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## CIVIL PROCEDURE AND LAW OF EVIDENCE

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### PART A: CIVIL PROCEDURE

#### I INTRODUCTION

EVEN THOUGH civil procedural law in India did not undergo major changes during the year under survey, either in the form of legislative amendments or through judicial interpretation, transformations that could affect it are happening across the borders.

Firstly, a debate over comparative procedural law is at its peak. In the last couple of years, arguments raised by scholars demanding comparative researches in procedural law are more powerful. The arguments raised by conservative scholars on the basis of the nature of procedural laws as ‘nationally based specific rules which are not transferable to other countries and societies’<sup>1</sup> are answered more vehemently. Peter Gottwald argues that he “... do not see that there is something different in procedural law” which should prevent a comparative scholarship in them.<sup>2</sup> Similar is the case with the ‘American Law Institute/UNIDROIT-Principles of Transnational Civil Procedure’, which consists of 31 rules that aim at harmonizing<sup>3</sup> the procedural laws internationally. It is argued that such a harmonization is necessary in dealing with the globalisation and its “negative consequences, the costs and distress resulting from legal conflict”<sup>4</sup> and these “can be mitigated by reducing differences in legal systems, so that, the same or similar ‘rules of the game’ apply no matter where the participants may find themselves.”<sup>5</sup>

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1 Peter Gottwald, “Comparative Civil Procedure” 22 *Ritsumeikan Law Review* (2005) 23 at 24.

2 *Ibid.* There are more scholars raising the same argument. For example Michael L. Moffitt, Michael J Legg, Sir Lawrence Street, etc.

3 Harmonization means the ‘the efforts to reduce the differences among national legal systems.’ Another word with similar meaning in this context is approximation, which means “the process of referring the rules of various legal systems so that they approximate each other.” For details read American Law Institute, *Principles of Transnational Civil Procedure* (2006).

4 American Law Institute, *Principles of Transnational Civil Procedure* 1, (2006).

5 *Ibid.*



The second change is the increased attention on the trends of procedural law developments in India from scholars across the globe, presumably because of the unprecedented economic growth and the increased foreign investments in India. Some of them were too critical on ‘court red tape’<sup>6</sup> amendments and ‘conflicting judicial decisions’<sup>7</sup> pertaining to civil procedure.<sup>8</sup>

The third important aspect is the demand for ‘customized procedural laws’, which can deliver maximum level of satisfaction to the parties to a dispute, and greater efficiency within the system. It is argued that customized procedural law would also protect the court system, since they are the main pillars of rule of law in the civil administration of justice.<sup>9</sup>

With these background notes, this survey attempts to analyse the selected cases on civil procedure law in India, decided by the Supreme Court and high courts in the year 2007.

## II JURISDICTION

Sections 15 to 22A of the Code of Civil Procedure, 1908 (CPC) deal with ‘place of suing’, that is the forum for institution of suits in India. In ordinary sense jurisdiction is “the extent of the authority of a court to administer justice not only with reference to the subject matter of the suit but also to the local and pecuniary limits of jurisdiction.”<sup>10</sup> These provisions seek to regulate the place of suing within India and are applicable only to the places where the CPC applies. In the year under survey there were few interesting questions regarding jurisdiction that came up before the judiciary in India.

### **Distinction between courts lacking territorial/pecuniary jurisdiction and subject matter jurisdiction**

The first question that came before the court was regarding the distinction between the effect of decrees passed by courts lacking territorial/

6 *Infra* note 8. By ‘court red tape amendments’ Matthieu Chemin, mean the some of the amendments to the Code of Civil Procedure made by the high courts, which makes the procedure complex and confusing.

7 *Ibid.* Regarding ‘conflicting judicial decisions’ Matthieu Chemin says, “conflicting judicial decisions, in other words, violations of precedents already established by high courts, are found to increase trial duration as judges are required to spend considerable time in choosing between several conflicting views.”

8 Matthieu Chemin, “Decoding the Code of Civil Procedure: Do Judiciaries Matter for Growth?” *Working Paper 07-26 University of Quebec at Montreal* (2007).

9 Michael L. Moffitt, “Customized Litigation: The Case For Making Civil Procedure Negotiable” *75 Geo. Wash. L. Rev.* 461 (2007). He argues, “the current set of procedural rules should be treated as default rules, rather than as nonnegotiable parameters.” “The current system of litigation may work well for some disputants, but the system is not ideally designed for every disputant in every context” and “The disputants should be allowed to vary from strict rules of procedure as long as” the current set of procedural rules as the baseline.

10 S. K. Sarvaria and Snigdha Sarvaria, *Mulla’s The Code of Civil Procedure* 409 (2007).



pecuniary jurisdiction on one hand and subject matter jurisdiction on the other hand. In *Hasham Abbas Sayyad v. Usman Abbas Sayyad & Ors.*<sup>11</sup> the Supreme Court said that an order passed by a person lacking inherent jurisdiction would be a nullity. The principles of estoppel, waiver and acquiescence or even *res judicata* which are procedural in nature would have no application in a case where an order has been passed by the tribunal/court which has no authority in that behalf. The court opined that any order passed by a court without jurisdiction would be a *coram non judge*, being a nullity, the same ordinarily should not be given effect to. The court held “... a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless the prejudice is shown, ordinarily the second category of cases would be interfered with.”<sup>12</sup>

#### Revisional jurisdiction and appellate jurisdiction

Similarly in *G. L. Vijain v. K. Shankar*<sup>13</sup> the Supreme Court analysed the nature of revisional jurisdiction and appellate jurisdiction. The court after referring to its own decision in *Narinder Mohan Arya v. United India Insurance Co. Ltd and others*<sup>14</sup> in which the court held that “A revisional jurisdiction as is well known involves exercise of appellate jurisdiction.” held that “There is ...no dispute that the High Court can exercise its inherent jurisdiction in appropriate cases. The revisional jurisdiction, in effect and substance is an appellate jurisdiction.”<sup>15</sup>

#### The meaning of ‘place of suing’

What is the meaning of the phrase ‘place of suing’ in section 21A<sup>16</sup> of the CPC? Does it include both territorial jurisdiction and pecuniary jurisdiction? This was answered in *Subhas Mhadevaasa Habib v. Nemasa Ambasa Dharmadas (deceased by L.Rs) & Ors.*<sup>17</sup> by the Supreme Court when it held that section 21A includes both territorial jurisdiction and pecuniary jurisdiction as well. “Though Section 21A of the Code speaks of a suit not being maintainable for challenging the validity of a prior decree between the same parties on a ground based on an objection as to ‘the place of suing’, there is no reason to restrict its operation only to an objection

11 AIR 2007 SC 1077.

12 *Id.* at 1081.

13 AIR 2007 SC 1103.

14 (2006) 4 SCC 713.

15 *Supra* note 13.

16 21A. Bar on suit to set aside decree on objection as to place of suing: No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

17 AIR 2007 SC 1828.



based on territorial jurisdiction and excluding from its purview a defect based on pecuniary jurisdiction. In the sense in which the expression 'place of suing' has been used in the Code it could be understood as taking within it both territorial jurisdiction and pecuniary jurisdiction. Section 15 of Code deals with pecuniary jurisdiction and Sections 15 to 20 of the Code deal with 'place of suing'. The heading 'place of suing covers section 15 also.'<sup>18</sup>

**Disobedience of interim injunction order issued by a court without jurisdiction**

In *C. Aravindaksha Menon & Ors. v. Raghava Menon*<sup>19</sup> an interim injunction order was issued by a civil court restraining the defendants from doing certain things but they failed to obey this order. Thereafter it was found that the court, which passed this injunction order, did not have jurisdiction to try the suit. The question before the Kerala High Court was whether an application under order 39, rule 2A could be maintained when that particular court did not have jurisdiction to try the suit. The court held that the interim injunction order passed by the trial court was a valid order and the defendant ought to have obeyed it.

**Territorial jurisdiction of executing court**

When a property sought to be proceeded against is outside the jurisdiction of the court, which passed the decree acting as the executing court, the courts in India had expressed conflicting views. Some courts had opined that the courts which passed the decree and which were approached for execution could not proceed with execution but could only transmit the decree to the court having jurisdiction over the property. Another view taken was that it was discretion of the executing court, and either they could proceed with the execution or send the decree for execution to another court. In *Mohit Bharagava v. Bharat Bhushan Bhargava & Ors.*<sup>20</sup> the Supreme Court held that this conflict was resolved after the amendment of the CPC in the year 2002. As per this amendment, if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing court, nothing in section 39 of the CPC shall be deemed to authorise the court to proceed with the execution.

**Subordination of land acquisition courts**

The question of law that came before the Supreme Court in *State of A.P. v. V. Sarma Rao & Ors. etc.*<sup>21</sup> was regarding the jurisdiction of a civil court in a land acquisition case. The court held that Land Acquisition Act, 1894, is a self contained statute and in relation to the matters falling within the

18 Reliance was placed on *The Baherein Petroleum Co Ltd v. P.J. Pappu & Anr*, (1966) 1 SCR 461. The court made no distinction between section 15 on the one hand and sections 16 to 20 on the other.

19 AIR 2007 (NOC) 1577 (Ker).

20 AIR 2007 SC 1717.

21 AIR 2007 SC 137.



purview of this Act the civil court would have no jurisdiction.<sup>22</sup> So a land acquisition judge is subordinate to the concerned high court and not to the district court. A court of subordinate judge may be subordinate to district judge for administrative purposes and under the CPC. But when the same subordinate judge is acting as the land acquisition judge, he or she is not subordinate to the district court.

**Restriction of application of CPC by the Railway Claims Tribunal Act, 1987**

In *Prasant Kumar Choudhary v. Union of India*<sup>23</sup> the Orissa High Court said that there is no specific bar to the application of the CPC in the provisions of section 18 of the Railway Claims Tribunal Act, 1987. This provision is clearly an enabling provision and not a disabling provision.

III RES JUDICATA

Section 11 of the CPC embodies the doctrine of *res judicata*, which means that once a matter is finally decided by a competent court no party can be permitted to reopen it in a subsequent litigation.

**Applicability of res judicata in case of delay**

In *Kashi Bai v. Sundarlal Vaidh & Ors.*<sup>24</sup> the Madhya Pradesh High Court while deciding the applicability of *res judicata* to an inter-locutory order, held that dismissal of an earlier application for injunction on account of delay will bar a subsequent application for injunction filed on account of subsequent developments.

**Applicability of res judicata in a case for divorce based on cruelty**

In *Shyam Lal v. Smt. Leelawati*<sup>25</sup> the Rajasthan High court held that the ground of desertion and cruelty under section 13 of the Hindu Marriage Act, 1955 is a continuous wrong. Each day would give fresh cause of action to the wronged spouse and so the principle of *res judicata* cannot be applied.

**Applicability of res judicata on purchaser of suit property from judgment debtor in an ex parte decree**

The interesting question which was decided by the apex court in *Saroja v. Chinnusamy (Dead) by L.Rs & Anr.*,<sup>26</sup> was whether a person who purchased the property under dispute from the judgment debtor in an *ex parte* decree, which reached finality, would be bound by the doctrine of *res judicata*. The court held that all the conditions of the doctrine of *res judicata* are satisfied in this case. Those conditions are:

22 *Id.* at 141.

23 AIR 2007 Ori 33.

24 AIR 2007 MP 112.

25 AIR 2007 Raj 93.

26 AIR 2007 SC 3067.



- a. There must be two suits- One former suits and one subsequent suit;
- b. the court which decided the former suit must be competent to try the subsequent suit;
- c. the matter directly and substantially in issue must be the same either actually or constructively in both the suits;
- d. the matter directly and substantially in issue in subsequent suit must have been heard and finally decided by the court in the former suit;
- e. the parties to the suits or the parties under whom they or any of them claim must be the same in both the suits; and
- f. the parties in both the suits must have litigated under the same title.

Regarding condition (e), the only condition which needs an analysis, the court relying on *Ishwardas v. The State of Madhya Pradesh & Ors.*<sup>27</sup> opined that "...it is not necessary that all the parties to the litigations must be common. All that is necessary is that the issue should be between parties under whom they or any of them claim."<sup>28</sup> The court held that "...by virtue of the ex parte decree passed in the former suit, the subsequent suit filed by the appellant is hit by res judicata."<sup>29</sup>

#### IV APPEAL

Appeal means a legal proceeding by a party against the decision of a lower court or authority before a higher court or authority. In CPC part VII, which includes sections 96 to 112, and orders 41,<sup>30</sup> 42,<sup>31</sup> 43<sup>32</sup> along with the rules lay down the framework for filing of an appeal.

##### Second appeal

Section 100 of the CPC deals with 'second appeal.' This provision says that an appeal shall lie to the high court from every decree passed in appeal by any court subordinate to the high court if there is a substantial question of law in the opinion of the high court. Clauses 4 and 5 as well as *proviso* to the section says that the court shall hear only such substantial question of law involved in the case. The *Proviso* says that the high court may if it is satisfied hear any other substantial question of law. In *Smt Basanti Devi & Anr v. Fulchand Mondal & Anr*<sup>33</sup> the Calcutta High Court said that when a plea is not taken up in the written statement and oral evidence, and the lower court did not frame any issue and record any findings, that particular plea

27 AIR 1979 SC 551.

28 *Supra* note 26 at 3070.

29 *Id.* at 3071.

30 Appeals from original decrees.

31 Appeals from appellate decrees.

32 Appeals from orders.

33 AIR 2007 Cal 8.



cannot be considered by the high court sitting in second appeal as a substantial question of law.<sup>34</sup>

**Difference between a 'question of law' and a 'substantial question of law'**

In *P.Chandrasekharan & Ors. v. S. Kanakarajan & Ors.*<sup>35</sup> the Supreme Court explained the distinction between a 'question of law' and a 'substantial question of law'. Any interpretation, which goes to the root of the title of a party to the *lis*, would indisputably give rise to a question of law. But when the courts misread and misinterpret a document, for example, a document of title read with other documents and the plan for the identification of the suit lands whereupon the plaintiffs themselves relied upon, a substantial question of law arises.

**Substantial question of law in second appeal**

Is formulation of a substantial question of law as per section 100(4) necessary to hear a second appeal? Can the courts proceed to hear the second appeal without such requirement? In *M/s Wyawahare & Sons & Ors. v. Madhukar Raghunath Bhave.*<sup>36</sup> the court held that a second appeal heard without formulating the substantial question of law cannot be maintained.

**Maintainability of second appeal against observations made by first appellate court**

The issue that came up in *Krishnananda v. Kattu Siva Ashram & Ors.*<sup>37</sup> before the Supreme Court was whether an observation made by the first appellate court could be a substantial question of law that could be heard by a high court in a second appeal. The brief facts of the case were that in a suit, which was dismissed by the trial court, the appellant, who was defendant no. 4 in the suit, did not prefer any appeal. The trial court had negatived the appellant's claim of adverse possession. Other defendants, excluding the appellant of this case, filed an appeal, which was dismissed, by the first appellate court. But it opined that both the plaintiff and appellant/defendant no. 4 had not acquired any title to the property. Aggrieved by this order the appellant/defendant no. 4 filed a second appeal in the High Court of Madras, which was also dismissed summarily. On appeal, the Supreme Court held that "There cannot be by any doubt that the second appeal filed at the instance of the appellant herein was not maintainable as the first appellate court had merely arrived at certain findings which might be relevant for the purpose of determination of an issue by and between the appellant and the original plaintiff, but the same were not relevant for determination of an issue amongst the defendants inter se. Moreover, no decree against the appellant was preferred."<sup>38</sup> On this reasoning the appeal was dismissed by the apex court.

34 *Id.* at 15.

35 AIR 2007 SC 2306.

36 AIR 2007 SC 3037.

37 AIR 2007 SC 1160.

38 *Ibid.*

**Applicability of prohibition on further appeals as per section 100-A**

The CPC Amendment Act, 1999 abolished appeals against judgments of a single judge of a high court in every case. This total ban was removed by the CPC Amendment Act, 2002. Thereafter the position is that where any appeal from an original or appellate decree or order is heard and decided by a single judge of a high court, no further appeal shall lie against this to a division bench of the high court. Section 32(2)(g) of the 1999 amendment Act stipulated that the amended section 100A shall not apply or affect any appeal against the decision of a single judge of a high court under article 226 and 227 of the constitution which had been admitted before the 1999 amendment to section 100A. This means that the amendment is applicable to all other appeals with retrospective effect. But since the 2002 amendment Act does not have any similar provision, is it retrospectively applicable? In *Kamala Devi v. Khushal Kanwar & Anr.*<sup>39</sup> the Supreme Court held that section 100-A as amended by CPC Amendment Act, 2002 will not have retrospective effect so as to bring within its fold even appeals preferred before 2002 amendment. Similarly in *Dr. John George & Anr. etc. v. Stewards Association in India & Ors. etc.*<sup>40</sup> the Kerala high court held that Section 100-A is not having any retrospective effect and all the appeals filed before the amendment are competent.

**Does filing of an appeal make the decree inexecutable?**

In *Suresh Kumar and Anr. v. Virendra Kumar*<sup>41</sup> the Rajasthan High Court, relying on *Ratan Singh v. Vijay Singh and Others*<sup>42</sup> held that a decree became executable from the date it was given and mere filing of appeal against it could not make the decree inexecutable. It was pointed out that even though the decree remains executable its execution can be suspended by the order of the appellate court as per order 4, rule 5(1) CPC or by the executing court as per order 41, rule 5(2) CPC. Regarding the exclusion of this period from the limitation period in *Lohit Prakash Dutta & Ors. v. Kanai Dutta*<sup>43</sup> the Guahati High Court held that the period of limitation for executing a decree will not start running until the stay is vacated.

## V PLEADINGS

“Pleading shall mean plaint or written statement,” says order 6 rule 1 of the CPC and both these documents are submitted to the court, a plaint by the plaintiff and a written statement by the defendant, with the object of narrowing down the dispute into definite issues so that the expenses and delay in resolving the dispute can be minimized. Once the plaint and written

39 AIR 2007 SC 663.

40 AIR 2007 Ker 57.

41 AIR 2007 Raj 117.

42 AIR 2001 SC 279.

43 AIR 2007 (NOC) 1146 (Gau).





statements are submitted in the court, both should be read as a whole to gather the exact issues of the disputes. In the year under survey few questions came up before various courts in India.

#### **Rejection of a plaint for fraud**

Rule 11 of order 7, CPC says that a plaint can be rejected under few circumstances like non disclosure of the cause of action, undervaluing the relief claimed, or barred by any law etc. The question that came up before the Patna High Court in *Kapildeo Prasad & Anr v. Ramanand Prasad & Ors.*<sup>44</sup> was that whether a suit could be rejected on the basis of an allegation of fraud raised in the written statement. The brief facts of the case are as follows:

In a suit before the subordinate court, the plaintiffs/respondents had allegedly suppressed some material fact in the plaint. In the written statement the defendants petitioners argued that the plaint is liable to be rejected because of this concealment of material fact, which would amount to fraud. The court said that a plaint could not be rejected immediately after the defendants raise arguments of fraud in the written statement. The principle 'fraud vitiates all' as established by a series of judicial decisions including the case of *S.P. Chengalvaaya Naidu v. Jagnnath and Ors*<sup>45</sup> could not be extended to rejection of plaint because fraud is a question of fact that has to be proved in course of trial. Moreover, the consistent view of the Indian judiciary<sup>46</sup> has been that order VII rule 11 of CPC makes it clear that while accepting or rejecting a plaint what can be looked into is only the averments made in the plaint and not defence. The court also applied the ratio of *T. Arivandandam v. V. T. Satyapal and Anr.*<sup>47</sup> with regard to stage and manner of stopping unscrupulous litigations. The court observed " ... If the plaint suffers from the defect as pointed out in Rule 11 of Order VII, the plaint will be rejected but, ...if there has been crafty drafting by shrewd lawyers to conceal material particulars then once written statement is filed, the court can exercise jurisdiction under Order X of CPC, the power to serve interrogatories to get admissions and evidences. Even if that stage is crossed then they can resort to dismissal of the suit on preliminary issues as contemplated under Order XIV Rule 2(2) of CPC. This is only to indicate that at various stages, various remedies are available to the defendants to protect their interest against such fictitious litigations."<sup>48</sup>

#### **Rejection of a plaint on basis of an objection of misjoinder of parties**

A similar question that came up before the Supreme Court in *Prem Lala*

44 AIR 2007 Pat 1.

45 AIR 1994 SC 853.

46 *Jagat Singh v. Bhawani Singh*, AIR 1996 Del 14; *Orissa Mining Corporation Ltd. v. M/s Klockner and Company*, AIR 1996 Ori 163; *Ranjeet Mal v. Poonam Chand*, AIR 1983 Raj 1.

47 AIR 1977 SC 2421.

48 *Supra* note 44 at 4.



*Nahata & Anr. v. Chandi Prasad Sikaria*<sup>49</sup> was regarding rejection of plaint on the basis of an objection of misjoinder of plaintiffs. The court held that, objections of misjoinder of plaintiffs or misjoinder of causes of action are procedural objections, which should not bar the trial court from entertaining the suit and final disposal of it. In the scheme of CPC, there is no such prohibition or prevention at the entry of a suit, which is defective for misjoinder of parties or of causes of action. The court is competent to try the suit and can also require the plaintiffs to correct the mistake. The court while arriving at this decision upheld the decision rendered by the Calcutta High Court in *Assembly of God Church v. Ivan Kapper & Anr.*<sup>50</sup> The court also distinguished the question of law raised in this case from one of its earlier decisions in *Mayar (H.K) Ltd. & Ors. v. Owners & Parties, Vessel M. Vfortune Express & Ors.*<sup>51</sup> where the case was regarding suppression of material facts in the plaint.

#### Maximum time for filing of written statements

Rule 1 of order 8, CPC makes it obligatory on the part of the defendant to file the written statement within 30 days from the date of service of summons. *Proviso* to rule 1 allows the court to extend the period to 90 days provided reasons for the requirement of such extended time is recorded in writing by the court.<sup>52</sup> The reason for granting this power is because each case is different from the other and there could be variety of reasons for not filing the written statements.

In *M/s. R.N. Jadi and Brothers & Ors. v. Subhashchandra*<sup>53</sup> the Supreme Court held that the fact that there is a prescribed time for filing the written statement does not take away the power of the court to accept the written statement beyond time. This is because order 8, rule 1 is procedural and not substantive in nature. The court observed, “ While Justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.”<sup>54</sup>

In *M/s Aditya Hotels (P) Ltd. v. Bombay Swadeshi Stores Ltd. & Ors.*<sup>55</sup> the question of law was some what different. Here the trial court and the high court allowed the defendant to file written statement after the time without indicating any reason for doing so. The Supreme Court while setting aside the order of the high court held, “The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they

49 AIR 2007 SC 1247.

50 2004 (4) Calcutta High Court Notes 360.

51 (2006) 3 SCC 100.

52 See cases like *Shaikh Salim Haji Abdul Khavimsab v. Kumar*, AIR 2006 SC 396 at 399; *Salem Advocate Bar Asson v. Union of India*, AIR 2005 SC 3353 at 3360; *Kailash v. Nauhkau*, AIR 2005 SC 2441 at 2452.

53 AIR 2007 SC 2571.

54 *Id.* at 2574.

55 AIR 2007 SC 1574.



may be, by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel.”<sup>56</sup>

Before the Himachal Pradesh High Court in *Rakesh Jolly v. Bhim Singh & Ors.*<sup>57</sup> there were many defendants but notice was not served to all of them. The defendants who were served notice delayed filing of written statement beyond 30 days period on the reason that some of the defendants were yet to receive the notice. The court observed that “The defendant, who is served in the suit cannot claim the extension of period for filing of written statement only on the ground that other defendant or defendants have not been served or that the served defendant shall file the written statement only after the service of other defendants has been completed.”<sup>58</sup>

**Delay in filing written statement due to not sending documents along with summons**

In *M/s Sreenivas Basudev v. Shree Vineet Kumar Kothari*<sup>59</sup> the Guahati High Court answered the question regarding the delay caused in filing written statement due to reason of not sending copies of documents to the defendant along with the summons. The court held that the civil court has inherent power under section 151 of the CPC to direct the plaintiff to furnish a copy of a document to the defendant if the court is of the view that furnishing of such a copy is necessary or imperative in the interest of justice. When a court directs a plaintiff to furnish a copy of a document to the defendant to enable the latter to file a written statement, time will not start running against him until copies of all the documents are made available to him. Thus the correct interpretation of order VIII, rule 1, would be that in an appropriate case, court can extend the period of 90 days for filing of the written statement if a plaintiff has not, in terms of the directions of the court, supplied to a defendant the copy of the plaint by excluding the period during which the plaintiff had not furnished copies of the documents.

**Filing of additional written statements by legal representatives**

Order 22, rule 4(2) of CPC says that in the event of death of the defendant, a person who is made a party to the suit may make any appropriate defence to his character as a legal representative of the deceased defendant. In *Sumitabai & Ors. v. Paras Finance Co Reg. Partnership Firm*<sup>60</sup> the question of law was regarding filing of additional written statement by the legal heirs when they are *prima facie* found to be co-owners of the property. The court held that they are entitled to file additional written statements in spite of the fact that some of the points in the additional written statements had been rejected earlier when they were sought to be filed as amendments by the deceased defendant.

<sup>56</sup> *Id.* at 1575.

<sup>57</sup> AIR 2007 HP 39.

<sup>58</sup> *Id.* at 39.

<sup>59</sup> AIR 2007 Gau 5.

<sup>60</sup> AIR 2007 SC 3166.



**Amendment of a plaint**

Rule 17 of order 6 says that “the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.” The *proviso* to the rules further lays down that “Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.”

*Krishnadeo Pathaka & Ors. v. Hemlata Choudhary*<sup>61</sup> involves an important question of law pertaining to amendment of the plaint after the closing of evidence. The plaintiff sought for amending the plaint since no specific relief was prayed for possession of the immovable property. The trial court was of the opinion that a new case would be brought out if such an amendment were to be allowed. The court went into the merits of the case and allowing the amendment held that “...amendments should be liberally allowed as it would tend to end all litigations between parties once and for all and, as such, it would be in the larger interest of justice to permit such an amendment especially when none of the parties are taken with surprise.”<sup>62</sup>

**Fifteen years delay in amending plaint**

The Supreme Court in *Shiv Gopal Sah alias Shiv Gopal Sahu v. Sita Ram Saraugi & Ors.*<sup>63</sup> however, has held that when an amendment in the plaint is sought to be made after 15 years without explaining the reasons for delay, it cannot be permitted.

**Amendment of written statement**

In *Ajendraprasadji N. Pande & Anr. v. Swami Keshavprakeshdasji N. & Ors.*<sup>64</sup> the examination in chief of three witnesses were over. The facts showed that the defendants were not diligent to amend the written statement at an earlier stage. More importantly the amendment also seeks to introduce a totally new case. The court held that once the trial begins an amendment could not be permitted.

**Principles to be applied in amending plaint and written statement**

The Supreme Court in *Usha Balasaheb Swami & Ors. v. Kiran Appaso Swami & Ors.*<sup>65</sup> has held that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. “The general principle that amendment of pleadings cannot be allowed so as

61 AIR 2007 Pat 54.

62 *Id.* at 55.

63 AIR 2007 SC 1478.

64 AIR 2007 SC 806.

65 AIR 2007 SC 1663.



to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.”<sup>66</sup> The court further added, “Such being the settled law, we must hold that in the case of amendment of a written statement the courts are more liberal in allowing an amendment than that of the plaint as the question of prejudice would be far less in the former than in the latter case.”<sup>67</sup>

**Delay in filing application for amending written statement is not a ground for its refusal**

In *Andhra Bank v. ABN Amro Bank N.V. & Ors.*<sup>68</sup> there was considerable delay in filing the application for amendment of the written statement. The court held that delay is no ground for refusing the prayer for amending a written statement. Rejecting the argument that the application for amendment was a tactic for stalling the hearing of the suit, the court allowed the amendment relying on the undertaking of the applicant that the amended written statement shall be filed within two days.

In the instant case the court also held that while considering an amendment of the pleadings the court cannot go into the merits of such an amendment. “The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit.”<sup>69</sup>

**Express and implied admission made in written statement**

In *Uttam Chand Kothari v. Gauri Shankar Jalan & Ors.*<sup>70</sup> the important questions that came up before the court were “whether an admission made by a defendant, in his written statement, can be allowed to be withdrawn by way of amendment? Is there, in the matter of permitting such amendment of a written statement, any difference between an ‘express admission’ and an ‘implied admission’? Can a lawyer’s incorrect instructions, omission or failure leading to the making of an implied or express admission, in a written statement, be allowed to be withdrawn by way of amendment and if not what is the remedy for a defendant, whose written statement contains, on account of incorrect instructions, failure or omission of his counsel, an admission, either express or implied? Is there any remedy available at all to a defendant if an admission, implied or express is made by him in a written statement, following incorrect instructions, omissions or failure on the part of his counsel and if so, what is the remedy? Should this

<sup>66</sup> *Id.* at 1667.

<sup>67</sup> *Ibid.*

<sup>68</sup> AIR 2007 SC 2511.

<sup>69</sup> *Id.* at 2513.

<sup>70</sup> AIR 2007 Gau 20.



court interfere with the impugned order passed by the learned trial court disallowing the defendant's prayer for amendment of his written statement?"<sup>71</sup>

Attempting to answer these questions, the court first chose to go into the difference in law between an express and implied admission made in a written statement and withdrawal thereof by way of amendment. The court after reading order 8, rules 3,4, and 5 of CPC held that "evasive denial or non specific denial constitutes an implied admission in a judicial proceeding of civil nature. This does not, however, mean,...that an implied admission must necessarily occur in a judicial proceeding, for, it is possible to make an implied admission, otherwise than in a judicial proceeding, in terms of the provisions of the Evidence Act....An express admission is one which is specifically made, either in a judicial proceeding or otherwise, in accordance with the provisions of the Evidence Act."<sup>72</sup>

As regards the scope of withdrawing an admission, express or implied, through an amendment even in a situation where such an admission was due to the fault of the advocate the court, following the ratio of the decisions in *Heeralal v. Kalyan Mal*,<sup>73</sup> *B. K. Narayana Pillai v. Parameswaran Pillai*<sup>74</sup> and *Union of India v. Pramod Gupta*<sup>75</sup> held that "no admission made in favor of a plaintiff, can be allowed to be withdrawn by amendment."<sup>76</sup> Further, "even an implied admission, made in a written statement, is binding on the party making the admission, such admissions constitute waiver of proof and cannot be allowed to be withdrawn by way amendment of the written statement, particularly, when the admission seeks to displace a plaintiff from the admission made by the defendant in his written statement. ...[Therefore, it is different] to agree with the views expressed, in *M/s Mahendra Radio and Television, Meerut v. State Bank of India* [AIR 1988 All 257] and *Gobinda Sahoo v. Ram Chandra Nanda* [AIR 1974 Ori 36], which lay down that an admission, made inadvertently or erroneously due to fault of an advocate can be allowed even if the effect of such an amendment is to take away the admission made."<sup>77</sup>

In answer to the question that in such a circumstance what could be the remedy of such a defendant, the court held that "in a given case, when the counsels default leads to an implied or express admission, the remedy of the defendant does not lie in withdrawing the admission by making amendment in the written statement, but in making out a case for the court to exercise

71 *Id.* at 21.

72 *Id.* at 22.

73 AIR 1998 SC 618.

74 AIR 2000 SC 614.

75 AIR 2005 SC 3708.

76 *Supra* note 70 at 27.

77 *Id.* at 30.



its powers under the proviso to Rule 5 of Order 8<sup>78</sup> and insist upon the plaintiff to prove his case notwithstanding the admission-express or implied-made in the written statement.”<sup>79</sup> The court also stated “even section 58 of the Evidence Act makes it clear that notwithstanding a defendant’s admission, express or implied, made in his written statement, a court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.”<sup>80</sup> So according to the court the remedy for the affected party in such a case is to apply to the court to direct the plaintiff to prove the fact otherwise than by way of admission. Thus, the court properly balanced various interests and justice was done.

**Adding a condition through an amendment to admission made in written statement**

Similarly in *Usha Balasaheb Swami & Ors. v. Kiran Appaso Swami & Ors.*<sup>81</sup> adding a condition by way of amendment to the admission made by the defendant in the original written statement was in issue. The defendant had not tried to withdraw the admission by way of amendment. Reversing the Bombay High Court decision, from where it had come as a special leave petition, the Supreme Court held that such an amendment was permissible.

## VI FRAMING OF ISSUES

Framing of issues is an important stage at which the scope of the trial is determined. Once the issues are properly and effectively framed by the court, of both law and facts, the answering of those issues would automatically be the solution of the dispute between the two parties. Order 14, rules 1 to 7 of the CPC deal with settlement of issues and determination of suit on issues of law or on issues agreed upon by the parties.

**Severability of issues of law and issues of fact on trial**

Order 14 rule 2 of the CPC says that, “(1) Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub rule (2), pronounce judgment on all issues. (2) Where issues of both law and of fact arise in the same suit, and court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to- (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other *issues* until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.” This means that

78 The proviso to rule 5 gives to the court the power to insist that notwithstanding the fact that there is an implied admission, because of the non-traversing of a fact, the plaintiff proves his statement by adducing the evidence.

79 *Id.* at 30.

80 *Id.* at 31.

81 *Supra* note 70.

normally the court has to pronounce judgment on all issues but where there are issues related to jurisdiction or bar created by any law for the time being in force, the court may post pone the settlement of other issues till these issues are settled.

The Himachal Pradesh High Court in *Prithvi Raj Jhingta & Anr. v. Gopal Singh & Anr.*<sup>82</sup> held that in situations where the court has framed all the issues together, both of law as well as facts and has also tried all these issues together, it is not open for the court to adopt the principle of severability and proceed to decide the issues of law first, without taking up simultaneously other issues for decision. The exceptions are in situations perceived or warranted under sub-rule (2) of rule 2 of order 14 where a court in fact frames only issues of law in the first instance and postpones settlement of other issues. This is because sub-rule (1) does not permit the court to adopt any such principle of severability and to dispose of suit only on preliminary issues, or what can be termed as issues of law. Sub-rule (1) clearly mandates that in a situation contemplated under it, where all the issues have been framed together and have also been taken up for adjudication during the course of the trial, these must be decided together and the judgment in the suit as a whole must be pronounced by the court covering all the issues framed in the suit.

**Relevance of evidence adduced without a specific issue framed on that regard**

As per order XIV of CPC, a court is required to frame issues only on such controversies, as it perceives between the parties. The purpose of this is to enable the parties to direct their resources to those issues, in the form of oral and documentary evidence and for the court to focus its attention to those issues. But what if the parties adduce evidence without a specific issue in that regard? In *Smt Chand Bee & Ors v. Hameedunnissa*.<sup>83</sup> the Andhra Pradesh High Court held that “In such cases, if the court is satisfied that the understanding of the parties was clear and absolute, and they, in turn, have produced all the facts before the court, it can consider the feasibility of dealing with the particular controversy. Such course would become permissible, if only it had any bearing up on the subject matter of the suit.”<sup>84</sup>

## VII APPEARANCE OF PARTIES

The general rule is that once the summons is served to the defendant, the parties shall be present at the court on such day, which is mentioned in the summons as the date for the appearance of the defendant. The parties may on that day appear either in person or through their respective pleaders.

<sup>82</sup> AIR 2007 HP 11.

<sup>83</sup> AIR 2007 AP 150.

<sup>84</sup> *Id.* at 155.





Thereafter the court may hear or adjourn the case for a future date.<sup>85</sup> But if on such date none of the parties appear in person or through pleader the court may dismiss the suit.<sup>86</sup>

**Non-appearance of counsel- whether party can be made to suffer?**

In *Lal Devi & Anr. v. Vaneeta Jain & Ors.*<sup>87</sup> the question before the Supreme Court was regarding setting aside an *ex parte* decree, in a case which was made *ex parte* due to non appearance and non representation by the counsel for the defendant. The facts of the case were that the counsel engaged by the defendant did not appear before the court nor represented to the court about his absence, which made the court to proceed with the case *ex parte*. The trial court heard the witnesses and an *ex parte* order was passed. The high court refused to interfere with the order. On appeal the Supreme Court held that "...the passing of an *ex parte* decree in a case of this nature is too harsh a consequence to be upheld. The defendant cannot be made to suffer an *ex parte* decree particularly when he was not at fault, having duly instructed his counsel to appear before the court of the learned District Judge."<sup>88</sup> The court also said, "We are not delving into the technicalities of the legal questions argued before us because we are of the view that in the facts of this case the interests of justice demands that the *ex parte* decree be set aside."<sup>89</sup>

**Is a civil court empowered to order parties to be present in person?**

In *Jagraj Singh v. Birpal Kaur*<sup>90</sup> the Supreme Court held that a civil court has power to direct the party to remain present in person. "...A Court of law may order either the plaintiff or the defendant to remain personally present in Court. For instance, Rule 1 of Order III of the Code of Civil Procedure, 1908 ('Code' for short) states that a party may appear in Court either in person or by a pleader on his behalf. The Proviso of the said rule, however, declares that any such appearance shall, if the Court so directs, be made by the party in person. Likewise, Rule 12 of Order IX provides that where the plaintiff or defendant, who was ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the said Order applicable to plaintiffs and defendants respectively who fails to appear. It is thus clear that in appropriate cases, a Civil Court may direct a party to the suit- plaintiff or defendant, to appear in person."<sup>91</sup>

85 The Code of Civil Procedure, 1908; order 9, rule 1.

86 *Id.* rule 3.

87 AIR 2007 SC 1889.

88 *Id.* at 1893.

89 *Ibid.*

90 AIR 2007 SC 2083.

91 *Id.* at 2085.

**Procedure to be followed in case of non-appearance of defendant**

What is the procedure to be followed by the trial court if the defendant do not appear on a particular day? Is it appropriate for it to give a judgment without setting the defendant *ex parte*? In *M/s Sahara India & Ors. v. M.C. Aggarwal HUF*<sup>92</sup> on the day the case was posted the defendant failed to appear in person or through counsel. The trial court instead of setting the defendants *ex parte* and fixing another date for the case, delivered the judgment on the same day. On appeal, the high court, without discussing any of the pleas and submissions of the appellant dismissed the matter. The Supreme Court, on appeal remitted the matter to the trial court opining that the procedure adopted by the trial court was unusual and order 9, rule 6 of the CPC was clear in this regard.<sup>93</sup>

**Dismissal of suit before issuing summons to defendants**

The brief facts of *Anil Kumar v. VijayaLakshmi M.V*<sup>94</sup> was that the trial court dismissed the suit on merits at the admission stage itself holding that the cause of action averred in the suit was barred by limitation and the suit was not maintainable either on facts or on law. Aggrieved, the plaintiff filed a petition under article 227 of the Constitution before the Kerala High Court contending that the trial court should have issued summons to the defendants and should not have dismissed the unnumbered suit on merits. The high court held that a disposal of a suit before numbering or registering the plaint could be made only as provided under rule 11 of order 7 of CPC.<sup>95</sup> The object of this provision is to save a defendant from being unnecessarily harassed. It is to serve a public purpose by saving the time of the court from meaningless exercise and waste of valuable time and energy. Relying on *Vijai Pratap Singh v. Dukh Haran Nath Singh*<sup>96</sup> the court held that “What the court has to see is whether the pleading discloses a cause of action and not whether the case set up is likely to succeed.”<sup>97</sup>

## VIII COUNTER CLAIMS

Rules 6A to 6G of order 8 confers a statutory right to file a counter claim to the defendant against the claim of the plaintiff. The effect of a counter claim is that it will place the plaintiff in the position of the defendant.<sup>98</sup> As regards the ‘cause of action’ for the plaintiff to file the suit and the defendant to file the counter claim the Supreme Court in *Jag Mohan Chawla v. Dera Radha Swami Satsang*<sup>99</sup> has held that “...the cause of

92 AIR 2007 SC 1261.

93 *Ibid.*

94 AIR 2007 Ker 123.

95 *Ibid.*

96 AIR 1962 SC 941.

97 *Supra* note 94 at 125.

98 B.M. Prasad, *Mullas 'The Code of Civil Procedure'* 502 (17<sup>th</sup> edn., 2007).

99 AIR 1996 SC 2222.



action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit.”<sup>100</sup>

**Whether a counter claim can be raised after issues are framed and evidence is closed?**

In *Rohit Singh & Ors. v. State of Bihar*<sup>101</sup> the Supreme Court held that counter claim under order 8, rules 6A, 6E cannot be raised after issues are framed and evidence is closed. The court said, “A counter-claim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter claim can be raised after issues are framed and evidence is closed.”<sup>102</sup>

**A counter claim against co-defendant without directing it to plaintiff**

In *Rohit Singh*<sup>103</sup> the court also answered the question whether a counter-claim can be directed against the co-defendants alone without directing it against the plaintiff also. The court held that “a counter-claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counter-claim directed solely against the co-defendants cannot be maintained. By filing a counter-claim the litigation cannot be converted into a interpleader suit.”<sup>104</sup>

**Limitation period for filing a counterclaim in wrongful detention of goods**

In *Sankar Dastdar v. Smt Banjula Dastdar & Anr.*<sup>105</sup> the important question before the Supreme Court was regarding the period of limitation for raising a counter claim in respect of wrongful detention of goods. The court by interpreting articles 68, 69 and 91 of the Limitation Act held that limitation period would start running from the time when property was wrongfully detained. Earlier High Court of Calcutta had held that a wrong of this kind was a continuing wrong and hence suit was not barred by limitation. The apex court, however held, “A suit for damages, in our opinion, stands on a different footing vis-à-vis a continuous wrong in respect of enjoyment of one’s right in a property. When a right of way is claimed whether public or private over a certain land over which the tort-feasor has no right of possession, the breaches would be a continuing one. It is however, indisputable that unless the wrong is a continuing one, period of limitation does not stop running.”<sup>106</sup>

100 *Id.* at para 5.

101 AIR 2007 SC 10.

102 *Id.* at 16.

103 *Ibid.*

104 *Id.* at 17.

105 AIR 2007 SC 514.

106 *Id.* at 515.



**Unification of suit and counter claim on appeal**

In *Pampara Philip v. Koorithottiyil Kinhi Mohammed*.<sup>107</sup> the Kerala High Court has held that in a suit, if the counter claim is dismissed and the claim in the plaint is allowed the defendant need not file separate appeal for the dismissal of his counter claim. A single appeal can be filed before the high court challenging both the findings. In such circumstances valuation of appeal would be a combination of the suit plus counter claim.

**IX CROSS OBJECTIONS**

Order 41 rule 22 of the CPC deals with cross objections. Cross objections are in fact cross appeals, which is a substantive right.

**Memorandum of cross objection by respondent**

*S. Nazeer Ahmed v. State Bank of Mysore*,<sup>108</sup> was a money suit where the loan was secured by a hypothecation agreement and equitable mortgage of immovable properties. The respondent filed a suit to recover the money as per the hypothecation agreement. The suit was decreed to that effect. But there were no decree on the mortgage and so the respondent could recover the money by executing the decree on the hypothecation agreement. The hypothecated vehicle however, could not be found and money could not be recovered. So another suit was filed for enforcement of the equitable mortgage. The appellant defended the suit on various pleadings like; (a) the suit was barred by order 2, rule 2 of CPC; (b) the transaction of loan stood satisfied by a tripartite arrangement and transfer of the vehicle to one Fernandes (c) there was no equitable mortgage created; and (d) the suit was barred by limitation. The trial court rejected pleadings (a) and (b) of the appellant, but dismissed the suit accepting pleadings (c) and (d) as sustainable. According to the trial court “there was no creation of a valid equitable mortgage since the memorandum in that behalf was not registered.”<sup>109</sup> The Karnataka High Court on appeal held that memorandum did not require registration and so a valid and enforceable mortgage was created. It also rejected the argument that the suit was barred by limitation. Reversing the decision of the trial court, the high court held that the suit was hit by order 2, rule 2 of the CPC and observed thus: “Since the appellant had not challenged the finding of the trial court that the suit was not hit by Order. 2, Rule 2 of the Code by filing a memorandum of cross-objections the plea in that behalf could not be and need not be upheld.”<sup>110</sup> Invoking order 41 rule 33 of CPC it granted the respondent a decree against the appellant.<sup>111</sup> On special leave to appeal, the important question of law before the Supreme

107 AIR 2007 Ker 69.

108 AIR 2007 SC 989.

109 *Id.* at 990.

110 *Ibid.*

111 *Ibid.*



Court was regarding the admissibility of the suit in view of order 2, rule 2 of CPC.

The court held:<sup>112</sup>

[T]he High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI, Rule 22 of the Code, could not challenge the finding of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief, which had been negated to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the high court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvass the correctness of the finding on the bar of O.2, R.2 rendered by the trial court.

Criticizing the high court for invoking order 41, rule 33, CPC, the Supreme Court held that in a case of this nature "...no recourse to O. XLI, R. 33 is necessary. Order XLI, R.33 enables the appellant court to pass any decree that ought to have been passed by the trial court or grant any further decree as the case may require and the power could be exercised notwithstanding that the appeal was only against a part of the decree and could even be exercised in favour of the respondents, though the respondents might not have file any appeal or objection against what has been decreed. There is no need to have recourse to O. XLI, R. 33 of the Code, in a case where the suit of the plaintiff has been dismissed and the plaintiff has come up in an appeal claiming a decree as prayed for him in the suit."<sup>113</sup>

## X COMPROMISE

Rules 3, 3A and 3B of order 23 make a provision that an agreement or compromise under rule 3 should be in writing and signed by the parties. The object of this provision is to avoid the setting up of oral agreement or compromise to the progress of the suit. Similarly section 89 was added to

112 *Id.* at 991.

113 *Ibid.*



the CPC in the year 1999 to deal with settlement of disputes outside the court.

**Settlement of matrimonial disputes outside court**

Order 32 A and rules 1 to 6 which seek to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement, was added in CPC in the year 1976 through the CPC (Amendment) Act, 1976.<sup>114</sup> In *Smt. Hina Singh v. Satya Kumar Singh*,<sup>115</sup> the High Court of Jharkhand held that section 89 and order 32-A of CPC along with other provisions such as section 23 of the Hindu Marriage Act, 1955 and section 9 of the Family Courts Act, 1984 make it obligatory for the court to give a fair chance to a conciliated or negotiated settlement before adjudication is embarked upon.

**Separate suit for setting aside compromise decree is not maintainable**

In *Brajesh Kumar Awasthi & Anr. v. State of M.P. & Ors.*<sup>116</sup> the question of law decided by the Madhya Pradesh High Court was the maintainability of a separate suit filed for setting aside a compromise decree. Following the decision of the apex court in *Pushpa Devi Bhagat v. Rajinder Singh*<sup>117</sup> the court held that the only remedy available to a party to a consent decree to avoid the same is to approach the court, which recorded the compromise and made a decree in terms of it, and to establish that there was no compromise. The court said that “the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made.”<sup>118</sup> Under these circumstances a separate suit for setting aside the compromise decree could not be maintained at all.

The court accordingly directed the trial judge to treat the plaint as an application for setting aside the judgment and decree passed through an alleged compromise. However, it is unclear as to what made the court to give such a direction, when there was no prayer to that effect.

**Non-signing by a party in a compromise petition**

In *Mavullathil Anandan v. Kannampoliyan Nanu & Ors.*<sup>119</sup> a compromise petition was filed, signed by plaintiff and all the defendants except one and their counsel. But the counsel had signed on behalf of the party who did not sign. Later a compromise decree was passed. The question of law that came up before the court was whether the defendant who did not

114 M. P. Jain, *The Code of Civil Procedure* 1014 (2008).

115 AIR 2007 Jhar 34.

116 AIR 2007 MP 139.

117 (2006) 5 SCC 566

118 *Supra* note 116 at 141.

119 AIR 2007 Ker 146.



sign the compromise petition, was entitled to file an application to set aside the compromise decree on the ground that he was not a signatory to the compromise, alleging fraud? The court held that the compromise decree was valid since the signature of the counsel is sufficient for the non-signatory defendant. To arrive at this decision the court went through the role of the counsel in the common law system, and held that “To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons.” The court interpreted the words ‘in writing and signed by the parties’ in order 23, rule 3 in relation with order 3 rule 1 CPC. It is submitted that even if it is assumed that the signature of the counsel would be sufficient for a compromise petition in terms of order 23, rule 3 CPC, it only means that the signature made by the counsel on the instruction of the party concerned would be sufficient. It does not refer to the signature made by the counsel without the knowledge of party or against his will. The court also should have considered the fact that this is a compromise decree against which no appeal would lie or fresh suit would lie. When there is an alleged fraud, the meaning of ‘in writing and signed by the parties’ in order 23, rule 3 could have been more appropriately interpreted otherwise.

#### **Order 23, rule 3A and jurisdiction of high court**

In *A.A Gopalakrishnan v. Cochin Devaswom Board & Ors.*<sup>120</sup> the Supreme Court held that the bar contained in rule 3A<sup>121</sup> will not come in the way of high courts examining the validity of a compromise decree, when allegations of fraud/collusion are made against a statutory authority which entered into that compromise.

## XI JUDGMENTS, DECREES AND ORDERS

#### **Arbitration award cannot be equated to a decree for purposes of Insolvency Act**

In *Paramjeet Singh Patheja v. ICDS Ltd.*<sup>122</sup> the Supreme Court held that an award rendered under the provisions of the Arbitration Act, 1996 cannot be construed to be a decree for the purposes of section 9(2) of the Insolvency Act.<sup>123</sup>

#### **Setting aside of *ex parte* decree**

In *Tea Auction Ltd. v. Grace Hill Tea Industry & Anr.*<sup>124</sup> the court held that in exercising the discretionary jurisdiction under order 9 rule 13 for setting aside an *ex parte* decree the court may require the defendant to prove

120 AIR 2007 SC 3162.

121 Order 23 Rule 3A reads as follows “R. 3A. No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.”

122 AIR 2007 SC 168.

123 *Id.* at 180.

124 AIR 2007 SC 67.



sufficient cause for his non appearance and also other attending facts and circumstances. The court may also put the defendant on terms, which it thinks fit. The question that arose in this case was whether the court was justified in imposing terms and conditions that were unreasonable. The court held that “ It is, however, trite that such terms should not be unreasonable or harshly excessive. Once t unreasonable or harsh conditions are imposed, the appellate court would have power to interfere with. ... The condition imposed should have reasonable. What would be reasonable terms would depend upon facts and circumstances of each case.”<sup>125</sup>

**Amendment of decrees, judgments and orders<sup>126</sup>**

The brief facts in *The Deputy Director, Land Acquisition v. Malla Atchinaidu & Ors.*<sup>127</sup> were that 19.87 acres of land was acquired under the Land Acquisition Act, 1894. The land acquisition officer granted a compensation of Rs 11,500/- per acre on the basis that the land had 176 palmyrah trees and seven cashew trees. Being unsatisfied the respondents referred the matter to the court of the subordinate judge under section 18 of the Land Acquisition Act. The sub judge enhanced the compensation to Rs 55,000/- per acre. Thereafter the respondents filed an interlocutory application contending that there were 10,000 big palmyrah trees and 4,500 small palmyrah trees and that the order of the sub-judge contained a typographical error. The sub-judge however rejected this application. The respondents then approached the high court by way of a civil revision petition and also filed another appeal in the same high court. A single bench allowed the civil revision petition and directed that the order of the sub-judge be amended. Aggrieved by this, the appellants preferred an appeal before the division bench. Meanwhile the division bench allowed the earlier appeal filed by the respondents and the compensation was increased to Rs 1,50,000/- per acre.

The important issues of law that came up before the Supreme Court were mainly two:

- a. “Whether the ...Single Judge of the High Court was right in law in upholding the plea of the claimants that their grievance (which is not sustainable even on evidence) is amenable for correction under section 152 of the CPC?”
- b. “Whether the...Single Judge was right in entertaining the respondents Revision under Section 115, CPC., more so, when the

125 *Id.* at 70. The court also based its reasoning on *B. Padmavathi Rai v. Parvathiamma*, AIR 1976 Kar 97; *Karumurri Surayya v. Tadepalli Pushpavalli Thayaramma & Ors*, AIR 1950 Mad 618; and *Somlal Nathlal Mistri v. The Vasant Investment Corporation Ltd. & Anr*, ILR(1954) Bom 371.

126 CPC, 1908 s. 152.

127 AIR 2007 SC 740.





matter was seized by a Division Bench and thus pre-empting an adjudication by the later?”<sup>128</sup>

The Supreme Court after going through earlier decisions held that “...the ...Single Judge of the High Court has erred in law in upholding the plea of the claimants that their grievance is amenable for correction under Section 152 of the CPC and that the ... Single Judge was not right in entertaining the respondents revision under Section 115 CPC more so, when the matter was seized by the Division Bench and thus preempting an adjudication by the latter.” Therefore the order passed by the single judge in civil revision petition was set aside and the order passed by the sub judge was restored.

**Auction sale of suit property without initiating formal final decree proceeding**

In *Hasham Abbas Sayyad v. Usman Abbas Sayyad & Ors.*<sup>129</sup> the Supreme Court held that without drawing a final decree proceeding a court cannot put the property on auction sale. The court distinguished between a preliminary decree and a final decree. The court said, “A final decree proceeding may be initiated at any point of time. No limitation is provided therefore. However what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree.”<sup>130</sup>

**Order of withdrawal of suit is not a decree**

In *Kandapazha Nadar & Ors v. Chitraganiammal & Ors.*<sup>131</sup> it was held by the Supreme Court that “when the court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such an order allowing withdrawal cannot constitute a decree and it cannot debar the petitioners herein from taking the defence in the second round of litigation ...”<sup>132</sup>

**Judgments on admissions**

The Delhi High Court in *Mrs. Vijay Gupta & Ors. v. Asok Kumar Gupta*<sup>133</sup> has held that it is a pre-requisite for passing a decree on admission that there has to be a clear and unambiguous admission. One or two lines in a pleading cannot be taken out of context and used as an admission of a party. A pleading or a document has to be construed or read as a whole to see its effect.

128 *Id.* at 744.

129 AIR 2007 SC 1077.

130 *Id.* at 1079.

131 AIR 2007 SC 1575.

132 *Ibid.*

133 AIR 2007 Del 166.

**Enforcement of a foreign judgment**

In *Ramakrishana Balasubramanian v. Ms. Priya Ganesan & Ors.*<sup>134</sup> an interim order was passed by a court in USA directing the mother to hand over interim custody of minor child to the father until further orders. The Madras High Court held that this being an interim and not a final order it did not assume the characteristic of a foreign judgment. The court also stated that in the event of enforcement of a foreign judgement the welfare of the child should be given paramount importance.

**XII SUITS AGAINST GOVERNMENT**

Part IV of CPC which includes section 79 to 82 deals with suits by or against the government or public officers in their official capacity. These sections provide the procedure where a suit is to be instituted by or against the government. It in no way enlarges or affects the extent of the claims or liabilities enforceable by or against the government. The main object of section 80 which provides for prior notice of two months to be given to the concerned governmental authority, is to afford the public officer concerned an opportunity to reconsider his legal position and do the necessary things so as to avoid litigation.

**Dispensing with requirement of leave of court**

In *State of A.P. & Ors v. M/s Pioneer Builders, A.P.*<sup>135</sup> the Supreme Court held that in a suit against government under section 80 of CPC, the statutory requirement of notice to the government could be dispensed with the leave of the court only when urgent and immediate relief is to be granted. The state, in the instant case, did not raise the plea of maintainability of the suit for non-issue of notice in the written statement or additional written statement. In such a situation it could be considered that the state had waived its objections. The court observed that though in this case the objection could be considered as waived, it is to be determined based on the facts of each case and is liable to be tried by the court if raised.<sup>136</sup>

**Maintainability of writ petition against a company, which ceased to be a government company**

The interesting question that came up in *Ashok Kumar Gupta & Ors. v. Union of India & Ors.*<sup>137</sup> was regarding the maintainability of an appeal against the order of the court in a writ petition filed against a government company when that company ceased to be a government company. The writ petition out of which the present appeal arose was filed when the respondent company was a sick government company whose revival was pending before

134 AIR 2007 Mad 210.

135 AIR 2007 SC 113.

136 *Id.* at 118.

137 AIR 2007 Cal 195.



the BIFR. Thereafter the Government of India effected disinvestments by transferring its shares to private parties and the company ceased to be a government company and was not any more an authority under article 12 of the Constitution of India. The counsel for the company submitted that at the time of presentation of the writ petition, the company was amenable to writ jurisdiction under article 226 of the Constitution since it used to perform public and statutory duties. But in the course of proceeding there was a cessation of status of the company due to privatization and disinvestments through transfer of shares to private hands, because of which the pending proceeding also ceases to be maintainable. The Calcutta High Court applying order 22, rule 10 of CPC held that “the status of the respondent company was a Public Sector Enterprise at least on the date of filing of the instant appeal and therefore, the said appeal cannot become invalid due to the subsequent decision of the respondent Government of India on account of privatization of the company by transferring its share in favour of private individuals. The respondent government of India or the respondent company by its subsequent action cannot render a pending appeal infructuous.”<sup>138</sup> The court on the basis of this reasoning held the appeal in the instant case to be maintainable.

### XIII REVISION

Section 115 of CPC speaks about the revisional powers of the high court. As per this power a high court may call for the records of any case, which has been decided by any court subordinate to it, under any of the following circumstances:

- a) Subordinate court exercised jurisdiction not vested in it by law;
- b) Subordinate court have failed to exercise a jurisdiction vested on it;
- c) Subordinate court have exercised jurisdiction illegally or with material irregularity.

The *proviso* to section 115 as amended by the 1999 and 2002 amendment Acts stipulates that the high court shall not vary or reverse any order made except where the order made in favour of the party applying for revision would have finally disposed of the suit or other proceedings. Clause 2 of section 115 says that the high court shall not vary or reverse any decree or order against which an appeal lies either to the high court or to any subordinate courts. Clause 3 states that a revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the high court.

138 *Id.* at 200.



**Revision against an order in an interlocutory application**

In *Col. Anil Kak (Retd) v. Municipal Corporation, Indore & Ors.*<sup>139</sup> the Supreme Court upheld the decision of the high court that no revision would lie under section 115 of CPC against the order of the first appellate court in an interlocutory application. The apex court also held that the high court could either *suo motu* or otherwise convert these revisions into a petition under article 227 of the Constitution.

**Scope of interference by a revisional court in an award passed by a motor accidents claims tribunal**

The important question that came up before the Madhya Pradesh High Court in *National Insurance Company Ltd., Gwalior and etc. v. Shrikant Vinod Tiwari and Ors.*<sup>140</sup> was regarding the scope of interference by a revisional court against an award passed by a Motor Accident Claims Tribunal. The court said that for examining the correctness of the award, passed by the Motor Accident Claims Tribunal, the scope of section 115 CPC is limited and the award passed can be interfered with only on two grounds:

- a. The award so passed is without jurisdiction or in excess of jurisdiction vested with the tribunal.
- b. The award so passed, if allowed to stand, would occasion in failure of justice or cause irreparable injury to the party against whom it was made.

XIV REVIEW

Review under section 114<sup>141</sup> is a remedy to be sought for and applied under special circumstances. The settled position is that the jurisdiction or power to review cannot be assumed or imported in the absence of any specific provision. Thus, in *MCD v. Anil Prakash*<sup>142</sup> it was held by the Delhi High Court that re-hearing matter on merits, re-examination and re-appreciating contentions raised and decided in the original order, while deciding a review application is not permissible. The court also opined that the power of the court to review is circumscribed by the conditions specified in order 47 of CPC.

139 AIR 2007 SC 1130.

140 AIR 2007 MP 98.

141 S. 114 of CPC says that "Subject as aforesaid, any person considering himself aggrieved- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed by this Court, or (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

142 AIR 2007 (NOC) 1653 (Del).



## XV DOCUMENTS

### **Return of documents not admitted in evidence**

In *Lokara Om Kumar v. Baikan Satyanarayana & Ors.*<sup>143</sup> the question that arose before the Andhra Pradesh High Court was whether a document not admitted in evidence and which did not form part of the record could be returned before the conclusion of the suit to the party who produced such document? The court held that it is not necessary for the trial court to mark all the documents produced by the parties to the suit. Only such documents which are admitted in evidence and marked as exhibits form part of the court record. All other documents like the documents produced by the parties but are not taken in evidence can be returned. The court held, “No purpose would be served by retaining the documents, which are not admitted in evidence.”<sup>144</sup>

### **Effect of non-production of documents that plaintiff relies**

Order 7, rule 14 of CPC says that where a plaintiff sues upon a document in his possession or power in support of his claim he shall enter such documents in a list and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof to be filed with the plaint. If such a document is not produced along with the plaint, then it cannot be received in evidence in support of the plaintiff except with the leave of the court. The courts are at discretion to grant leave for producing the documents at a later stage depending upon the facts and circumstances of each case. The orders of the court in this regard have to be speaking orders. The Bombay High Court in *Mohanraj Rupachand Jain v. Kewalchand Hastimal Jain & Ors.*<sup>145</sup> held that there is nothing wrong in granting leave of the court for submission of the documents if they do not substantially affect the rights of parties.

### **Admission of a document**

In *Dr. K.P. Johny v. K.P. James & Anr.*<sup>146</sup> the Kerala High Court decided the nature of order 13 as to admission of a document. In this case the court received the document and assigned number to that document as per rule 4. The question that came up before the court was regarding the inference as to admission once they are so numbered. The court held that by assigning numbers it could be assumed that documents have been admitted or at least admitted subject to objections, which are raised. Endorsement and affixing of seals as mandated by order 13 and rules are only a post admission formality. Any delay in considering the objection to the admissibility of those documents does not confer a right on any party to re-open the evidence

143 AIR 2007 AP 3.

144 *Id.* at 4.

145 AIR 2007 Bom 69.

146 AIR 2007 (NOC) 1106 (Ker).



and further examine and cross-examine the witnesses.

#### XVI MISCELLANEOUS

##### **Applicability of order III, rule 5 CPC**

In *O. N. G. C. Ltd. v. M/s. Nippon Steel Corporation Ltd.*<sup>147</sup> the Supreme Court held that the principles enshrined in order III, rule 5 CPC is only applicable to cases where the counsel acts on behalf of his client and the counsel in his representative capacity represents the client. The court held that “in the instant case, by filing the award at the instance of the arbitrator, the counsel is acting as representative of the arbitrator and was not acting as a representative of the appellant and therefore the presumption envisaged by the said rule cannot be stretched to situations where the pleader is not acting on behalf of the party.”<sup>148</sup>

##### **Effect of conflict between original side rules of a high court and CPC**

In *Birla Corporation Ltd. v. Prasad Trading Company & Anr.*<sup>149</sup> the Calcutta High Court held that the original side rules of a chartered high court, framed under clause 37 of the letters patent read with section 108 of the Government of India Act, 1935 and article 225 of the Constitution, have got the effect of Supreme Court legislation. The court also held that it being a special legislation would override the general law of procedure. The practice and procedure followed by the court for a long time partakes the character of a law by virtue of rule 3, chapter XL of the original side rules. This practice and procedure, which are having the status of law, cannot be taken away or curtailed by a general law like CPC.

##### **Abatement of suit**

In *Baldev Singh and Ors. v. State of H.P. & Ors.*<sup>150</sup> the Himachal Pradesh High Court held that, where there are large number of plaintiffs, if some of them die during the pendency of the suit and their legal heirs do not come on record in time, the surviving plaintiffs could not be deprived of their right to seek declaration nor could their claim be held to have abated. The court said, “...as a matter of fact, even the claim of the deceased could not be said to have abated as the other plaintiffs could have pursued the suit on behalf of the deceased plaintiffs.”<sup>151</sup>

##### **Substitution of legal representatives of defendant**

The Rajasthan High Court in *Prem Singh (Deceased through L.Rs.) v. Smt. Savitri Devi & Ors.*<sup>152</sup> held that when legal representatives of a

147 AIR 2007 SC 327.

148 *Id.* at 334.

149 AIR 2007 Cal 38.

150 AIR 2007 HP 32.

151 *Id.* at 33.

152 AIR 2007 Raj 64.



deceased defendant come on record, they are not permitted to take a plea contrary to the one taken by the deceased defendant. It also held that the legal representatives could not re-agitate a plea, which was earlier raised by the deceased defendant.

**Leave to defend a summary suit**

The question that arose in *Ajay Bansal v. Anup Mehta & Ors.*<sup>153</sup> was whether an application under article 227 of the Constitution could be entertained, when an appeal could be filed under section 96 CPC against a decree passed in a summary suit where leave to defend the suit has been refused. The court held: “Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies.”<sup>154</sup>

**Meaning of ‘immediately’ in order 21, rule 84(1)**

In *Rosali V. v. Taico Bank & Ors.*<sup>155</sup> an auction sale was conducted at about 4 PM and the auction purchaser could not raise the money immediately because most of the banks were closed by that time. The main issue before the Supreme Court was regarding the meaning of ‘immediately’ in order 21, rule 84(1) of the CPC.<sup>156</sup> The court said that the term immediately has two meanings, one, which indicates the relation of cause and effect and the other, the absence of time between two events. The former approach means proximately, without any intervention of anything and the latter approach means instantaneously. Relying on the settled principles of interpretation, that when literal meaning leads to anomaly and absurdity it should be avoided; and Parliament must be held to have intended to lay down a reasonable statute unless a plain meaning of the Act leads to a different conclusion, the court interpreted the term to mean ‘with all reasonable speed.’

**Date of institution of suit for ‘original parties to the suit’ and parties added subsequently**

In *Ganapathi (Padala) Suryakumari v. Dr. Erra Ramadevi & Anr.*<sup>157</sup> the Andhra Pradesh High Court held that there is a clear difference between the original parties to the suit and parties who are added subsequently. For the original parties, the date of institution of suit would be the date of actual institution of the suit whereas for those who were subsequently added it would be the date on which the order was passed by the court allowing their impleadment.

153 AIR 2007 SC 909

154 *Id.* at 911.

155 AIR 2007 SC 998.

156 Order 21, Rule 84(1) of the CPC reads as under “84. Deposit by purchaser and resale on default.-(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty –five per cent, on the amount of his purchase money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold.”

157 AIR 2007 AP 118.

**Inherent powers of court under section 151 CPC**

In *Banwarilal Kedia v. A.P. State Electricity Board*<sup>158</sup> it was held that when the court has discretionary jurisdiction to dismiss a case for valid reasons for default, at an equal level, it is also a discretionary jurisdiction to restore the same depending upon the facts of each case.

**Interest on capital: does it amount to punishment?**

In *Alok Shankar Pandey v. Union of India & Ors.*<sup>159</sup> the Supreme Court held that interest is not a penalty or punishment. It held that interest "... is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B."<sup>160</sup>

**Applicability of section 47 CPC between co-plaintiffs or co-defendants**

The brief facts of *Shiv Autar & Anr v. Hariom & Ors.*<sup>161</sup> is that after a decree attained finality, at the execution stage there was a dispute among the respondents as to issuance of warrant of possession. In this dispute among decree-holders, the appellant claimed the warrant of possession in his name whereas the respondents claimed it jointly in favour of all the decree holders. The Madhya Pradesh High Court held that a dispute between the co-defendants or co-plaintiffs was not covered by section 47 CPC, because explanation no. 1 to section 47 stipulates the disputes to be between the plaintiff and defendant.

**Nature of hand-loan between relatives and determination of interest**

In *Manesh Rajkumar Kanhed v. Ramesh Bhagwansa Walale*<sup>162</sup> the Bombay High Court held that a hand-loan between the relatives is not a commercial transaction and the rate of interest must be restricted to 6% per annum from date of decree. The court also said that in the absence of an agreement to pay interest on the said amount, assessment of interest on the said amount prior to the decree would be a nullity. The court held that "...taking of hand-loan for whatever purposes, including starting a business of agency, cannot come within the four-corners of definition of 'commercial transaction'.... especially when it is an admitted position that it was a hand-loan between the relatives of each other."<sup>163</sup>

158 AIR 2007 AP121.

159 AIR 2007 SC 1198.

160 *Id.* at 1199.

161 AIR 2007 MP 130.

162 AIR 2007 Bom 86.

163 *Id.* at 87.





**Withdrawal of a suit by a single plaintiff**

In *Dhoop Singh v. Zile Singh & Ors.*<sup>164</sup> the Punjab and Haryana High Court held that one single plaintiff can withdraw suit *qua* himself without consent of other plaintiffs.

**PART B: LAW OF EVIDENCE**

**I INTRODUCTION**

Nowadays the law generally, and law of evidence particularly is challenged by the advancements in modern science and technology. To face these challenges, changes are inevitable. Firstly, a change is unavoidable in overcoming negative impacts of science and technology on law of evidence. This demands, among other things, the need for adequately training the officers of the various departments of the government and judicial officers. Secondly, science and technology demands positive changes in the law of evidence. An appropriate example for such a change would be the legal recognition of digital signatures. In the year under survey few cases have reflected the approach of the Indian judiciary.

**II EVIDENCE IN CIVIL CASES**

The following are important issues that have been settled by various high courts and the Supreme Court on law of evidence in civil cases.

**Mistake in respect of boundary of the land sold**

In *Jayadeb Sawin v. Santha Behera and Ors.*<sup>165</sup> the Orissa High Court held that if there is a mistake in description of land in respect of *khata* number and plot number, the boundary of land given in sale deed should be given preference to ascertain the land actually sold.<sup>166</sup> The parties may be permitted to adduce evidence about the boundary of the land, as it is a relevant fact as per section 5 of the Indian Evidence Act.

**Evidentiary value of bill of lading**

In *S.K. Networks Company Ltd. v. M/s Amulya Exports Ltd. & Ors.*<sup>167</sup> the Bombay High Court held that a bill of lading is an evidence to establish the fact that goods were actually put on board and were received by the master of the ship. The contents and details of the bill of lading are presumed to be true and correct unless proved otherwise. It also held that a bill of lading is a conclusive statement of a contract between shipper and ship owner, unless there is a fraud.

<sup>164</sup> AIR 2007 (NOC) 1666 (P&H).

<sup>165</sup> AIR 2007 Ori 15.

<sup>166</sup> *Id.* at 18.

<sup>167</sup> AIR 2007 Bom 15.

**Carbon copy of document as primary evidence**

The issue before the Gujarat High Court in *Bhagwanji and Kalyanji v. Punjabhai Hajabhai Rathod*<sup>168</sup> was regarding the value of a carbon copy of original document, in evidence. After going through section 62 explanation 1<sup>169</sup> of the Indian Evidence Act, the court was of the opinion that “In the present case, the submission of the plaintiff had been that the document was executed in two parts, he was left with the carbon copy which was executed in the very same process and was in fact a counter part of the original. If that be so, the said carbon copy would be the primary evidence for the purposes of its production. It would be an altogether different thing that the parties against whose interest the document is sought to be produced may challenge its genuineness or may disprove the same.”<sup>170</sup>

**Admissibility of photocopy of a document in evidence**

In *Smt. J. Yashoda v. Smt K. Shobha Rani*<sup>171</sup> the Supreme Court held that if photocopies of documents are not comparable with the original, the conditions of section 65(a) is not satisfied and those documents cannot be accepted as secondary evidence.

**Admissibility of newspaper reports in evidence**

In *Udaysingh v. State of Maharashtra & Ors.*<sup>172</sup> the Bombay High Court held that mere newspaper reports are not admissible in evidence. However, when identities of newspaper reporters are located and they are supported by newspaper reports, their versions are admissible in evidence.

**Whether marking of a document as an exhibit dispenses with requirement of proving that document**

In *H.P. State Forest Corporation and Anr. v. Ram Singh*<sup>174</sup> the Himachal Pradesh High Court has held that mere marking of the document, as an exhibit does not dispense with proving the said document.

**Evidentiary value of attested copy of a document**

In *Smt Labanya Prova Mitra v. Purnendu Kumar Ghose & Ors*<sup>175</sup> the Calcutta High Court has held that an attested copy is not secondary evidence until the person who attested it do not come forward to prove the accuracy

168 AIR 2007 Guj 88.

169 S. 62 “Explanation 1. - Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.”

170 *Supra* note 168 at 89.

171 AIR 2007 SC 1721.

172 *Ibid.*

173 AIR 2007 (NOC) 1640 (Bom).

174 AIR 2007 (NOC) 1124 (HP).

175 AIR 2007 (NOC) 1164 (Cal) (DB).



of the contents of the copy.

**Acceptance of army record as a proof of marriage**

It was held by the Himachal Pradesh High Court in *Ajay Singh (deceased by LRs.) and etc. v. Tikka Brijendra Singh & Ors. etc.*<sup>176</sup> that, if the fact of marriage is duly recorded by army in its record, such a record could be tendered in evidence to prove the fact of marriage in a court of law.

**Doctrine of estoppel**

In *M. P. Mathur & Ors. v. D. T. C. & Ors.*<sup>177</sup> the Supreme Court held that since the doctrine of promissory estoppel is based on equity the court has to strike a balance between individual rights on the one hand and the larger public interest on the other. The court observed: "In equity the court has to strike a balance between individual rights on one hand and larger public interest in on the other hand. Freedom to contract is a common law civil liberty enjoyed by all persons. But when the government is contracting with private parties this common law freedom is circumscribed by the principles of administrative law which require larger public interest to be taken into account."<sup>178</sup>

**Advertisement as a promise**

The Calcutta High Court in *West Bengal Housing Board and Anr. v. Sunil Prakash and Others*<sup>179</sup> held that deviation by a builder from the promises given in their advertisement is not permissible because people approached the builder after looking into the brochure. The rule of estoppel under section 115 of the Evidence Act would be applicable in such a case.

**Withdrawal of promise with retrospective effect by government**

In *P.V. Vijayakumaran & Ors. v. State of Kerala & Ors.*<sup>180</sup> the Government of Kerala had exempted employees of 'water authority' from payment of stamp duty for executing documents to avail house-building loans from 'water authority.' Thereafter the government withdrew these exemptions with retrospective effect. Few employees who had benefited out of this exemption approached the court. The Kerala High Court held that it was not only a clear breach of promise, but also arbitrary, discriminatory and unenforceable as it violated the rule of promissory estoppel.

**Doctrine of promissory estoppel and doctrine of legitimate expectation**

In *Southern Petrochemichals Industries Co. Ltd v. Electricity Inspector and E.T.I.O & Ors.*<sup>181</sup> the facts show that section 1 of the Tamil Nadu Tax on

176 AIR 2007 HP 52.

177 AIR 2007 SC 414.

178 *Id.* at 418.

179 AIR 2007 (NOC)1182 (Cal).

180 AIR 2007 (NOC) 1067 (Ker).

181 AIR 2007 SC 1984.



Consumption of Electricity Act, 1962, granted some exemption to the entrepreneurs setting up power generating plants from payment of electricity tax. Later on Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003, replaced the 1962 Act. The 2003 Act changed this exemption, which was there in the 1962 Act. The court held that, “The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a state to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the state shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. Appellants had undoubtedly been enjoying the benefit of payment of tax in respect of sale/consumption of electrical energy in relation to the cogenerating power plants.”<sup>182</sup> The apex court further stated “They had invested a huge sum on basis of exemption granted under 1962 Act. In view of the doctrine of promissory estoppel in the case of appellants, their right is not destroyed and in that view of the matter although the scheme under the 2003 Act is different from 1939 Act and the 1962 Act and furthermore in view of the phraseology used in section 20(1) of the 2003 Act, right of the appellants cannot be said to have been destroyed. The legislature in fact has acknowledged that right to be existing in the appellants.”<sup>183</sup> The court further added, “...the doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved.”<sup>184</sup> Regarding the legitimate expectation the court added, “If principle of promissory estoppel would apply, there may not be any reason as to why the doctrine of legitimate expectation would not.”<sup>185</sup>

#### **Recording of evidence through video conference**

In *Bodala Murali Krishna v. Smt. Bodala Prathima*<sup>186</sup> the Andhra Pradesh High Court applied the law laid down by the Supreme Court for examination of witnesses in criminal cases through video conferencing<sup>187</sup> to examination of witnesses in civil cases. The court said that “When such is the facility accorded in criminal cases, there should not be any plausible objection for adopting same procedure, in civil cases as long as the necessary facilities, with assured accuracy exist.”<sup>188</sup>

#### **Cross examining co-defendant**

In *Smt. Saroja Bala v. Smt. Dhanpati Devi & Ors.*<sup>189</sup> the question that

182 *Id.* at 2009.

183 *Id.* at 2011.

184 *Id.* at para 144.

185 *Id.* at para 146.

186 AIR 2007 AP.

187 *State of Maharashtra v. Dr. Praful B. Desai*, AIR 2003 SC 2053.

188 *Ibid.*

189 AIR 2007 Del 105.



came up before the Delhi High Court was whether a co-defendant could cross examine, if he took a contradictory stand on a relevant and material issue. The court after going through section 137 and 138 of the Indian Evidence Act, held that the trial court cannot deny a party to a litigation the basic right to cross examine a witness produced by the other. Stretching this right a little further the court said, "...where parties arrayed as defendants in suit take contradictory stand on a relevant and material issue, they shall be adversary to each other and are entitled to exercise their right of cross examining each other."<sup>190</sup>

**Evidentiary value of chief examination of an attester when he is not cross examined**

The question that came up before the Andhra Pradesh High Court in *Peddavandla Narayanamma v. Peddasani Venkata Reddy & Ors.*<sup>191</sup> was regarding the applicability of section 68 of the Evidence Act in a case where the attester of a will deposed but was not cross examined. The plea that was raised by the respondent was that since the attester was not cross-examined, his deposition in the examination in chief would be hit by section 68. The counter argument was that the respondent admittedly failed to cross-examine the attester and thus it would not be hit by section 68. The court, distinguishing this case from *Gopal Saran v. Satyanarayan*<sup>192</sup> wherein the witness did not turn up for cross examination, held that "...the irresistible conclusion is that the evidence of P. W. 3 cannot be disregarded." and "thereby, the requirement under Section 68 of the Evidence Act, stands satisfied."<sup>193</sup>

**Cross-examination without chief-examination**

In *Smt. Sharadamma v. Smt. Kenchamma & Ors.*<sup>194</sup> the Karnataka High Court held that under section 138 of the Evidence Act, cross-examination follows chief examination. So if there was no chief examination, cross-examination cannot be permitted under any circumstances.

**Filing of affidavit by a minor: whether hit by section 118 of Evidence Act**

The brief facts of *S. Amutha v. C. Manivanna Bhupathy*<sup>195</sup> were that in a case for dissolution of marriage, the minor son was made a witness in favour of the father against the mother. The trial court took on record the sworn affidavit filed by the minor. The Madras High Court held that this act of the trial court was illegal as an affidavit filed by a minor was eschewed as he was incompetent to swear to an affidavit and could not affirm statements found in affidavit received by the trial court. The court also held

190 *Id.* at 106.

191 AIR 2007 AP 137.

192 AIR 1989 SC 1141.

193 *Supra* note 191 at 142.

194 AIR 2007 Kar 17

195 AIR 2007 Mad 164.



that such an affidavit was also inadmissible in evidence in the light of Oaths Act, 1969, read with General Clauses Act, 1897.

**Adverse inference**

In *Jagjit Singh v. State of Haryana & Ors.*<sup>196</sup> the Supreme Court held that drawing an adverse inference is discretion of the court and depends upon the facts and circumstances of each case. In this case the petitioner was disqualified as a member of the legislative assembly on account of defection. The petitioner's allegation was that the speaker of the assembly disqualified him with a *mala fide* intention of keeping him away from voting in the Rajya Sabha election. The court held that "...there is no general rule that adverse inference must always be drawn, whatever the facts and circumstances may be."<sup>197</sup> The court added that the facts and circumstances of this case shows that the petitioner was also delinquent and avoiding the process of law through many of his acts. The court held that in light of these facts, no adverse inference could be drawn against the speaker as alleged by the petitioner.

### III EVIDENCE IN CRIMINAL CASES

**Evidentiary value of delayed FIR**

*Ramdas and Ors v. State of Maharashtra*<sup>198</sup> was a case of rape committed on a girl belonging to scheduled caste. The Supreme Court held that since there was no evidence to prove that the victim was raped because she belongs to scheduled caste, the provisions of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 could not be attracted. The court also held that mere delay in filing FIR was not by itself fatal to the case. However, this delay was a relevant fact or which the courts must take notice. This delay should be considered in the light of other facts and circumstances of the case. The court of facts should consider whether delay in lodging the FIR adversely affected the case of the prosecution. The court should decide this after appreciating the evidence in hand. It should consider all the facts, which could explain the delay. In few cases there might be direct evidence available, which could explain the delay. In few other cases there might be circumstances appearing on the record, which could explain the delay. Under such circumstances the court should answer the following questions:

- a. Whether the delay in lodging the FIR adversely affected the case of the prosecution?
- b. If yes, was there any direct evidence or circumstances appearing in record that could explain the delay?

<sup>196</sup> AIR 2007 SC 590.

<sup>197</sup> *Id.* at 613.

<sup>198</sup> AIR 2007 SC 155.



In this case two FIRs were lodged. The first one on the second day of the alleged offence and the second one after eight days of the alleged offence. But the second one did not disclose about the first FIR. The court suspected the reliability of the witnesses and acquitted the accused.

**Confession**

In *Francis Stanley alias Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram*<sup>199</sup> the Supreme Court held that no hard and fast rule could be laid down regarding the acceptability of a confessional statement. General rule is that if a confessional statement is voluntary and free from pressure it can be accepted. But the acceptability depends upon the facts and circumstances of each case.

**Confession made before an officer under NDPS Act: whether hit by section 25?**

In *Francis Stanley alias*<sup>200</sup> the apex court held that an officer under NDPS Act is an officer of the Department of Revenue Intelligence and a confession made to him is not hit by section 25. But in this case the court cautioned that such a confession must be subjected to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under the Act.

**Reliability of a confession**

In *Bishnu Prasad Sinha & Anr. v. State of Assam*<sup>201</sup> the Supreme Court analysed the evidentiary value of a confessional statement. The court said, “A confessional statement, as is well known, is admissible in evidence. It is a relevant fact. The court may rely thereupon if it is voluntarily given. It may also form the basis of conviction, wherefore the court may only have to satisfy itself in regard to voluntariness and truthfulness thereof. A confession which is not retracted even at a later stage of the trial and even accepted by the accused in his examination under section 313 of the Code, in our considered opinion, can be fully relied upon.”<sup>202</sup>

**Extra judicial confession: whether witnesses to whom such a confession is made has to remember the exact sentence**

The Supreme Court held in *Ajay Singh v. State of Maharashtra*<sup>203</sup> that the exact words used by the accused need not be stated. The only thing is that there should not be any vital and material difference. The court observed: “If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by the accused, evidence can be acted upon even though substance and not actual words have been stated. Human

199 AIR 2007 SC 794.

200 *Ibid.*

201 AIR 2007 SC 848.

202 *Id.* at 853.

203 AIR 2007 SC 2188.



mind is not a tape recorder, which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused.”<sup>204</sup>

**Identification parade**

The purpose of test identification parade was examined in *Heera & Anr. v. State of Rajasthan*.<sup>205</sup> by the Supreme Court. The court held that the purpose of the identification parade is to check the memory of eyewitnesses based upon their first impression and to help the prosecution in deciding as to who can be cited as eyewitnesses. This does not constitute substantive evidence. Conducting of such test identification parade is not obligatory but if it is conducted, it should be done soon after the arrest of the accused.

**Showing photographs of suspects to witness before identification parade**

In *State of Madhya Pradesh v. Chamru @ Bhagwandas etc.*<sup>206</sup> photographs of the accused were shown to child witnesses before the identification parade. The Supreme Court held that this took away the effect of test identification parade.

**Miscellaneous**

*Baso Prasad & Ors. v. State of Bihar*,<sup>207</sup> was a murder case in which the time of death was questioned, on the basis of absence of *rigor mortis* even after a lapse of six to seven hours. The court after referring to authoritative works on medical jurisprudence held that presence or absence of *rigor mortis* depends on many factors including, age and the condition of the body, mode of death, surroundings, season of the year and the temperature in the region and the conditions under which the body has been preserved. The court held that “the exact time of death, therefore, cannot be established scientifically and precisely, only because of presence of *rigor mortis* or in the absence of it.”<sup>208</sup>

IV CONCLUSION

As has been the trend for past many years, the year under survey has also proved the fact that the working of judicial process in the field of procedural laws is based on the principles of judicial pragmatism. The first and foremost reason for this reasoning is the stand taken by the courts that wherever possible the judiciary ought to move away from literal interpretation of the law in the statute book. The second reason is that procedural law rests in the domain of the courts as it was always, giving more leeway for the courts to

204 *Id.* at 2190.

205 AIR 2007 SC 2425.

206 AIR 2007 SC 2400.

207 AIR 2007 SC 1019.

208 *Id.* at 1023.





give practical solutions to disputes when compared to substantive law of strict application. It can be said that both these factors are healthy as long as they properly balance the interests of the parties at one hand and promote the stability and efficiency of the legal system in resolving the varied disputes on the other hand. The judiciary in India cannot remain unheard about arguments advocating for unified transnational standards of civil procedure. It is also hoped that the ongoing efforts of training the judicial officers all over India, in various aspects of computer technology would be of great help in evaluating the electronic evidence. Hence, the need of the day is to adopt a holistic approach and thereby promoting the interests of different stakeholders without compromising on the very principle of procedural justice to parties.