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CIVIL PROCEDURE

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I INTRODUCTION

PROCEDURAL LAW reminds one of an oft-quoted aphorism that "not only must justice be done, but it should manifestly and undoubtedly be seen to be done". Reasonable opportunity for meaningful and effective participation, in a given case, of all stakeholders in the judicial process is required not only for the purpose of manifestation of "justice" but essentially for the purpose of reaching "just decision" itself. It is in this context that the fundamental canons of procedural law acquire more significance.

Though the procedural law is considered to be a handmaid, the essence and spirit behind it are not merely of some importance but are of fundamental importance. They are the guiding principles in the administration of justice and, thus, are not always to be personified as a "handmaid" but a "mistress", indeed, as well to certain extent.

The extent of development and application of procedural law reflects, at least partly, the fairness in the process of administration of justice. An attempt has been made, in this survey, to encapsulate important judicial pronouncements so as to reflect the development and application of civil procedural law in the year under survey.

II JURISDICTION

Under the Code of Civil Procedure (herein after referred to as Code), civil courts, subject to their territorial and pecuniary limits, have the jurisdiction to try all suits of civil nature provided their cognizance is not, either expressly or impliedly, barred. In other words, as per section 9, civil courts have inherent jurisdiction to try all suits of civil nature unless a part of that jurisdiction is carved out, either expressly or by necessary implication, by any statutory provision and conferred on other tribunal or authority. Thus, law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by statute.[1] Various issues relating to jurisdiction

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1 *Abdul Gafur* v. *State of Uttarakhand*, (2008) 10 SCC 97.

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of civil courts have been the subject matter of judicial discourses in the year under survey.

Territorial jurisdiction

In *Dabur India Ltd.* v. *K.R. Industries*,[2] the apex court has dealt with the question whether the composite suit for passing off and copyright infringement can be filed at a place where the plaintiff resides or carries on business, etc. in terms of section 62 of the Copy Right Act, 1957?

Clause (2) of section 62 of the Copy Right Act provides for an additional forum to file suit for copyright infringement. It authorizes a person to institute suit or other proceedings in the court within the local limits of whose jurisdiction the person instituting the suit or other proceedings or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain as well. It is provided in addition to what is provided under section 20 of the Code. However, similar provision has not been made in the Trade and Merchandise Marks Act, 1958. Thus, having considered the true intent and purport of the relevant provisions of law in detail, the apex court held that the composite suit for passing off and copyright infringement cannot be filed at a place where the plaintiff resides or carries on business, etc.

Territorial jurisdiction specified in the contract

In *M/s. Associated Rubber Products* v. *M/s Harry and Jenny and Ors.*,[3] the High Court of Karnataka considered the implications of a clause in the contract specifying the territorial jurisdiction as to where suits for dispute arising out of a contract can be instituted. The court was of the opinion that jurisdiction of the court specified in the contract can safely be presumed and it can also be inferred that there is an exclusion of the jurisdiction of all other courts. Absence of the words like 'alone', 'only' or 'exclusive', indicating that jurisdictions of all other courts except the one specified in the contract stand excluded, would be irrelevant. The court relied on the rule *expressio unius est exclusio alterius* to reach this conclusion. It is submitted that the conclusion reached by the High Court of Karnataka in the present case is contrary to the one reached by the High Court of Madhya Pradesh in *Registrar, Mahatma Gandhi Chitrakoot Gramodaya Vishwavidyalaya* v. *M.C. Modi*[4] decided in 2007. The High Court of Madhya Pradesh, while interpreting a similar clause in the contract, has emphasized on the words like 'only', 'alone' or 'exlusive' to infer the exclusion of jurisdiction of civil courts except the one situated in the place mentioned in the contract. Contrary conclusions reached by two different high courts while interpreting similar clauses in the contract give rise to a substantive question of law, thus, need to be settled at the earliest.

2 (2008) 10 SCC 595.
3 (2008) AIHC 2754.
4 (2008) AIHC 650.

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Exclusion of jurisdiction

As stated above civil courts have the jurisdiction to try all suits of civil nature unless, either expressly or impliedly, excluded. Generally, provisions excluding jurisdiction of civil courts and provisions conferring jurisdiction on authorities and tribunals other than civil courts are strictly construed for there is a fundamental presumption in statutory interpretation that ordinary civil courts have jurisdiction to decide all matters of a civil nature.[5] Thus, courts would normally lean in favour of construction, which would uphold retention of jurisdiction of civil court. And the burden of proof in this respect is always on the party who asserts that the civil courts jurisdiction is ousted.[6] The apex court seems to have consistently adopted the same approach during the year under survey.

In *Rajasthan SRTC* v. *Mohar Singh*,[7] the apex court considered the extent of exclusion of jurisdiction of the civil court by the Industrial Dispute Act, 1947 (ID Act). In the instant case, the respondent, a driver with the appellant corporation, filed a civil suit challenging his dismissal and the same was set aside by the civil court on the ground of violation of principles of natural justice. First and the second appeal filed against the said order were dismissed. It was contended on behalf of the appellant before the apex court that the civil court had no jurisdiction to entertain the suit. Rejecting the contention, the apex court held that it is a settled law that where the right is claimed by the plaintiff in terms of common law or under a statute other than the one which created a new right for the first time and when a forum has also been created for enforcing the said right, the civil court shall also have jurisdiction to entertain a suit. It was also observed that since the appellant authority is a "state" within the meaning of article 12 of the Constitution of India, it is bound to follow the principles of natural justice. Court was of the opinion that in the event it is found that the action on the part of the state is violative of the provisions of the constitutional provisions or mandatory requirements of a statute or statutory rules, the civil court would have the jurisdiction to direct reinstatement with full back wages. However, in *Chief Engineer, Hydel Project* v. *Ravinder Nath*,[8] the dispute as to whether the principle of "first come last go" is applicable while effecting termination was considered to be an industrial dispute under section 25G of the ID Act and accordingly, it was held that civil court had no jurisdiction.

In *V. Laxminarasamma* v. *A. Yadaiah*,[9] the apex court considered the extent of jurisdiction of special courts established under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 *vis-à-vis* jurisdiction of civil courts

5 *United India Insurance Co. Ltd*. v. *Ajay Sinha*, (2008) 7 SCC 454.
6 *Tata Motors Ltd*. v. *Pharmaceutical Products of India Ltd.,* (2008) 7 SCC 619.
7 (2008) 5 SCC 542.
8 (2008) 2 SCC 350.
9 (2008) 4 SCC 526.

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under the Code. However, owing to the contradictory views expressed by two coordinate benches of the Supreme Court in earlier cases,[10] the matter was referred to the larger bench for decision. This approach of the court is highly appreciable. Though a bench of the Supreme Court is not bound by the decision of the coordinate bench made in an earlier case, judicial propriety requires, in order to establish uniformity, that the latter coordinate bench confronted with a similar issue should always refer the matter to the larger bench in case of disagreement with the views expressed in an earlier decision. Thus, uniformity in the judicial discourses on a particular question of law may be established, which, indeed, serve as a clear guide for subordinate courts.

The jurisdiction of the special tribunal set up under the Andhra Pradesh (Andhra Area) Tenancy Act, 1956 was in issue before the court in *Kalipindi Appala Narasamma* v. *Alla Nageshwara Rao*.[11] In the instant case the appellant-plaintiff filed a suit before the civil court asking for various reliefs including that of the declaration of permanent leasehold right and interest of the plaintiffs as per the terms and conditions of the original registered permanent lease deed, possession of property after eviction of the defendants, past and future *mesne* profits among other things, which were decreed by the civil court. The high court, in an appeal, set aside the decree of the trial court on the ground that the suit was not maintainable before the civil court. Reversing the order of the high court, the apex court observed that the suit filed by the appellants was in effect and substance, for declaration of title and recovery of possession and the same was maintainable before the civil court and merely because for grant of ancillary relief claimed by the plaintiff, the special tribunal could have been moved, the civil courts jurisdiction cannot be treated to have been ousted. Thus, in the opinion of the apex court, the high court committed an error in dismissing the suit on the ground that the civil court did not have jurisdiction to entertain the suit. Similarly, in *R. Gopalakrishna* v. *Karnataka State Financial Corporation*,[12] the High Court of Karnataka held that neither section 91 of the Karnataka Land Revenue Act, 1964 nor section 29 of the State Financial Corporation Act, 1951 exclude, either expressly or impliedly, the jurisdiction of civil court.

Further, when a statutory provision mandates that a suit for infringement of rights guaranteed thereunder is to be instituted in a particular court, jurisdiction of all other courts stands excluded. This aspect has been reiterated in *Sanjay Kumar @ Mallu* v. *Manoj Kumar Sahu*,[13] where the

10 See *Konda Lakshmana Bapuji* v. *Govt. of A.P.,* (2002) 3 SCC 258 and *N. Srinivasa Rao* v. *Special Court*, (2006) 4 SCC 214. In the former case, it was held that mere allegation of an act of land grabbing is sufficient to invoke the jurisdiction of special court whereas in the latter case it was held that actual dispossession must be established to invoke the jurisdiction of special court.

11 (2008) 10 SCC 107.

12 (2008) AIHC 2081.

13 (2008) AIHC 2805.

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court considered the question as to whether a suit for infringement of trademark can be instituted in the court of civil judge (senior division). After considering the implications of section 134 of the Trade Marks Act, 1999 in the light of sections 9 and 15 of the Code, the court came to the conclusion that a suit for infringement of trademark cannot be filed in any court inferior to the district court.

Arbitration clause *vis-à-vis* civil courts jurisdiction

In *Indian Drugs and Pharmaceuticals Ltd.* v. *M/s Ambika Enterprises*,[14] the question as to whether the civil court can entertain a dispute which is referable to arbitration in terms of section 8 of the Arbitration and Conciliation Act, 1996 came to be dealt with by the court. Answering the question in the negative, the court observed that where the party approaches the civil court and arbitration clause is put forth as a bar to its jurisdiction, the civil court has the power to decide whether there is an arbitration agreement and if yes, whether the dispute before it falls under the arbitration clause. If it comes to the conclusion that the dispute is covered under the arbitration clause, it has no option but to refer it to arbitration. In the opinion of the court, section 8 of the Arbitration and Conciliation Act, 1996 being a special provision would prevail over section 9 of the Code.

Objection as to jurisdiction

Ordinarily objection as to jurisdiction has to be raised at the court of first instance itself. By virtue of section 21 of the Code, appellate or revisional courts are required not to entertain any objection as to jurisdiction, if the same had not been raised at the first instance. However, the same is not made applicable in case of subject matter jurisdiction. Any order passed by a court without subject matter jurisdiction is a nullity. In *Chief Engineer, Hydel Project* v. *Ravinder Nath*,[15] dealing with the question as to whether objection as to jurisdiction can be raised before the Supreme Court when the same had not been raised before the lower courts, the apex court answered it in the affirmative. It held that once the original decree itself has been held to be without jurisdiction and hit by the doctrine of *coram non judice*, there would be no question of upholding the same merely on the ground that the objection to the jurisdiction was not taken at the initial, first appellate or the second appellate stage.

Decision as to jurisdiction

Civil courts have competence to decide issues relating to their jurisdiction as well. When a preliminary objection as to jurisdiction has been raised, courts are expected to adjudicate upon it. In *AVN Tubes Ltd.* v.

14 (2008) AIHC 619.
15 (2008) 2 SCC 350.

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Shishir Mehta,[16] the trial court before which the defendant raised the objection as to territorial jurisdiction rejected the same. The high court, in revision, held that the trial court had no jurisdiction to try the suit, and this was challenged in the present appeal. The apex court, however, without going into the merits as to whether the court in which the suit had been instituted had territorial jurisdiction to decide the suit or not, directed the trial court to decide the issue along with other issues without being influenced by the observations made either by the trial court or by the high court in revision. It was of the opinion that, in the event the trial court came to the conclusion that it did not have jurisdiction, the suit could be dismissed, otherwise, it could decide the same on merits.

It is submitted with due respect that the apex court does not seem to have appreciated the case in its proper perspective. What was impugned before the apex court was the order passed by the high court, in revision, where it appears to have gone into the merits and reached the conclusion that the trial court did not have jurisdiction. In the context, it does not seem appropriate to expect the trial court to decide the issue afresh notwithstanding the contrary findings of the high court. The apex court should have gone into the merits of the issue relating to jurisdiction and decided the same.

III RES JUDICATA

The rule of *res judicata* is a salutary principle envisaged in adjective law. It is based on both public policy[17] and private justice.[18] It accords finality to judicial decisions. The rule is founded on justice, equity and good conscience. Section 11 of the CPC embodies the rule. Courts in India, keeping in view the ends of justice, have deliberated much upon the relevance and the application of the rule of *res judicata* in different facts and circumstances. In the year under survey also, the judiciary has thrown some light upon different aspects of *res judicata*.

Applicability of *res judicata*

In *Williams* v. *Lourdusamy*,[19] a case relating to declaration of title and recovery of possession, the appellant had challenged the judgment of the high court, which applied rule of *res judicata* relying on some stray observations of the trial judge in an earlier suit instituted for permanent

16 (2008) 3 SCC 272. Similar order was passed by the apex court in *Rajender Singh* v. *Vijay Pal*, (2008) 4 SCC 36 where, of course, both the trial court and the first appellate court held that civil court has no jurisdiction to entertain the suit and the high court reached the contrary conclusion.

17 Envisaged in the maxims: (i) *interest republicae ut sit finis litium*; and (ii) *res judicata pro veritate occipitur*.

18 Envisaged in the maxim: *nemo debet lis vexari pro una et eaden cause*.

19 (2008) 5 SCC 647.

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injunction. The issue before the court, in an earlier suit, was whether on the date of the suit the plaintiff was in possession of the suit property or not but not whether the plaintiff has had the right to possess the property pursuant to or in furtherance of an agreement for sale. While holding that two questions are distinct and separate, the apex court opined that some stray observations made by the trial judge, in an earlier case, on the question which was not directly and substantially in issue would not bar the subsequent suit raising the issue that too when one of the parties to the alleged agreement for sale was not made a party to the earlier suit.

In *Faqruddin* v. *Tajuddin*,[20] the apex court held that where the suit was otherwise barred by *res judicata*, the entry subsequently effected in the revenue records did not give rise to a fresh cause of action so as to take away the effect of principles of *res judicata.*

Further, in *Niyas Ahmad Khan* v. *Mahmood Rahmat Ullah Khan*,[21] relating to the grant of special leave under article 136 of the Constitution, it was contended before the apex court that in several cases the court has rejected the challenge to similar orders by refusing to grant special leave. While rejecting the arguments, the apex court held that dismissal of a special leave petition, in *limine* does not preclude this court from examining the same issue in other cases.

In *Barkat Ali* v. *Badrinarayan*,[22] the apex court reiterated that "the principle of *res judicata* not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same court is precluded to go into that question again which has been decided or deemed to have been decided by it at an earlier stage." In the present case, relating to execution proceedings, despite notice of application under order 21 rule 22, the judgment debtor did not raise any objection and raised the same only after warrants of attachment were issued under order 21 rule 23. The apex court, while applying the rule of constructive *res judicata*, held that order passed under order 21 rule 22 amounts to a decree under section 47 and is appealable as a decree. Once a party has given up its right to object on the application given under order 21 rule 22 it is precluded from raising any objection at subsequent stages of execution proceedings. The judgment-debtor cannot be allowed to revert to earlier stage of proceedings except in case where the order passed under order 21 rule 22 is challenged in appeal.

Constructive *res judicata*

The rule of constructive *res judicata* was applied in *Tata Industries Ltd*. v. *Grasim Industries Ltd.,*[23] while dealing with an issue relating to jurisdiction to appoint the arbitrator. The applicants initially approached the

20 (2008) 8 SCC 12.
21 (2008) 7 SCC 539.
22 (2008) 4 SCC 615.
23 (2008) 10 SCC 187.

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Bombay High Court by way of an application under section 11 (6) of the Arbitration and Conciliation Act, 1996, however, a stand was taken by the other party that it would be an international commercial arbitration and, therefore, it would be the Chief Justice of India alone who would have the power to constitute arbitral tribunal under section 11 (12) of the Act. The *locus standi* of one of the applicants was not challenged before the high court and was only challenged before the apex court on transfer of proceedings. The apex court, while rejecting the argument that the jurisdictional issue was raised before the high court without prejudice to the issue relating to *locus standi*, held that the question of *locus standi* not having been raised before the high court did not survive as it amounted to an abandonment of the issue and hence could not be raised before the Supreme Court. However, in *Severn Trent Water Purification Inc.* v. *Chloro Controls India (P) Ltd.*,[24] where the contention regarding *locus standi* as creditor of the company to bring winding up petition, though raised, was not argued due to the success of alternative contention as to the standing of the appellant as contributory to the company. The decision of the company judge on the point was reversed by the division bench holding that winding up petition as contributory was not maintainable. However, the division bench accorded permission to the appellant to argue its contention, before the company judge, that it had the *locus standi* as creditor of the company. While holding that in view of the finding of the company judge that the petition instituted as "contributory" was maintainable, it was not necessary to address an alternative issue in the earlier instance, the apex court held that the division bench of the high court was not wrong in allowing *Severn Trent* to argue the point subsequently.

In *Fatma Bibi Ahmed Patel* v. *State of Gujarat*[25] where the appellant, on failure of the plea taken in an earlier application that she could not be tried in India without sanction of the central government under section 188 of the Code of Criminal Procedure, 1973 filed a fresh application stating that she was neither a citizen of India nor alleged offence took place in India and, therefore, she could not be tried in India. The said fresh application was resisted on the principle analogous to constructive *res judicata*. The apex court, while rejecting the objections to fresh application, held that the principle analogous to *res judicata* or constructive *res judicata* does not apply to criminal cases. It was further observed that the appellant has a fundamental right in terms of article 21 of the Constitution of India to be proceeded against only in accordance with the law. The appellant has raised a jurisdictional issue that goes to the root of the matter. The entire proceedings having been initiated illegally and without jurisdiction, all actions taken by the court were without jurisdiction and thus are nullities. In such a case even the principle of *res judicata* (wherever applicable) would

24 (2008) 4 SCC 380.
25 (2008) 6 SCC 789.

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not apply. The court was of the opinion that the jurisdictional issues could be permitted to be raised at any stage of proceedings, save and except for certain categories of cases.

Exceptions to *res judicata*

In *Raju Ramsing Vasave* v. *Mahesh Deorao Bhivapurkar*,[26] the apex court, while granting permission to reagitate the issue relating to the respondent 1's status as belonging to the scheduled tribe notwithstanding the earlier high court decision on the issue, has spelt out three exceptions to the rule of *res judicata*: (i) when a judgment is passed without jurisdiction, (ii) when a matter involves pure question of law, and (iii) when the judgment has been obtained by committing fraud on the court.

Maintainability of simultaneous civil and criminal proceedings

An interesting question as to whether an independent criminal proceedings initiated on the basis of certain observations/findings made by a trial court in civil case can be stayed in civil appeal by the high court, was considered by the apex court in *P. Swaroopa Rani* v. *M. Hari Narayana @ Hari Babu*.[27] While holding that the high court was not correct in staying the investigation in the criminal proceedings, it was observed that the high court indisputably is a final court of fact. Although it may, in a civil appeal, go into the correctness or otherwise of the findings arrived at by the trial judge and could set aside such observations or findings, it cannot stay the investigation in a criminal proceedings. In the opinion of the court, filing of an independent criminal case, although initiated in terms of some observations made by a civil court, is not barred under any statute.

In *D. Purushotama Reddy* v. *K. Sateesh*,[28] the court, *inter alia,* dealt with the question as to whether in one proceeding it can issue directions to deposit amount in favour of the plaintiff without taking into consideration the amount deposited by the defendant in the other. Answering the question in the negative, the apex court made an incidental observation reiterating in categorical terms that a suit for recovery of money due from a borrower indisputably is maintainable at the instance of the creditor. It is furthermore beyond any doubt or dispute that for the same cause of action a complaint petition under section 138 of the Negotiable Instruments Act is also maintainable. Thus, the position that there is no bar for maintaining civil and criminal proceedings simultaneously has been reaffirmed.

IV PLEADINGS

It is imperative that in order to have a fair trial, both the parties must be in the know-how of essential material facts on which the other side is relying

26 (2008) 9 SCC 54.
27 2008 (3) SCALE 501.
28 (2008) 8 SCC 505.

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on. Pleading serves this purpose. Pleading, either plaint or written statement, enables the adversary party to know the case it has to meet. Plaint, to state precisely, is a statement of claim on presentation of which the suit is instituted and the written statement is a reply to the plaint. Generally, submissions, which are not based on any of the pleas raised in the pleading, are not accepted in the court during the proceedings.[29] In a civil suit, parties are governed by rules of pleadings and there can be no adjudication of an issue in the absence of necessary pleadings.[30]

Importance of pleadings in civil suits

Emphasizing on the importance of pleading in a civil suit and distinguishing it from the writ proceedings, the apex court, in *SBI* v. *S.N. Goyal*,[31] has held that adjudication of a dispute by a civil court is significantly different from exercise of power of judicial review in a writ proceedings by the high court. In a writ proceedings, the high court can call for records of the order challenged, examine the same and pass appropriate orders after giving an opportunity to the state or statutory authority to explain any particular act or omission. In a civil suit parties are governed by rules of pleading and there can be no adjudication of an issue in the absence of necessary pleadings.

Discovery of new facts

In *SBI* v. *S.N. Goyal*,[32] the order of removal from service was challenged on several grounds. However, the plaint did not contain any plea that the order of removal by the appointing authority (chief general manager) was vitiated on account of his consulting and acting on the advice of the chief vigilance officer of the bank. Though this fact was learnt during the examination of the bank's witness, the respondent-plaintiff did not amend the plaint to include the said plea and no issue was framed in that behalf. Emphasizing on the importance of incorporating such a plea by amending the pleading, the court observed that the Code contains appropriate provisions relating to interrogatories, discovery and inspection to gain access to relevant material available with the other party. A party to a suit should avail those provisions and if any new ground becomes available on the basis of information secured by discovery, a party can amend its pleadings and introduce new facts and grounds, which were not known earlier. The difficulty in securing relevant material or ignorance of existence of relevant material will not justify introduction of such material at the stage of evidence in the absence of pleadings relating to a particular aspect to which the material relates. If a party is permitted to rely on evidence led on an issue/aspect not covered by pleadings, the other side will be put to a disadvantage.

29 *Sea Lark Fisheries* v. *United India Insurance Co.,* (2008) 4 SCC 131.
30 *SBI*. v. *S.N. Goyal, infra* note 74.
31 *Ibid*.
32 *Ibid.*

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Amendment of plaint and written statement

Order 6 rules 17 and 18 deal with amendment of pleadings. The Supreme Court, in *Chander Kanta Bansal* v. *Rajinder Singh Anand*,[33] traced the history of order 6, rule 17, which was omitted by the Code of Civil Procedure (Amendment) Act, 1999 with a view to shorten the litigation and speed up the trial of cases. This rule had been on the statute for ages and there was, in the opinion of the court, hardly a suit or proceedings where this provision had not been used. The omission of the rule, thus, evoked much controversy leading to protest all over the country. Thereafter, the rule was restored in its original form by amending Act 22 of 2002 with an additional rider in the form of a *proviso*. The *proviso* limits the power to allow amendment after the commencement of trial but grants discretion to the court to allow amendment if it feels that the party could not have raised the matter before the commencement of the trial in spite of "due diligence". The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises to the parties. It also helps in checking the delays in filing applications. However, amendment does not entirely shut out entertaining of any later applications. The amendment, to some extent, only limits the scope of amendments to pleadings while leaving enough powers with courts to deal with the unforeseen situations whenever they arise.

Principles governing the question of granting or disallowing amendments under order 6 rule 17 of the Code are well settled and the same have to be kept in mind while dealing with applications seeking amendment either to the plaint or written statement. As postulated under rule 17, amendment to the pleadings can be allowed at any stage of the proceedings. All amendments ought to be allowed which satisfy two conditions: (i) of not working injustice to the other side, and (ii) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where: (i) the other party cannot be placed in the same position as if the pleading had been originally correct, and (ii) the amendment would cause him an injury, which would not be compensated in costs.[34]

It is expedient to exercise the power to allow amendment liberally. The liberal principle which guides the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment.[35]

33 (2008) 5 SCC 117.
34 *North Eastern Railway Administration* v. *Bhagwan Das*, (2008) 8 SCC 511.
35 *Chandra Kanta Bansal*, *supra* note 33, at para 11.

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In *Gautam Sarup* v. *Leela Jatly*,[36] the court vehemently stated that amendment of pleadings being procedural in nature, the same should be liberally granted but as in all other cases while exercising discretion by court of law, the same shall be done judiciously. However, in the facts and circumstances of the case where the defendant admitted in her written statement the pleas and contentions of the plaintiff, the court held she shall not be permitted to amend the same to completely deny or dispute the plaintiff's claim. The submission that other defendants have disputed the claim of the plaintiff and, therefore, the amendment of the written statement would not prejudice the plaintiff was not considered to be a valid ground to accord sanction for amendment.

In *Usha Devi* v. *Rijwan Ahmad*,[37] the apex court considered an important issue relating to the applicability of *proviso* to rule 17, which limits amendment of pleadings after commencement of the trial, to the amendment petition filed after framing of issues. In the instant case, trial court rejected the application for amendment invoking the due diligence clause in the *proviso*. The apex court, having considered the submissions made by both the parties, but without venturing to make pronouncement on the larger issue as to the stage that would mark the commencement of the trial, has only expressed its opinion that "the appeal in hand is closer on facts to the decision in *Sajjan Kumar*[38] and following that decision the prayer for amendment in the present appeal should also be allowed". However, the court, proceeding further, had made a categorical statement to the effect that "in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and it will be open to the respondent-defendants to raise their objection in regard to the amended plaint by making any corresponding amendments in their written statement."[39] As indicated, the court had missed an opportunity to lay down clear propositions as to the stage that would mark the commencement of trial, which is a pre-condition for invoking the *proviso* to rule 17, which, it is submitted, would have provided guidelines for the lower courts.

Rejection of plaint

Rule of pleading postulates that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action, which can be entertained, by a civil court, it may be rejected in terms of order 7 rule 11. Similarly, a plea of bar to jurisdiction of a civil court has to be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the court would not be justified in determining the question, one way or the

36 (2008) 7 SCC 85.
37 (2008) 3 SCC 717.
38 *Sajjan Kumar* v. *Ram Kishan*, (2005) 13 SCC 89.
39 Also see, *M.C. Agrawal HUF* v. *Sahara India*, (2008) 5 SCC 642.

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other, only having regard to the reliefs claimed *dehors* the factual averments made in the plaint.[40]

V ISSUE AND SERVICE OF SUMMONS

Service of summons, containing all necessary details, is a fundamental rule of natural justice envisaged in procedural laws. The main emphasis of the law is on the purpose of service of summons but not on the mode of service. If the defendant/respondent is aware of the legal proceedings, date and place of hearing, the requirement of service of summons is generally not insisted. However, in the absence of such knowledge, the requirement of service of summons acquires more significance. The Code prescribes three principal modes of service of summons. It prescribes personal or direct service of summons as an ordinary mode of service of summons and a "substituted service" as an alternative mode.

Publication of summons in newspaper

Publication of summons in a newspaper is one of the substituted modes of service of summons prescribed under the Code. Where the court orders service of summons by publication in a newspaper and the same is published in a widely circulated newspaper, it is effective notwithstanding the fact as to whether the appellants were subscribers of the said newspaper and whether they were reading it or not. Once a summons is published in a newspaper having wide circulation in the locality, it not open for the person sought to be served with summons to contend that he was not aware of such publication, as he was not reading the said newspaper.[41]

Necessity of service of summons on transfer of case

Where a pending case has been transferred from the civil court to some other adjudicating authority newly constituted under a special legislation, is it necessary to serve the summons to the party, who had appeared before the civil court, engaged an advocate and filed written statement before such transfer, was one of the questions the apex court had to consider in *Sunil Poddar* v. *Union Bank of India*.[42] In the instant case there was, of course, an attempt to serve the summons after transfer of case to debt recovery tribunal and on failure, the same was published in a newspaper as well. However, having considered all these aspects, the court upheld the contention that in view of the fact that the appellants were appearing before the civil court, it was not necessary for the bank to get summons published in the newspaper after the matter was transferred in accordance with law.

40 *Abdul Gafur, supra* note 1.
41 *Sunil Poddar* v. *Union Bank of India*, (2008) 2 SCC 326.
42 *Ibid*.

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Purpose of substituted service

A substituted service is meant to be resorted to serve the notice at the address known to the parties where he had been residing last. Where the party had left the village and started residing outside the country for many years, substituted service effected on him for service of notice at the village address could not be considered as sufficient and effective and that too when the present address was well known to one of the plaintiffs.[43]

VI PARTIES

One of the essentials to the suit is that there must be opposing parties. Order 1 of the Code deals with the parties to suits and order 9 deals with the appearance of parties to the suit and the consequences of their non-appearance.

Necessary parties

A necessary party is one whose presence is indispensable for the prosecution of the suit, against whom the relief is sought and without whom no effective order can be passed. The general rule that a suit cannot be dismissed only on the ground of non-joinder or misjoinder of parties is not applicable to non-joinder of necessary party.

In *State of Uttaranchal* v. *Madan Mohan Joshi*,[44] it was held that seniority or *inter se* seniority is to be determined in the presence of the parties likely to be affected and accordingly, the court remitted the matter to the high court to hear the matter afresh after impleading such necessary parties. Similarly, in *Surinder Shukla* v. *Union of India*[45] and *Sadananda Halo* v. *Momtaz Ali Sheikh,*[46] the court emphasized on the importance of impleading the selected candidates as parties to the writ petitions challenging the selection process.

Determination of dispute as to who is legal representative

When a respondent in an appeal dies, and right to sue survives, the legal representatives of the deceased have to be brought on record, in terms of order 22 rule 4 of the Code, before the court can proceed further in appeal. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. The court cannot postpone the determination of the dispute for being decided along with the appeal on merits. Though order 22 rule 5 of the Code does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, order 22 rule 4 read with rule 11 makes it clear that the appeal can be heard only after the legal representatives are brought on record.[47]

43 *Rabindra Singh* v. *Financial Commissioner., Coop*., (2008) 7 SCC 663.
44 (2008) 6 SCC 797.
45 (2008) 2 SCC 649.
46 (2008) 4 SCC 619.
47 *Jaladi Suguna* v. *Satya Sai Central Trust*, (2008) 8 SCC 521.

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Representative suit

A representative suit should ordinarily be premised on the ground that the plaintiffs or, as the case may be, defendants represents the parties interested in the suit. A litigant, in a representative suit, may execute a decree which was obtained for the benefit of the people of the locality but if he intends to execute a decree which was obtained for his own benefit, those who would be affected thereby should ordinarily be made parties to the suit. In *V.J. Thomas* v. *Pathrose Abraham*,[48] it was held that if the village pathway is the subject matter of the suit filed on the premise that it is the personal property of the plaintiff, those who use the said pathway or at least have lands adjacent thereto should ordinarily be impleaded as parties. A decree obtained by suppression of fact or collusively would not be executable against those who are not parties to the suit.

Decree binding on parties not impleaded in an action

Ordinarily the court does not regard a decree binding upon a person who has not been impleaded in the action. However, there are certain exceptions to this rule. In *Mohd. Hussain* v. *Gopibai*,[49] the apex court reiterated some of the important exceptions. They are:[50]

(i) Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, the decree would be binding on all the persons interested in the estate.
(ii) If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate.
(iii) The court will also investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. Therefore, in the absence of fraud, collusion or other similar grounds, which taint the decree, a decree passed against the heirs impleaded binds the other heirs as well even though the other persons interested are not brought on record.

Setting aside decrees *ex parte*

Order 9 rule 13 of the Code provides for setting aside an *ex parte* decree against defendants if the court is satisfied that the summons was not duly served to defendant/s or that they were prevented by any sufficient cause from appearing when the suit was called on for hearing. But where the defendant had notice of the date of hearing and also sufficient time to appear and answer the claim, he cannot plead non-service of summons as a ground for setting aside the *ex parte* decree.[51]

48 (2008) 5 SCC 84.
49 (2008) 3 SCC 233.
50 *Id.* at para 13.
51 *Sunil Poddar, supra* note 41.

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In *Rabindra Singh* v. *Financial Commr. Coop.*,[52] the apex court considered the power of land revenue court to set aside *ex parte* decree in the face of inapplicability of the Code and absence of express provision in the relevant statute. The court was of the view that all courts, in certain situations, have the incidental power to set aside an *ex parte* order on the ground of violation of principles of natural justice. Thus, even in the absence of any express provision, having regard to the principles of natural justice in such a proceeding, the courts will have ample jurisdiction to set aside an *ex parte* decree, subject, of course, to statutory interdict.

VII APPEAL

It is an understanding of the unavoidability of judicial (human) fallibility in all cases that necessitated appeal to higher courts for the correction of error in order to meet the ends of justice.[53] Though, provisions for appeal may not guarantee an absolutely immaculate decision in every case (it certainly does it in most cases), there has to be an end to the appellate processes as well so that the judicial decisions, at some stage, receive finality. Provisions dealing with appeals, in the Code, seems to have attempted to strike a balance between these two conflicting interests of ensuring immaculate decision on the one hand, and the need to put finality on the other. An overview of provisions dealing with appeals and procedure provided therefor makes it amply clear that the right to file appeal is well regulated under the Code. However, scope and extent of right to file appeal and conditions for exercise of appellate jurisdiction have always been the subject matter of judicial scrutiny in many cases. Some of the cases decided during the year under survey also dealt with these aspects.

Appeal from original decrees

From any decree passed by any court exercising original jurisdiction, first appeal lies to the court authorized to hear appeals from the decision of such court unless otherwise has been expressly provided either under the Code or by any other law for the time being in force.[54] It is open to the first appellate court to examine not only questions of law but questions of fact as well. It is settled law that an appeal is a continuation of suit. An appeal thus is a rehearing of the matter and the appellate court can reappraise, reappreciate and review the entire evidence, oral as well as documentary, and can come to its own conclusion. But, at the same time, the appellate court is expected to bear in mind findings recorded by the trial court on oral evidence for the trial court had an advantage and opportunity of seeing the demeanour of witness. Hence, the trial court's conclusions should not normally be disturbed unless the approach of the trial court in appraisal of

52 (2008) 7 SCC 663.
53 *State of Maharashtra* v. *Sujay Mangesh Poyarekar*, (2008) 9 SCC 475.
54 S. 96.

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evidence is erroneous, contrary to well-established principles of law or unreasonable.[55] The apex court spelt out certain requisites to be fulfilled before an appellate court reverses a finding of the trial court:[56]

(i) It applies its mind to reasons given by the trial court;
(ii) It has no advantage of seeing and hearing the witness; and
(iii) It records cogent and convincing reasons for disagreeing with the trial court.

After satisfying these requisites, it is open for the appellate court to come to its own conclusion.

The Supreme Court in *B.K. Sri Harsha*[57] and *Arundhati*[58] dealt with the mode of disposal of first appeal. In *B.K. Sri Harsha*, the court held that when triable issues are involved, first appeal should not be summarily disposed of. On perusal of the judgment of the first appellate court, the apex court observed thus:[59]

> It is to be noted that pp. 4 to 18 of judgment (in the paper book) are quotations from the trial court's judgment. The quotations were made after briefly referring to the major issues. Up to p. 21 contentions were noted. Learned Single Judge dismissed the appeals in purported exercise of power under Order 41 Rule 1 CPC. Though strictly speaking, the judgment cannot be said to be in limine dismissal of the appeals, yet the manner of disposal of the first appeal leaves much to be desired. When triable issues are involved, the appeals should not be summarily dismissed or disposed of in the manner done.

In *Arundhati*, taking serious note of the manner of disposal of the first appeal which was to be decided, in the opinion of the court, on facts and law, the apex court remitted the matter to the high court for fresh determination by passing a reasoned order in accordance with law after taking into consideration the entire materials on record including the oral and documentary evidence.

Thus, when triable issues, either of fact or of law, involved in the appeal, it is imperative for the first appellate court to examine them and dispose of the appeal with adequate reasoning in support of the same. Merely upholding the judgment of the trial court without assigning reasons therefor would defeat the very purpose of (first) appeal.

55 *Jagdish Singh* v. *Madhuri Devi*, (2008) 10 SCC 497. See also *Mazdoor Sangh* v. *Usha Breco Ltd.*, (2008) 5 SCC 554.
56 *Jagdish Singh*, *id.* at para 36.
57 *B.K. Sri Harsha* v. *Bharat Heavy Electricals Ltd*., (2008) 4 SCC 48.
58 *Arundhati* v. *Iranna*, (2008) 3 SCC 181.
59 *Supra* note 57, para 6. See also *Thimmaiah* v. *Shabira,* (2008) 4 SCC 182.

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In *B.P. Agarwal* v. *Dhanalakshmi Bank Ltd.*,[60] the court dealt with the provision providing for deposit of disputed amount in case of appeal against a decree for payment of money. In the impugned order, the high court, acting under order 41 rule 1(3) of the Code, had directed the appellant to deposit a sum of Rs. 5,00,000 in the trial court within a particular time, which was challenged before the apex court on the ground that the high court could not have directed for the payment in the absence of any application for stay. Upholding the contention and relying on *Kayamuddin Shamsuddin Khan*[61] and *Devi Theatre*,[62] the apex court quashed the direction for deposit of money.

In *Brihanmumbai Mahanagar Palika* v. *Akruti Nirman (P) Ltd.*,[63] where the high court, acting as first appellate court, has disposed of the first appeal with abrupt conclusions without applying its mind to various points urged and with practically no reasoning, the apex court castigated the manner of disposal of the first appeal by the high court. It was observed that when various contentious pleas were raised in the appeal, the high court ought to have analyzed the factual position in the background of principles of law involved and then to decide the appeal. Accordingly matter was remitted without expressing any opinion as to the merit of the case, for fresh consideration by the high court.

An overview of the cases decided in the year under survey suggests that the discourses of the apex court have been motivated by the need and importance of provisions for appeal in the administration of flawless justice. Thus, the emphasis was on proper adjudication of triable issue involved in the appeal.

Appeal from appellate decrees

Unlike the appeal from the original decrees, second appeal under the Code is provided to the high court and only on substantial question of law. It is made mandatory for the party approaching the high court to precisely state, in the memorandum of appeal, the substantial question of law involved in the appeal and also for the high court to formulate the question for hearing the matter. But, the question, what does 'substantial question of law' mean and how is it different from 'mere question of law' and 'mixed question of law and fact', seems to have remained enigmatic till date. The apex court, in *Anathula Sudhakar* v. *P. Buchi Reddy*,[64] while dealing, *inter alia*, with an issue whether the high court, in a second appeal could examine the factual question of title which was not the subject matter of any issue and based on a finding thereon, reverse the decision of the first appellate court, has, in fact, examined the nature of issues framed by the high court as substantial

60 (2008) 3 SCC 397.
61 *Kayamuddin Shamsuddin Khan* v. *SBI*, (1998) 8 SCC 676.
62 *Devi Theatre* v. *Vishwanath Raju*, (2004) 7 SCC 337.
63 (2008) 3 SCC 78.
64 (2008) 4 SCC 594.

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question of laws in the second appeal.[65] The apex court was of the opinion that, of three issues framed by the high court, only the first question formulated by it could arise for consideration in the second appeal as substantial question of law and not the second and third questions. The court was of the opinion that second[66] and third[67] questions formulated by the high court were both mixed questions of law and fact and would not arise for consideration. Similarly, in *Gauri Shankar Prasad* v. *Brahma Nand Singh*,[68] the apex court held that the question, "whether the time was an essence of agreement and whether the appellants – plaintiffs were ready and willing to perform their part of the contract", is, by no stretch of imagination, a substantial question of law. In *Chandrakant Shankarrao Machale* v. *Parubai Bhairu Mohite*,[69] the question, "whether lower appellate court ought to have held that the parties had by their conduct agreed to treat the transaction as a lease and hence the suit filed by respondents for redemption of mortgage was not maintainable and ought to have been dismissed with costs" was not considered to be a substantial question of law.

However, in *Laxmi Ram* v. *Beitshwar Singh*,[70] where the high court had dismissed the second appeal on the ground that no substantial question of law involved therein, the apex court held otherwise. While holding that the high court was not justified in observing that no substantial question of law is involved in appeal, the apex court itself formulated the following two questions of law:[71]

> (iv) Whether the findings of the trial court… is based on an error of record in appreciating the averments made in Para 18 of the

65 The three issues framed by the high court were:
(i) Whether the plaintiffs' suit for permanent injunction without seeking declaration of title is maintainable under law?
(ii) Whether the acts and deeds of Damodar Rao (DW 2) made the plaintiffs to believe that Rukminibai is the ostensible owner of the suit property and thus made them to purchase the suit property for valid consideration and, therefore, the provisions under s. 41 of the Transfer of Property Act are attracted and as such DW 2 could not pass on a better title to the defendant under Ext. B-1?
(iii) Whether the alleged oral gift of the suit property in favour of Rukminibai by DW 2 towards pasupu kumkumam is legal, valid and binding on DW 2 though effected in contravention of the provisions under Section 123 of the Transfer of Property Act?"

66 See para 27, *supra* note 64.

67 See para 28, *supra* note 64.

68 (2008) 8 SCC 287.

69 (2008) 6 SCC 745.

70 (2008) 10 SCC 697.

71 *Id.* at para 5. However, in *Bant Singh* v. *Niranjan Singh*, [(2008) 4 SCC 75], the apex court refused to formulate the substantial question of law and remit the matter to the high court for fresh hearing on the ground that it was too late to do so. It is difficult to understand what prompted the apex court in *Laxmi Ram* to formulate issues and remand the matter back to the high court and why it has refused to do it in *Bant Singh*. It is submitted that proper and adequate reasoning in such cases is highly desirable to have better understanding of judicial decisions.

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written statement which read with the averment made in Para 10 of the written statement makes out a clear case…?

(v) Whether the findings… are vitiated in law for being influenced by an error of record and misappreciation and non-appreciation of evidence on the record…?

Accordingly, the matter was remanded to the high court with a direction to first frame two substantial questions of law mentioned above and to decide the appeal afresh.

It is submitted that the apex court has neither applied any principle or test for determination of 'substantial question of law' nor any such principle or test is discernable from the above rulings. On the other hand, a combined reading of *Anathula Sudhakar*[72] and *Laxmi Ram*[73] rather causes confusion as to what 'substantial question of law' is and how it is different from 'mixed question of law and fact'. As it is evident, the apex court in *Laxmi Ram* has not taken into account rulings made few months earlier in *SBI* v. *S.N. Goyal*,[74] where an attempt was made to explain what substantial question of law is. The court explained thus:[75]

> [T]he word "substantial" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the *lis* between the parties. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of Section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by this Court (or by the High Court concerned so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a

72 *Supra* note 64.
73 *Supra* note 70.
74 (2008) 8 SCC 92.
75 *Id*. at para 13.

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> substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by this Court (or by the High Court concerned), but the lower court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by this Court (or the High Court concerned) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this Court (or the High Court concerned) and the same has been followed by the lower court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two viewpoints, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case. Be that as it may.

The above observations of the apex court are, no doubt, suggestive of what 'substantial question of law' does mean but not exhaustive. Had the court distinguished it from mere 'question of law' and 'mixed question of law and fact', it would have been greatly useful for better understanding of 'substantial question of law'.

The rulings of the apex court, in *Maria Colaco* v. *Alba Flora Herminda D'Souza*,[76] further make the scope and extent of second appeal unclear. The court has observed in the case that "… it is true normally that in the second appeal the High Court should not interfere on the question of fact. But if on the scrutiny of the evidence it is found that the finding recorded by the first appellate court is totally perverse then certainly the High Court can interfere in the matter as it constitutes the question of law…" Thus, the distinction between 'question of law', 'mixed question of law and fact' and 'substantive question of law' still remained obscure.

Further, as stated above and also well settled by a catena of decisions of the apex court the high court in second appeal, before allowing the same, is bound to formulate the substantial question of law and thereafter, to decide the same on consideration of such substantial question of law.[77] Allowing the second appeal without formulating substantial question of law is clearly contrary to the mandate of section 100 of the Code.[78] However, the court, while hearing the appeal, need not confine itself only to such substantive question of law/s so formulated by it. By virtue of *proviso* to clause (5) of section 100 of the Code, high court can hear, for reasons to be recorded in

76 (2008) 5 SCC 268.

77 *Bokka Subba Rao* v. *Kukkala Balakrishna*, (2008) 3 SCC 99.

78 *Basayya I. Mathad* v. *Rudrayya S. Mathad*, (2008) 3 SCC 120. See also *Nune Prasad* v. *Nune Ramakrishna*, (2008) 8 SCC 258; *N. Balakrishnana* v. *Kailasa Naicker*, (2008) 10 SCC 714; *Town Planning Municipal Council* v. *Rajappa*, (2008) 2 SCC 593.

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writing, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question. But this, however, does not mean that the high court can hear the appeal without first formulating substantial question of law/s. The *proviso* is applicable only when any substantial question of law has already been formulated and it empowers the high court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law, which was not formulated earlier, can be taken up by the high court for reasons to be recorded, if it is of the view that the case involves such question.[79]

The high court, under section 100 of the Code, has limited power. It is generally not permissible for the high court to interfere with the question of fact in second appeal[80] though it can do so in certain cases.[81] In *Town Planning Municipal Council* v. *Rajappa*,[82] where the high court, without formulating any substantial question of law and without assigning any reasons, interfered with the concurrent findings of fact recorded by the trial court and first appellate court, the apex court remitted the matter to high court for fresh hearing keeping in view parameters of section 100 of the Code. In the opinion of the apex court, it was not possible to find out as to what weighed with the high court to upset the concurrent findings since the high court's order was practically non-reasoned.

Though the provisions dealing with second appeal in the Code seem to be, more or less, unambiguous, there have been many instances, where the high courts have not appreciated the scope and ambit of second appellate jurisdiction. While taking serious note of the problem, the apex court, in *SBI* v. *S.N. Goyal*,[83] has observed thus:[84]

> It is a matter of concern that the scope of second appeals and as also the procedural aspects of second appeals are often ignored by the High Courts. Some of the oft-repeated errors are:
>
> (a) Admitting a second appeal when it does not give rise to a substantial question of law.
> (b) Admitting second appeals without formulating substantial question of law.
> (c) Admitting second appeals by formulating a standard or mechanical question such as "whether on the facts and

79 *Dharam Singh* v. *Karnail Singh*, (2008) 9 SCC 759.
80 *Basayya I. Mathad, supra* note 78.
81 See for eg., *Bant Singh* v. *Niranjan Singh*, (2008) 4 SCC 75.
82 *Supra* note 78.
83 *Supra* note 74.
84 *Id*. at para 15.

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circumstances the judgment of the first appellate court calls for interference" as the substantial question of law.

(d) Failing to consider and formulate relevant and appropriate substantial question(s) of law involved in the second appeal.

(e) Rejecting second appeals on the ground that the case does not involve any substantial question of law, when the case in fact involves substantial questions of law.

(f) Reformulating the substantial question of law after the conclusion of the hearing, while preparing the judgment, thereby denying an opportunity to the parties to make submissions on the reformulated substantial question of law.

(g) Deciding second appeals by reappreciating evidence and interfering with findings of fact, ignoring the questions of law.

These lapses, in the opinion of the apex court, lead to injustice and also give rise to avoidable further appeals to the Supreme Court resulting in the prolonging of period of litigation. Thus, cautions were issued to the high courts to take proper care to ensure that the cases not involving substantial questions of law are not entertained, and at the same time ensure that cases involving substantial questions of law are not rejected as not involving substantial question of law.

Powers of appellate court

An appellate court has the power, as provided in the Code, to determine a case finally; to remand a case; to frame issues and refer them for trial and even to take additional evidence or to require such evidence to be taken. Appellate courts have the same powers and perform as nearly as may be same duties as that of courts of original jurisdiction. However, these powers are not completely unbridled. They are subjected to such conditions and limitations as may be prescribed.

The scope of power of the appellate court to remand the matter, in terms of order 41 rule 23, is extremely limited. Power of remand can be exercised only after satisfying all the conditions laid down therein. The court should be loath to exercise its power of remand under the said provision and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court, in exercise of its power of remand, cannot shirk its duties.[85]

As regards the power of appellate court to take additional evidence, the general rule is that ordinarily the appellate courts do not travel beyond the records of lower courts and additional evidences are not admitted. But section 107, which carves out an exception to the general rule, enables an

85 *Municipal Corpn., Hyderabad* v. *Sunder Singh*, (2008) 8 SCC 485.

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appellate court to take additional evidence or to require such evidence to be taken subject to certain conditions as are prescribed under order 41 rule 27. Thus, the additional evidence can be admitted only when the circumstances stipulated in the said rule are found to exist. The provisions of section 107 read with order 41 rule 27 are clearly not intended to allow litigant, who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omission in the court of appeal. Under clause (b) of sub-rule (1) of rule 27, an appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it may still consider that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner.[86] Thus, compliance with the conditions specified under rule 27 of order 41 for allowing additional evidence is mandatory. Findings of the appellate court based on an additional evidence produced at the time of argument *dehors* rule 27 cannot be sustained in the eye of law.[87]

Under order 41, rule 33 the appellate court has the power 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 filed any appeal or objection against what has been decreed. However, order 41, rule 33 has limited application. When there exists a legal interdict, the same would not apply.[88]

Relief to party not having preferred appeal

In *Chokalingaswami Idol* v. *Gnaanapragasam*,[89]the apex court considered the question as to whether the high court and the first appellate court were justified in reversing the order of trial court in favour of state government in the absence of state's appeal? In the instant case, the trial court decreed the suit claiming declaration of title and permanent injunction. The state, which was one of the defendants in the suit, did not file any appeal. But in an appeal filed by one of the co-defendants who was allegedly a lessee of the land in question, the first appellate court held that the suit property was government *poramboke* land and as such the idol had no right over the suit property. The said order of the first appellate court was upheld by the high court as well. Having regard to the fact and circumstances of the case,

86 *North Eastern Railway Administration*, *Supra* note 34. See also *Lachhman Singh* v. *Hazara Singh*, (2008) 5 SCC 444.
87 *Basayya I. Mathad*, *supra* note 78.
88 *Samundra Devi* v. *Narendra Kaur*, (2008) 9 SCC 100.
89 (2008) 4 SCC 219.

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the apex court upheld the contention of the appellant that it was not permissible for the first and the second appellate courts to hold in favour of the state government as the government had accepted the judgment of the trial court as no appeal had been filed by it.

VIII REVIEW AND REVISION

The nature, scope and extent of review and revisional jurisdictions have always been the subject matter of judicial scrutiny. In the year under survey as well courts deliberated upon some of the issues.

Review

Section 114 provides for review of decree or order by the court, which passed such decree or, as the case may be, order. Order 47, rules 1 to 9 deal with conditions and procedure therefor. The apex court, in *State of West Bengal* v. *Kamal Sengupata*,[90] has considered the applicability of these provisions to the review proceedings before the administrative tribunals.

Administrative tribunals set up under the Administrative Tribunals Act, 1985 have been freed from the shackles of procedure enshrined in the Code in order to enable them to expeditiously adjudicate service disputes.[91] But at the same time they have been vested with the powers of a civil court in respect of some matters including review of their decisions. Having considered these factors, the apex court came to the conclusion that the power of administrative tribunals to review their own decisions is akin to that of a civil court, therefore, all statutorily enumerated and judicially recognized limitations on the civil courts power to review the judgments would also apply to the tribunals power of review. In other words, tribunals power of review can be exercised only on the grounds specified in order 47, rule 1 of the Code. Further, on detailed consideration of the legal position, the apex court summarized the scope of review power of the tribunals thus:[92]

(vi) The power of the Tribunal to review its order/decision under section 22 (3) (f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.

(vii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(viii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(ix) An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of the record justifying exercise of power under Section 22 (3) (f).

90 (2008) 8 SCC 612.

91 See s. 22 (1) and (2) of the Administrative Tribunals Act, 1985 (Act No. 13 of 1985).

92 *Supra* note 90, para 35.

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(x) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(xi) A decision/order cannot be reviewed under Section 22 (3) (f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

(xii) While considering an application for review, the tribunal must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(xiii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

It is submitted that the administrative tribunals have, for the purpose of discharging their functions, the same powers as are vested in a civil court under the Code, while trying a suit, in respect of several matters enumerated under sub-clauses (a) to (i) of clause (3) of section 22 of the Administrative Tribunals Act, 1985. In the matters of summoning and enforcing the attendance of any person and examination of him on oath; requiring the discovery and production of documents; issuing commissions for the examination of witnesses or documents; receiving evidence on affidavits; reviewing its decisions, etc., the tribunals exercise powers of a civil court. In the light of the decision of the apex court in the instant case, an important question that comes to the fore is whether the administrative tribunals are bound by the provisions of the Code in all such matters where they exercise powers akin/analogous to a civil court? Answering the question affirmatively would negate the very purpose of freeing the tribunals (in express terms) from the shackles of the Code. Thus, there is a need to show circumspection while drawing analogy from the present case.

Revision

Section 115 of the Code deals with the revisional jurisdiction of high courts. It empowers the high court to call for the records of any case, which has been decided by any court subordinate to it. High courts can exercise revisional jurisdiction in respect of any case in which no appeal (either first appeal or second appeal) lies to the high court. However, revisional jurisdiction of the high court under section 115 is not as wide as its appellate jurisdiction. It is restricted both in terms of the grounds on which it can be exercised as well as the nature of order or relief it can grant.

93 (2008) 7 SCC 293.

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In *Yunus Ali* v. *Khursheed Akram*[93] where an order passed by the High Court of Rajasthan in exercise of its revisional jurisdiction was impugned, it was contended before the apex court that the impugned order is perverse, erroneous and illegal as the high court exceeded its jurisdiction in replacing concurrent findings of facts, by the trial court and lower appellate court, with its own findings as if it was exercising the jurisdiction of the appellate court. While setting aside the order of the high court, the apex court delineated the scope of high courts power under section 115 of the Code to interfere with the findings of fact thus:[94]

> It is well-settled position in law that under Section 115 of the Code of Civil Procedure the High Court cannot reappreciate the evidence and cannot set aside the concurrent findings of the courts below by taking a different view of the evidence. The High Court is empowered only to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the courts below. Simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction.

Thus, the high court, while exercising revisional jurisdiction, can interfere with the findings of fact only on limited grounds of findings being either perverse or arbitrary.[95]

IX JUDGMENT, DECREE AND ORDERS

Judgment means, to state precisely, what 'judge meant'. It is a statement of reason given by the judge on the basis of which a decision has been reached. Decree or, as the case may be, order is the formal expression of the decision of the court.

Nature of decree

A decree may denote final adjudication between the parties and against which an appeal lies, but only when a suit is completely disposed of, a final decree would come into being. A decree may be partly preliminary and partly final. But a decree, whether preliminary or final, is binding on the parties. It is now well settled that for the purpose of construing the nature of the decree as to whether it is preliminary or final, one has to look to the terms thereof rather than speculate upon the courts intention.[96]

94 *Id.* at para 20.
95 Also see *Ajit Singh* v. *Jit Ram*, (2008) 9 SCC 699.
96 *Bikoba Deora Gaikwad* v. *Hirabai Marutirao Ghorgare*, (2008) 8 SCC 198.

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Effect of judgment or decree obtained by fraud

In *North Eastern Railway Admn.* v. *Bhagwan Das*,[97] the apex court categorically held that a judgment or decree by the first court or by the highest court obtained by playing fraud on the court is a nullity and *non-est* in the eye of law.

Self-contradictory judgment

As stated above, judgment is a statement of reasoning on which the decision has been reached. There has to be reasonable and logical nexus between the reasoning/findings of the court and the conclusions reached by it. In *State of Bihar* v. *Bokaro and Ramgur Ltd.*,[98] the apex court came across with a self-contradictory judgment, which was impugned before it where apparently there was no nexus between findings recorded by the court and the conclusion reached. The basic issue involved in the case was whether the suit premises were used as an office or *kutchery* for collection of rent. The trial court decided the issue holding that the suit premises were not primarily an office or *kutchery* for collection of rent. In an appeal, a division bench of the high court, despite having arrived at contrary findings, dismissed the appeal. In the opinion of the apex court, when the contrary findings were recorded in favour of the appellant's claim, the only conclusion that could have been arrived at was to allow the appeal, but strangely the high court had dismissed it. The apex court, accordingly, corrected the apparent contradiction in the judgment. It is submitted with due respect that proper care and caution should be taken to avoid inadvertence in writing judgments adjudicating issues relating to life, liberty and property of people.

X EXECUTION

'Execution' refers to the enforcement of decree or order by the process of court so as to enable the decree-holder to realize the fruits of the decree. At times execution proceedings appear to be more cumbersome than the prosecution of the suit itself. In the year under survey, various issues relating to execution came to be considered by the courts, which have been encapsulated hereunder.

Power of executing court

It is well settled that the executing court cannot travel beyond the order or decree under the execution. Executing court has the jurisdiction to execute the orders or decrees in accordance with order 21 of the Code. Thus, the executing court does not have power to award interest if the same has not been awarded in the decree.[99]

97 *Supra* note 34.
98 (2008) 5 SCC 384.
99 *State of Punjab* v. *Harvinder Singh*, (2008) 3 SCC 394.

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Who can resist execution proceedings

In *Usha Sinha* v. *Dina Ram*,[100] whether the purchaser of the suit property during *pendente lite* has any right to resist execution of a decree passed by the competent court was the question the apex court had to consider. On examination of the existing legal position, the apex court held that a purchaser of a suit property during *pendente lite* has no right to resist or obstruct execution of a decree passed by a competent court. The doctrine of *lis pendens* prohibits a party from dealing with the property, which is the subject matter of suit. *Lis pendens* itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit.

Scope of rule 104 of order 21

In *Vaniyankandy Bhaskaran* v. *Mooliyil Padinhjarekandy Sheela*,[101] the Supreme Court considered the question regarding interpretation of rule 104 of order 21 *vis-à-vis* rule 101 thereof in the context of a case where the trial court, in a suit subsequently instituted, passed an order granting injunction to prevent eviction of appellant in execution proceedings. While upholding the order of the high court which set aside the order of the trial court as irregular, the apex court held that the suit filed by the appellant for the specific performance of contract was considerably later in point of time than the commencement of the execution proceedings and, in any event, the language of rule 104 is clear and unambiguous that any order made under rule 101 or 103 would be subject to the result of a suit pending on the date of commencement of the proceedings in which orders were made under rule 101 or 103. Since the appellants suit was filed long after the commencement of the execution proceedings, provisions of rule 104 will not apply.

Stay of execution of decree

In *Oriental Bank of Commerce* v. *Sunder Lal Jain*,[102] where the high court, in an independent writ proceedings, stayed the execution of a decree passed by the debt recovery tribunal, the apex court held that proceedings for execution of a decree could not be stayed in an independent writ petition when the decree had attained finality for not having filed a statutory appeal provided under section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

In *Rajaram Prasad Gupta* v. *Ramachandra Prasad*,[103] the court dealt with an important question as to when can an appellate court ordinarily stay execution proceedings for recovery of residential premises in terms of the decree. The court reiterated that it is well settled that in cases where the subject of the suit is residential premises and the judgment debtor is residing

100 (2008) 7 SCC 144.
101 (2008) 10 SCC 491.
102 (2008) 2 SCC 280.
103 (2008) 10 SCC 796.

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in it, prayer for stay is ordinarily granted and only for special reasons it may be refused.

Application of *res judicata* in execution proceedings

The apex court, speaking on the applicability of *res judicata* to different stages of the execution proceedings, has observed that at different stages of execution, orders passed by the executing court attain finality unless they are set aside by way of appeal before the higher forum. Otherwise they bind the parties at the subsequent stage of the execution proceedings so that the smooth progress of the execution is not jeopardized and the stage, which reached finality by dint of various orders of order 21, operates as *res judicata* for the subsequent stage of the proceedings. Since the order passed at different stage itself operates as a decree and is appealable as such, the same cannot be challenged in appeal against subsequent orders also.[104]

Nature of proceedings under section 54 of the Code

The Supreme Court in *Bikoba Deora Gaikwad*[105] has categorically held that the proceedings under section 54 of the Code cannot be termed to be an execution proceedings. It was observed that section 54 must be read in the context of order 26, rule 13 of the Code and/or section 51, order 21 rule 11 thereof. Section 54 only provides for ministerial functions of a court and, thus, not in the nature of execution proceedings.

XI MISCELLANEOUS

Transfer and withdrawal of cases

The law relating to transfer and withdrawal of suits, appeals and other proceedings is found in section 22 to 25 of the Code. Whereas sections 22, 24 and 25 deal with power of transfer, section 23 merely provides forum and specifies the court in which an application for transfer may be made. Section 23 is not a substantive provision vesting power in particular court to order transfer.[106]

The power to transfer cases is a discretionary power which vests with the courts. Though the scope and extent of the said power cannot be imprisoned within a straitjacket formula, the apex court, keeping in view various judicial pronouncements, has reiterated, in *Kulwinder Kaur* v. *Kandi Friends Education Trust*,[107] what may constitute a ground for transfer of cases. They are:[108]

(i) Balance of convenience or inconvenience to the plaintiff or the defendant or witnesses;

104 *Barkat* Ali, *supra* note 22.
105 *Supra* note 96.
106 *Durgesh Sharma* v. *Jayshree*, (2008) 9 SCC 648.
107 (2008) 3 SCC 659.
108 *Id*. at para 23.

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(ii) Convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit;
(iii) Issues raised by the parties;
(iv) Reasonable apprehension in the mind of the litigant that he might not get justice in the court in which suit is pending;
(v) Important questions of law involved or considerable section of public interested in the litigation;
(vi) Interest of justice demanding for transfer of suit, appeal or other proceedings, etc.

However, the court had made it clear that the circumstances mentioned above are some of the instances, which are germane in considering the question of transfer of cases and are only illustrative in nature and by no means exhaustive. Further, speaking on the scope of section 24 of the Code, the apex court observed that the power conferred under the provision to transfer cases is very comprehensive and can be exercised "at any stage" either on an application by any party or *suo motu*. However, the same has to be exercised with due care, caution and circumspection. While castigating the manner in which the impugned order transferring the case was made by the high court, the apex court observed that while making an order of transfer, normally the court may not enter into merits of the matter as it may affect the final outcome of the proceedings or cause prejudice to one or other side. At the same time, however, an order of transfer must reflect application of mind by the court and the circumstances, which weighed in taking the action. Powers under section 24 cannot be exercised *ipse dixit*.

In *Abdul Gafur* v. *State of Uttarakhand*,[109] the apex court has considered, *inter alia*, an interesting question as to whether the high court, in exercise of its power under section 24 of the Code, was justified *in limine* dismissing two suits and appeals, pending before courts below, after transferring the suits and appeals to itself, on the sole ground that it was proposing to examine a similar issue in the writ petition preferred before it?

In the instant case, the trial court had granted interim injunction, which was challenged before the court of the district judge. Arguments were heard by the judge and orders were reserved. In the meanwhile the high court passed the order withdrawing the suit and appeals to itself. On being served with the copy of the order, the appellants immediately moved an application for recall of the said order. When the transferred case came up for consideration, the high court, without passing any order on the application preferred by the appellants for recall, dismissed both the suit and the appeal on the ground that the issues raised in the suit are being examined in the writ petition. In an appeal before the Supreme Court, it was candidly admitted even by the counsel for one of the respondents that the manner in which the suit and appeal have been dismissed by the high court was indefensible. Having

109 *Supra* note 1.

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considered the matter in the light of earlier judicial pronouncements, the apex court observed thus:[110]

> [W]e are of the opinion that the impugned order cannot be sustained. It is true that under Section 24 of the Code, the High Court has jurisdiction to suo motu withdraw a suit or appeal, pending in any court subordinate to it, to its file and adjudicate itself on the issues involved therein and dispose of the same. Unless the High Court decides to transfer the suit or the appeal, as the case may be, to some other court or the same court, it is obliged to try, adjudicate and dispose of the same. It needs little emphasis that the High Court is competent to dispose of the suit on preliminary issues, as contemplated in Order 14 Rules 1 and 2 of the Code, which may include the issues with regard to maintainability of the suit. If the High Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by V.R. Krishna Iyer, J., in *T. Arivandandam* [(1977) 4 SCC 467], if on a meaningful—not formal—reading of the plaint, it is manifestly vexatious, and merit less, in the sense of not disclosing a clear right to sue, the court should exercise its power under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud at the first hearing by examining the party searchingly under Order 10 CPC. Nonetheless, the fact remains that the suit has to be disposed of either by the High Court or by the courts subordinate to it in a meaningful manner as per the procedure prescribed in the Code and not on one's own whims.

It was categorically stated that the procedure adopted by the high court is unknown to the law. The court reiterated one of the fundamental norms of judicial process that when arguable questions, either legal or factual, are involved, case should not be summarily dismissed without recording a reasoned order. In the opinion of the court, a mere entertainment of the writ petition, to which the appellants were not parties, even if it involved determination of similar issue was not a good ground to dismiss the two suits without granting an opportunity to the parties to prove their respective stands that too when scope of the writ petition and the suit and the appeal seems to be different.

Another interesting aspect with respect to the transfer of cases is that after the substitution of section 25, dealing with power of the Supreme Court to transfer cases, in the year 1976,[111] there has been some overlapping between section 25 and clause (3) of section 23 since the latter has been neither deleted nor amended thereafter. While addressing the issue in

110 *Id*. at para 20.

111 By Act 104 of 1976, s. 11. (w. e. f. 1-2-1977).

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Durgesh Sharma,[112] it was held that since section 23 is merely a procedural provision, no order of transfer could be made under the said provision. If the case is covered by section 25, it is only that section which will apply for both purposes, namely, for the purpose of making application and also for the purpose of effecting transfer. Section 23, thus, must be read subject to section 25. The power vested with the high court by virtue of clause (3) of section 23 immediately prior to the coming into force of the substituted section 25 stood withdrawn thereafter. Therefore, the high court has no power, authority or jurisdiction to transfer a case, appeal or other proceeding pending in a court subordinate to it to any court subordinate to another high court in purported exercise of power under section 23 (3) and it is only the Supreme Court which can exercise such authority under section 25 of the Code.

Inherent powers

Law relating to inherent powers of a court in different circumstances has been enacted in sections 148, 149, 151, 152, 153, 153A of the Code, of which section 151 is of paramount importance. It reads: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court". On a plain reading of the provision, which begins with the words "Nothing in this Code", though it appears that even the express provisions made in the Code are not to be treated as constraints on the inherent power, judicial interpretation ascribed to the provision has, however, narrowed down its scope and ambit. Reiterating the same, the apex court in *Durgesh Sharma* v. *Jayshree*[113] has held that the inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in the Code. The said power cannot be exercised in contravention or in conflict of or ignoring express or specific provision of law. Again, in *State of U.P.* v. *Roshan Singh*,[114] the court while considering the scope and object of section 151 has observed thus:[115]

> The object of Section 151 CPC is to supplement and not to replace the remedies provided for in the Code of Civil Procedure. Section 151 CPC will not be available when there is alternative remedy and the same is accepted to be a well-settled ratio of law. The operative field of power being thus restricted, the same cannot be risen to inherent power. The inherent powers of the court are in addition to the powers specifically conferred on it. If there are express provisions covering a particular topic, such power cannot be

112 *Supra* note 106, paras 55, 57.
113 (2008) 9 SCC 648.
114 (2008) 2 SCC 488.
115 *Id*. at para 8.

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> exercised in that regard. The section confers on the court power of making such orders as may be necessary for the ends of justice of the court. Section 151 CPC cannot be invoked when there is express provision even under which the relief can be claimed by the aggrieved party. The power can only be invoked to supplement the provisions of the Code and not to override or evade other express provisions. The position is not different so far as the other statutes are concerned.

However, in *Tanusree Basu* v. *Ishani Prasad Basu*,[116] it was observed that it is now a well settled principle of law that order 31, rule 1 of the Code is not the sole repository of the power of the court to grant injunction. Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by rules 1 and 2 of order 39 of the Code. The decision of the court implies that provisions in the Code dealing with grant of temporary injunction are not exhaustive. Had they been exhaustive, inherent power under section 151 could not be exercised to grant relief except on the grounds specified in the Code owing to the narrower interpretation ascribed to section 151.

Further, in *Arjan Singh* v. *Punit Ahluwalia*,[117] while emphasizing on the distinct manner of exercise of discretionary power under section 151 and limited power under order 39 rule 2A, it was held that the consequences of violating the order of injunction must be kept confined only to order 39 rule 2A of the Code. On the other hand, the court, in exercise of its inherent power under section 151, in the event of coming to the conclusion that a breach to an order of restraint had taken place, may bring back the parties to the same position as if the order of injunction has not been violated.

Grant of leave in terms of section 92

The object of section 92 of the Code is to protect the public trust of a charitable and religious nature from being subjected to harassment by suits filed against them. If the persons in the management of the trusts are subject to multiplicity of legal proceedings, funds which are to be used for charitable purposes would be wasted on litigation. The harassment might dissuade respectable and honest people from becoming trustees of public trust. Thus, there is a need to scrutinize applications seeking leave of the court to institute a suit. In the suit against public trusts, if on analysis of averments contained in the plaint it transpires that the primary object behind the suit was the vindication of individual or personal rights of some persons an action under the provision does not lie.[118]

Further, a suit contemplated under section 92 of the Code cannot be equated with a probate. In a suit under section 92, the title of the donor may

116 (2008) 4 SCC 791.
117 (2008) 8 SCC 348.
118 *Vidyodaya Trust* v. *Mohan Prasad R.,* (2008) 4 SCC 115.

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be disputed. Such a question as of necessity must be gone into by the court, which, however, is a forbidden domain for the probate court.[119]

Permission to institute a fresh suit on withdrawal

The apex court, in *Vimlesh Kumari Kulshrestha* v. *Sambhajirao*,[120]dealt with the aspect as to when it is not required to specifically seek liberty to file a fresh suit on the same cause of action at the time of withdrawing the suit. In the instant case, the appellant filed a suit for specific performance, which was contested by the respondent, *inter alia*, on the ground that proper court fee had not been paid. The appellant, thereafter, filed another suit and also applied for withdrawal of the earlier suit. In the fact and circumstances of the case, the apex court held order 23 rule 1 is not applicable. In reaching this conclusion, the court relied on the facts that the application filed for withdrawal of the suit categorically stated about the pendency of the earlier suit. The respondent was therefore aware of it. He objected to withdrawal of the suit on the ground that legal costs therefor should be paid. The court accepted this objection and the respondent even accepted the costs as directed by the court granting permission to withdraw the suit. In a situation of this nature, in the opinion of the court, an inference in regard to grant of permission can also be drawn from the conduct of parties as also the order passed by the court. Even a presumption of implied grant can be drawn.

Jurisdiction, powers and functions of *lok adalats*

In *State of Punjab* v. *Jalour Singh*,[121] where the *lok adalat* after hearing the parties, ignoring the absence of consensus, had increased the compensation to an extent it considered just and reasonable by a reasoned order, the apex court, declaring the said order as void and beyond the jurisdiction of *lok adalats,* delineated the jurisdiction, powers and functions of the *lok adalats*. It was observed thus:[122]

> [T]he Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and puts its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject-matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok

119 *Krishna Kumar Birla* v. *Rajendra Singh Lodha*, (2008) 4 SCC 300.
120 (2008) 5 SCC 58.
121 (2008) 2 SCC 660.
122 *Id.* at para 8.

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> Adalats are guided by the principles of justice, equity and fair play. When the LSA Act refers to "determination" by the Lok Adalat and "award" by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The "award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision-making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.

Having taken judicial note of the fact that many sitting and retired judges, while participating in *lok adalats* as members, tend to conduct *lok adalats* like courts, by hearing parties; imposing their views as to what is just and equitable and, sometimes, by passing orders on merits even in the absence of consensus or settlement, the apex court prognosticated that such acts, instead of fostering alternative dispute resolution through *lok adalats*, will drive the litigants away from the *lok adalats*. Thus, in the opinion of the court, the endeavour of the *lok adalats* should be to guide and persuade the parties, with reference to principles of justice, equity and fair play to compromise and settle the dispute by explaining the pros and cons, strengths and weaknesses, advantages and disadvantages of their respective claims.

XII CONCLUSION

In the year under survey, though there are no landmark decisions, contribution of the judiciary in enlivening the essence and spirit of civil procedure is a valuable addition to the procedural law jurisprudence. Judicial decisions rendered during the year have certainly brought conceptual clarity in many respects with exceptions like meaning of 'substantive question of law', which still remains obscure. Apex court's decisions on exercise of appellate jurisdiction and the manner of disposal of appeals serve both as caution as well as guidelines for high courts and courts subordinate thereto exercising appellate jurisdiction. The apex court's delineation of jurisdiction, powers and functions of *lok adalats*, apart from bringing clarity, has brought to light the way in which *lok adalats* are functioning just like regular courts. This prompts us to revisit the idea of having sitting and retired judges as members of *lok adalats* to settle the disputes. Further, the conflicting views expressed by the High Court of Karnataka and High Court of Madhya Pradesh as to the interpretation of contractual clause specifying the jurisdiction is a cause for concern, thus, needs to be settled to bring about clarity and uniformity.

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