidence, it is their duty to interfere and redress gross injustice.³¹ The apex court opined that after the 1976 amendment³² the scope of section 100 has been drastically curtailed and narrowed down. Now the high courts will have jurisdiction only in a case where substantial question of law is involved. The language used in the amended section specifically incorporates the words as *substantial question of law*, which is indicative of the legislative intention. It must be clearly understood that the legislature never wanted second appeal to become 'a third trial on facts' or 'one more dice in the gamble.'³³ In other words the high courts cannot admit second appeals to decide a question of fact. The reason for this is the need for finality and certainty to the law. The courts approach might seem harsh to an individual litigant but in the larger interests of the administration of justice this view is juristically sound and pragmatically wise.³⁴

The same view has been reiterated in *Mst Sugani v. Rameshwar Das & Anr*³⁵ which held that right of appeal being a substantive statutory right has to be regulated in accordance with law. Where first appellate court is shown to have exercised its discretion in a judicious manner, it cannot be termed to be an error either of law or procedure requiring interference in second appeal. The court emphatically stated that "substantial question of law has to be distinguished from substantial question of fact in second appeal and wrong application of law already decided by supreme court to facts of case not constitute substantial question of law."

Also in another case, *Radha Amma v. C. Balakrishnan Nair & Ors*³⁶ the apex court held that the high court was not justified to interfere in appeal and modify a decree of the courts below on a question, which did not arise for its consideration. No such issue was framed nor any evidence was recorded in this aspect of matter to call upon courts below to give a finding on such a question

In *Madan Lal and Another v. Bal Krishan & Ors*³⁷ the high court disposed off the appeal without formulating the questions of law and hearing the matter on any questions. Relying on *Khawar Dass Jain v. Sohan Lal*,³⁸ *Roop Singh v. Ram Singh*,³⁹ *Thakur Kishan Singh v. Aravind Kumar*⁴⁰ the apex court set aside the above order of the high court and remanded the matter for fresh disposal after formulating relevant questions of law.

31 *Id.* at 1986.

32 The Code of Civil Procedure (Amendment) Act of 1976.

33 *Supra* note 31 at 1985.

34 *Id.* at 1984.

35 AIR 2006 SC 2172.

36 AIR 2006 SC 3343.

37 AIR 2006 SC 645.

38 (2000) 1 SCC 434.

39 (2000) 3 SCC 708.

40 (1994) 6 SCC 591.

**Adjudication of second appeal without formulating substantial question of law**

In *C.A. Sulaiman & Ors v. State Bank of Travancore, Alwaye and Ors*⁴¹ the apex court has examined the scope of the argument that a second appeal can be adjudicated without formulating a substantial question of law. The court has held that proviso to section 100(5) of CPC does not provide for adjudication of second appeal without formulating a substantial question of law. Said proviso is applicable only when a substantial question of law has already been formulated and it empowers the high court to hear, for reasons to be recorded in the appeal, on any other substantial questions of law.

Revision

The high courts are empowered under their revisional jurisdiction to interfere with any case decided by any subordinate court under certain circumstances.⁴² Such a civil revision is maintainable if the lower court has failed to exercise jurisdiction vested in it and also failed in its basic duty to uphold dignity, respectability and effectiveness of orders and proceedings of court of law.⁴³

V PLEADINGS

The aim of pleadings⁴⁴ is to bring parties to explicit issues and to reduce expense and delay. A party is entitled to hear the case of his opponent so that he can meet it. Hence, pleadings seeks to ascertain the real disputes between the parties, to minimise the area of conflict and to see where the two sides differ, to rule out one party from taking the other by surprise and to prevent miscarriage of justice. Following are few cases where the courts discussed the various rules relating to pleadings.

Rejection of plaint

The question as to when an application for the rejection of the plaint can be made was raised in *Sudhir G. Angur & Ors v. M. Sanjeev & Ors*.⁴⁵ The court held that application for the rejection of a plaint should be made prior to the grant of the leave. Once the leave is granted question of rejecting plaint under order 7 rule 11 cannot be raised. The court said that appellants having lost their opposition to grant leave of the court, it was not open to them to then apply for the rejection of the plaint under order 7 rule 11 of CPC.

In another case⁴⁶ the plaint was rejected on the ground that documents relied upon by the plaintiffs were not sent along with the copy of plaint accompanying summons. The court ruled that it could not be a ground for

41 AIR 2006 SC 2848.

42 S. 115 of CPC.

43 *Prem Shankar Chaudhuary v. Special Officer, now President, Bihar State Board of Religious Trust and Others*; AIR 2006 pat 12; *Madan Mohan Das v. Kartick Chandra Das*, AIR 2006 Cal 92.

44 Order 6, rules 1-18 of CPC.

45 AIR 2006 SC 351.

46 *Shobhit Construction v. T.K international Ltd*, AIR 2006 HP 4.



rejection of plaint since no such ground is provided under order 7 rule 11 of CPC for rejection of plaint.

In *Akhtar & Ors v. Dist Judge & Anr*,⁴⁷ a graveyard that had been used by all sects of Muslim community for a considerably long time was registered as their *wakf* by the *Shia sect*. The *Sunnis* filed a suit questioning the registration of the graveyard as a *Shia wakf* with a prayer for injunction. Section 85 of the Wakf Act, 1995, bars the jurisdiction of the civil courts and in the instant case the court held that the suit was not just for injunction but also for questioning the registration of the graveyard as *Shia wakf* and hence, the jurisdiction of the civil court is barred and rejection of plaint was justified.

Stay of proceedings

In *Mayar (H.K) Ltd & Ors v. Owner & Parties, Vessel M.V. Fortune Express and Ors*⁴⁸ the Supreme Court opined that stay of proceedings is a serious interruption in the right of the parties to proceed with the trial to get it into the legitimate and substantive merits of the case. To get an order staying the proceedings, a positive case has to be made out by the defendants that the plaintiffs have no case on merits and it would be abuse of process of the court if the plaintiffs were permitted to go ahead with the trial. The facts of the case were that the plaintiffs had entered into a contract with the defendant for carrying 642 logs of wood to Calcutta port from Singapore. But when the vessel reached Calcutta 456 logs of wood that were on the deck were lost. The plaintiffs filed a suit in the High Court of Calcutta under admiralty jurisdiction for Rs. 1,30,19,688.44 with 24% interest per annum until realization of the entire sum from the defendants. The plaintiff also prayed for the arrest of the vessel since the defendants did not have any property in India. The marshals arrested the ship. Thereafter the Punjab National Bank issued a bank guarantee for releasing the ship. Accepting the bank guarantee, the ship was released by the court.

Thereafter the defendants filed an application under order 7, rule 11 CPC for dismissing the suit *in limine* since the Calcutta court did not have jurisdiction according to the bill of lading. They also argued that according to the Hague Rules the carrier did not have any liability for defects caused to the deck cargo. As regards the plea of lack of jurisdiction, the single bench dismissed the application relying on the principle adopted in *Chittaranjan Mukherjee v. Barho Mahto*⁴⁹ that the defendants having received a favourable order from the Indian court could not turn around and challenge the jurisdiction of the very court at a later stage. The single bench also held that for exonerating the carrier from its liability and responsibility, it would be necessary to prove that the loss or damage was the result of negligence of any servant of the carrier who was in the management of the deck cargo. The court said that this was a matter of evidence and could not be determined at a

47 2006(1) ALJ 772.

48 AIR 2006 SC 1828.

49 AIR 1953 SC 472.



preliminary stage.

The defendants filed an appeal before the division bench. The division bench held that only the courts in Singapore would have jurisdiction to entertain the suit. The court held that jurisdiction is a bargain of the parties and in the instant case the parties had decided to accede to the jurisdiction of the Singapore Court. It also stated that by producing the bank guarantee for releasing the ship, the defendants did not submit themselves to the jurisdiction of the Calcutta court. The court also observed that the plaintiffs had suppressed the jurisdiction clause in the agreement. In the Supreme Court the view taken by the division bench was not accepted and prayer for stay of proceedings was rejected.

Delay in filing written statement

In *Shaikh Salim Haji Abdul Khayumsab v. Kumar and Ors*⁵⁰ the apex court cleared the confusion relating to the delay in filing the written statement.⁵¹ The court held that order 8, rule 1 is a procedural law and is not part of substantive law. This provision intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases. The provision aims at expediting the hearing. The court said that unless compelled by express and specific language of the statute the provision of CPC or any other procedural enactment ought not be construed in a manner which would leave the court helpless to meet the extraordinary situations in the ends of justice. The court also opined that the words “*shall not be later than ninety days*” could not be circumscribed by implying mandatory character because it is couched in a negative language. In this case the court had permitted the defendant to file the written statement beyond 90 days. But unfortunately the last day happened to be a holiday and the written statement came to be filed on the next day. The court held that the maxim of equity namely, *actus curiae neminem gravabit* (an act of court shall prejudice no man) and *lex non cogit ad impossibilia* (the law does not compel a man to do what he cannot possibly perform) shall apply to this case.

In the similar line in *Jatinder Singh Hanspal v. Tejinder Singh and Anr*,⁵² it was held that defendant has to file written statement within 90 days from the date of summons. Said period can be further extended by the court under section 148 of CPC in exceptional circumstances for a period of not more than 30 days.

A different view was taken by another high court in *Shobhit Construction v. T.K International Ltd*,⁵³ that no extension could be allowed beyond 90 days

50 AIR 2006 SC 396. The court expressed the same opinion in *Hindurao Tukaram Shelke v. Prakash Kallappa Awade*, AIR 2006 Bom 58; *Vasant Stynarayana Hegde v. Managing Director, Karnataka Neeravari Nigama Ltd.*, AIR 2006 Kant 37.

51 S. 148 of CPC.

52 AIR 2006 Jhar 8.

53 AIR 2006 HP 4.



of service of summons. According to the court the said period cannot be extended by court even under its inherent powers under section 151 or under section 148 of CPC. The court concluded that the time to file the written statement couldn't be extended by the court beyond the period limited under rule 1 of order 8.⁵⁴

In *State of H.P. v. Pankaj Sharma*⁵⁵ on the date for filing of written statement the court was not sitting and the case was fixed for another date after vacation. The high court held that the period of 90 days has to be calculated excluding the period of vacation.

Similarly, in *Anil Khushabhrao Phutane v. Madhukar Kushabrao Phutane*,⁵⁶ the defendant filed the written statement beyond 30 days along with application seeking permission to file the written statement within 90 days. Detailed reasons were given for failure. Court instead of allowing application on that day itself, adjourned the matter for hearing the other side and passed the order in favour of the plaintiff after the expiry of 90 days on ground that court has no power to take written statement after expiry of a period of 90 days. Subsequently, the high court ruled that the rejection of application by the trial court has resulted in miscarriage of justice as a consequence of misconstruing the provisions.⁵⁷

Similarly, in *Bhabatosh Sinhga v. Prara Sinha*⁵⁸ it was held that once the written statement is filed by the defendant within the extended period the court cannot back out and say that time was granted without any jurisdiction.

In *Videocon Narmada Electronics Ltd v. Navabharat Ferro Alloys Ltd*,⁵⁹ the defendant sought permission from the court to file written statement after the cross-examination of the plaintiff. Along with the application for condoning the delay an affidavit signed by a clerk of the counsel for the defendant was also filed. In the said affidavit the clerk stated that the omission to file the written statement was due to his mistake. The court said that these types of reasons could not be permitted.

In *Mahadevamma and Anr v. Mahadevamma and Anr*⁶⁰ the delay was caused by a public officer in filing the written statement. When the matter of condoning the delay came up before the high court the application of order 27, rule 7 (1) was argued as defence. Order 27, rule 7 (1) provides that where defendant is a public servant he may need to make a reference to the government and he is not supposed to give his personal opinion in the written statement. He may need to consult different departments of the government for preparing the written statement. Hence, the delay was held to be reasonable.

54 *Id.* at 8.

55 AIR 2006 HP 14.

56 AIR 2006 Bom 1

57 *Id.* at 7.

58 AIR 2006 Ori 7.

59 AIR 2006 Guj 29.

60 AIR 2006 Kant 119.

**Amendment of pleadings**

In the facts of *Rajesh Kumar Aggarwal & Ors v. K.K. Modi & Ors*,⁶¹ a trust was formed by senior officers of a company for their mutual benefit. They purchased shares of another company in the name of the defendant. The defendant instead of using the dividend money for the benefit of the trust individually enjoyed it. So the other trustees filed a suit for the removal of the defendants from the trust. Later on the plaintiffs filed an application for amendment of the plaint and the court allowed the said application. The defendants filed an appeal arguing that the amendment made to the plaint would change the entire nature of the case. Accepting this argument the division bench of the high court allowed the appeal filed by the defendants.

On appeal to the Supreme Court, it was ruled that the provision of amendment of pleadings under order 6, rule 17 is partly mandatory and partly directory in nature. The court further stated that order 6, rule 17 consists of two parts where the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments, which are necessary for the purpose of determining the real question in controversy between the parties.⁶² The test that governs the issue of amendment is the 'real controversy test.'⁶³ The court also held that while considering an application for amendment the court should not go into the correctness or falsity of the case in the amendment. Hence, the amendment sought was held unjustifiable in the facts of the case.

In *Steel Authority of India Ltd v. Union of India*⁶⁴ the Supreme Court held that when an amendment is made in the pleadings the parties could not be permitted to go beyond their admission. This principle was held equally applicable to adjudication of industrial disputes also.

Adding to this, in *Baldev Singh & Ors v. Manohar Singh & Anr*⁶⁵ the apex court relying on *M/s Modi Spinning and Weaving Mills Co Ltd & Anr v. M/s Ladhram & Co*⁶⁶ held that in a written statement the defendants could raise inconsistent pleas. But the same may not be permitted in the case of a plaint.

VI FRAMING OF ISSUES

Framing of issues⁶⁷ or claims are important in a civil suit in determining the rights and liabilities of parties. The object of the legislature appears to be that as far as possible all matters in dispute between the parties relating to same cause of action should be disposed off in the same suit so as to prevent further litigation.

61 AIR 2006 SC 1647.

62 *Id.* at 1651.

63 *Id.* at 1652.

64 AIR 2006 SC 3231.

65 AIR 2006 SC 2832.

66 (1976) 4 SCC 320.

67 Rules 1 and 2 of CPC.



Issues of limitation as preliminary issue

In *Gunwantbhai Mulchand Shah v. Anton Elis Farel*⁶⁸ an agreement for sale was entered into between the predecessors of the plaintiff in the year 1964. They had also entered into another agreement through which the possession of property was handed over to the plaintiffs. They claimed that full consideration was paid to the defendants. Thereafter a suit for specific performance and perpetual injunction was filed in the year 1994. The trial court and high court dismissed the suit as barred by limitation while deciding the issue as a preliminary issue and rejecting the plaintiff's argument that the time for performance of the sale was not at all mentioned in the agreement. The Supreme Court held that the trial court should have insisted on leading evidence on the argument of the plaintiff that the time for performance of the sale was not there in the agreement. It further held that trial court ought to have postponed the consideration of the issue of limitation along with other issues arising in the suit after the trial. On this reasoning the finding of the trial court that the suit was barred by limitation and consequential dismissal of the suit were set aside and the matter was remanded to the trial court.

In another case⁶⁹ the Rajasthan High Court held that the issue of limitation is a mixed question of law and fact and accordingly rejected the application for deciding the issue of limitation as a preliminary issue.

VII COMPROMISE DECREE /CONSENT DECREE

Decree implies the formal and conclusive determination of rights and liabilities of parties with respect to all or any of the matters in controversy.⁷⁰ When the finality of a decision is based on a consent or compromise reached by the parties it is known as a compromise or consent decree.⁷¹ The present-day adjudication of disputes witnesses the importance of such compromise decrees giving autonomy to parties for a speedy disposal of cases. There are certain inherent issues associated with compromise decree as is evident from the following discussion.

In *Som Dev & Ors v. Rati Ram & Anr*⁷² the apex court held that when a suit is decreed on the basis of a compromise decree, which relates to property that is not subject matter of suit, it would require registration. Terms of compromise should be reduced to writing and signed by parties in compliance with requirements of order 23 rule 3.

Contempt of a consent decree

In *Ramaswamy v. Ramesh Narang & Ors*⁷³ the Supreme Court held that a compromise decree is as much a decree passed on adjudication and is not

68 AIR 2006 SC 1556.

69 *Saroj Raheja v. Addl Civil Judge (SD) Sri Ganganagar & Ors*, AIR 2006 Raj 102.

70 S. 2 (2) of CPC.

71 Order 23, rule 3 of CPC.

72 AIR 2006 SC 3297.

73 AIR 2006 SC 1883.



merely an agreement between the parties. In passing the decree by consent the court adds to its mandate to the consent. A consent decree is both a command and a contract. It is a contract with the *imprimatur*⁷⁴ of the court. The consent decree is also executable like any other decree under the CPC. There is no difference between other decrees and a consent decree under section 13 of the Contempt of Courts Act, 1971 because such contempt substantially interferes or tends substantially to interfere with the due course of justice. The court said that in such circumstances it would neither be in consonance with the statute, judicial authority, principle of logic to draw any distinction between the wilful violation of the terms of a consent decree and a decree passed on adjudication.

Appeal against consent decree

In *Pushpa Devi Bhagat(D) by LR v. Rajinder Singh & Ors*⁷⁵ the Supreme Court held that after the 1976 amendment to order 23, rule 3 of CPC appeal is not maintainable against a consent decree. The party has to approach the court, which passed the consent decree and establish that there was no compromise. The court said that the consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed consent decree. The logic behind this law is that a consent decree is nothing but a contract between the parties superimposed with the seal of approval of the court.

VIII EXECUTION

The term execution signifies the enforcement of decrees and orders by the process of the court, so as to enable the decree-holder to realize the fruits of the decree.⁷⁶ The executing court has got some powers under CPC⁷⁷ to facilitate the execution proceedings. The code extensively deals with the provisions of execution of decrees and orders made thereunder.

Duties of an executing court

In *Union of India v. Kamalaendu Shukla*⁷⁸ the Patna High Court held that the executing court could not go behind the decree except in cases where it can be demonstrated on the face of the record that the judgment and decree are nullity.

Similarly, in *Gopala Swamy Kounder v. Ramaswamy Kounder*⁷⁹ the Kerala High Court held that in all execution proceedings the court has to first decide whether it is necessary to bring the whole of the attached property to sale or to sell only such portion of the property, which will satisfy the decree.

74 *Imprimatur* means authorised or approved.

75 AIR 2006 SC 2628.

76 Order 21 of CPC.

77 S. 42 of CPC.

78 AIR 2006 Pat 117.

79 AIR 2006 Ker 138.



If the property is large and the decree to be satisfied is small the court must bring to sale only such property the proceedings of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if property is one if separate portion could be sold without violating any provision of law, only such portion of the property should be sold. The choice regarding the specified property to be sold is within the pure discretion of the court and at the same time the court is duty bound to exercise proper care to put up only such portion of the property for sale as would meet the claim made in the execution petition.

The apex court in *Balakrishnan v. Malaiyandi Konar*⁸⁰ affirmed this view and held that the same is not just a discretion but an obligation imposed on the court.⁸¹

Unrecorded compromise between decree holder and judgment debtor

The apex court in *Padma Ben Banushali & Anr v. Yogendra Rathore & Ors*⁸² held that when a decree holder and a judgment debtor enter into a contract of compromise amounting to an adjustment of decree as provided under order 21, rule 2 of CPC the same has to be recorded by the court under the said provisions. If the executing court comes to the conclusion that decree was adjusted wholly or in parts but compromise or adjustment or satisfaction was not recorded or certified by the court, the executing court would not recognise them and will proceed to execute the original decree.

Calculation of interest

In *Y.P Ganeshan v. The Tamil Nadu Civil Supplies Corporation Ltd*,⁸³ a suit was filed for recovery of money on account of breach of an agreement wherein there was no stipulation as to the rate of interest to be paid in the event of default. The trial court decreed for payment of interest at 15% per annum by way of damages for the period prior to the commencement of the proceedings. The two questions of law before the Madras High Court were that whether interest could be awarded as damages and whether interest could be awarded for the period prior to the commencement of the proceedings? Regarding the first question the high court followed *Clariant International Ltd v. SEBI*⁸⁴ where the Supreme Court had held that interest could be awarded in terms of an agreement or statutory provision. The court went on to say that interest could also be awarded by reason of usage of trade having the force of law or on equitable considerations but could not be awarded as damages except in cases where money due was wrongfully withheld. Regarding the second issue as to the relevant date for computing rate of

80 AIR 2006 SC 1458.

81 *Id.* at 1460.

82 AIR 2006 SC 2167.

83 AIR 2006 Mad 4.

84 (2004) 8 SCC 524.



interest, the court relying on the apex court's decision in another case⁸⁵ held that the claim of interest as damages for the period prior to the commencement of the proceedings cannot be made till it is quantified and ascertained.⁸⁶ Relying on these decisions the Madras High Court held that the interest could not be paid as damages and that too prior to quantification of damages and interest.

Adjustment of part payment

In *Oriental Insurance Co. Ltd. v. Smt Kala Bharathi and Ors*⁸⁷ the question was whether a part payment of the decretal amount could be adjusted towards the interest amount. The court held that the deposits made by the judgment debtor in compliance with the condition imposed by the appellate courts would be governed by sub-rules (4) and (5) of rule 1 to order 21 if the order of the court is silent as to the mode of adjustment. The court observed that Parliament added these sub-rules with definite objective of arresting the running interest on the deposits made by the decree holder to the court. Hence, it was held that part payment deserved to be adjusted towards the principal decretal amount.⁸⁸

IX MISCELLANEOUS

Power of court under section 151 of CPC

In *Jet Plywood Pvt Ltd v. Madhukar Nowlakha and Ors*⁸⁹ an application for withdrawal of the suit was filed without leave to file a fresh suit. The court gave the permission to withdraw the suit. Later on the plaintiff wanted to recall the order permitting the withdrawal of the suit. But a specific provision for filing an application for recalling order, permitting withdrawal of suit is not there in the CPC. The court held that the principle is well established that when the Code is silent regarding a procedural aspect, the inherent power of the court under section 151 can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties.

Article 20 of the Constitution of India

The question as to whether procedural laws must be applied on the date when suit or proceedings comes for trial or disposal was discussed in *Sudhir G Angur & Ors v. M. Sanjeev & Ors.*⁹⁰ Relying upon the decision in *Shiv Bhagwan v. Onkarmal*⁹¹ the court held that procedural laws in force must be applied as on the date when the suit or proceedings comes on trial or disposal.

85 *Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Bhudhraj*, (2001) 2 SCC 721.

86 *Id.* at para 43.

87 AIR 2006 AP 31.

88 *Id.* at 39.

89 AIR 2006 SC 1260.

90 AIR 2006 SC 351.

91 AIR 1952 Bom 365.



It has been held that a court is bound to take notice of the changes in the law and is bound to administer the law, as it was when the suit came up for hearing. It has also been held that if a court has jurisdiction to try a suit then it cannot refuse to assume jurisdiction when it comes for disposal by reason of the fact that it had no jurisdiction to entertain the same on the date when it was instituted.

Injunction

In *M. Gurudas & Ors v. Rasaranjan & Ors*⁹² the apex court held that finding of prima-facie case would be finding of fact. However, while arriving at such finding of fact, courts not only must arrive at a conclusion that a case for trial has been made out but would consider the questions with regard to balance of convenience of parties and also irreparable injury which might be suffered by plaintiffs, if prayer for injunction is to be refused.

The court further added that in a partition suit the courts while entertaining an application for injunction could take into consideration questions such as whether plaintiffs have any share in the property or have they changed their stand from stage to stage etc.

Oral evidence

In *Nadam Mohanamma and Others v. Markanada Narasimha Rao and Another*⁹³ the written statement filed by the appellants did not contain even a whisper about any allegation of fraud, intimidation or illegality. The question that was raised before the court was whether the appellants could lead oral evidence on these points. The court held that unless there is a plea in the pleadings and an issue is framed thereon it is impossible to lead evidence.

In *UBS AG v. State Bank of Patiala*⁹⁴ on presentation of documents by beneficiary to appellant bank, it made payment under letter of credit to the beneficiary. When the respondent bank refused to reimburse the appellant bank in respect of amounts disbursed to beneficiary, fraud committed by beneficiary and respondent bank were discovered.

Court held that if fraud had been detected earlier and the appellant bank had been informed of such fraud and put on caution prior to making payments the respondent bank might have had a triable issue to go to trial. Since in the present case fraud was discovered after negotiating letter of credit the respondent could not be entitled to defend the case

Allegation as to bias against presiding officer

The Madhya Pradesh High Court in *Sudarshan Jain v. Deep Chand Jain and Ors*⁹⁵ held that an application for transfer of case on allegations of bias

92 AIR 2006 SC 3275.

93 AIR 2006 AP 8.

94 AIR 2006 SC 2250.

95 AIR 2006 MP 6.



against presiding officer could not be filed without being supported by an affidavit.

In an application filed under section 24 the petitioner has stated that the opposite party is in visiting terms with the presiding officer and the presiding officer is influenced by him and there is no hope on the part of the petitioner to get justice. No affidavit was filed along with the application. The court said that without affidavit, the petitioner has made casual and nebulous allegation against the presiding officer, which was of vague nature. It is not the intent and purpose of section 24 of CPC. The court held that the petitioner's allegation that he lost faith on the trial judge is liable to be rejected as the requirement of law is that apprehension must be reasonable, sanguine and genuine. When an allegation is made against a judicial officer responsibility has to be owned, hence an affidavit is necessary.

Transfer of case

In *Harshad Chimam Lal Modi v. D.L.F. Universal Ltd*⁹⁶ a plaint was returned to the plaintiff for presentation to proper court on grounds of want of jurisdiction. On the plaintiffs argument that it is a transfer of case and the suit should be directed to be tried from stage at which the plaint has been transferred the court held that in such circumstances when the plaint is presented before the court having jurisdiction it would be considered a fresh suit and not continuation of the proceeding from the earlier court.

Non-compliance with amended procedural provisions

In *Vidyavati Gupta v. Bhakti Hari Nayak*⁹⁷ the apex court held that amendments effected to section 26, order 4 and order 6, rule 15 are aimed at eliminating procedural delays in disposal of civil matters. But being procedural in nature they are directory in nature and non-compliance would not automatically render the plaint *non est*.

Equal opportunity to give evidence

In *Sona Spicy Foods Tech Ltd v. M/s Special Spices Industries and Anr*⁹⁸ the trial court had given the plaintiff two years time to close his evidence after the issues were framed. But the defendant was given only very less time. The high court held that this act of the trial court resulted in miscarriage of justice as one party was denied equal opportunity to give evidence

Appearance of party in person

In *Nagappa Mallappa Bandi v. Shivraj*⁹⁹ the respondent who is an advocate by profession had appointed another advocate to look after his case. The question before the Karnataka High Court was whether

96 AIR 2006 SC 646.

97 AIR 2006 SC 1194.

98 AIR 2006 HP 42.

99 AIR 2006 Kant 229.



the respondent could appear in person before the court for conducting his case without discharging the other advocate. Considering sections 30¹⁰⁰ and 33¹⁰¹ of the Advocates Act, 1961 the high court held that party could not conduct the case without discharging his counsel.

Scope of section 149 of CPC

The Supreme Court in *K.C Skaria v. Government of State of Kerala*¹⁰² ruled that section 149¹⁰³ of CPC is applicable only where court fee is payable at the time of institution of suit. That is, if the court fee due on plaint instituted is not paid wholly or partly by person instituting the suit. In such circumstances the court in its discretion may allow him to pay court fee or deficit court fee within a period fixed by it.

In the instant case court fee due on plaint as per valuation of suit was fully paid but subsequently it was found that a larger amount is due to plaintiff. It was held that since there is no deficit in court fee at the time of institution of suit, section 149 of CPC would not apply.

X CONCLUSION

During the year under survey, there were not many cases showing a major shift from the settled position of law especially in the areas of jurisdiction, appeal and framing of issues. Only with regard to issues of filing of written statement there is a difference of opinion amongst the high courts. Nonetheless, the proclivity of the judiciary to travel beyond hollow formalism towards a balanced approach in pursuit of justice is strongly evident in this year also as was there in the year preceding the survey. The courts have started identifying the procedural enactments as important weapons in their armory, to make their path smooth.

100 “Right of advocates to practise: Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends, -

(i) In all Courts including the Supreme Court; (ii) Before any tribunal or person legally authorised to take evidence; and (iii) Before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.”

101 “Advocates alone entitled to practise: Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act.”

102 AIR 2006 SC 811.

103 “Power to make up deficiency of court-fees— Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.”