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CIVIL PROCEDURE

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I INTRODUCTION

COURTS OF law, while interpreting and applying the provisions of procedural law, generally adopt a liberal approach in order to ensure substantial and real justice to the parties. The said approach is evident in the judgments delivered during the year under survey as well. The apex court even restated the principle that "the procedural laws are primarily intended to achieve the ends of justice, and, normally, not to shut the doors of justice for the parties at the very threshold".[1]

Since the adjudication of disputes in a court of law is to be carried on in accordance with set procedures, the provisions of procedural law are regularly invoked in the adjudicative processes. In some of the cases decided during the survey year, special attention has been paid on certain aspects of civil procedure. Courts have interpreted several statutory provisions, clarified ambiguities therein, elaborated and expounded certain principles and propositions. The present survey restates the development of civil procedural law through judicial decisions delivered during the year, and highlights certain significant changes in some areas.

II JURISDICTION

Territorial jurisdiction

For the purpose of entertaining any suit, generally, there has to be a live link between the cause of action and the territorial jurisdiction of the court concerned. In *InterGlobe Aviation Limited* v. *N. Satchidananda*,[2] the apex court dealt with an important question as to whether parties, by agreement, can confer jurisdiction on a court to deal with issues arising out of such agreement even when there is no live link between the cause of action and its territorial jurisdiction?

Relying on *A.B.C. Laminart*,[3] the apex court held that "any clause which ousts the jurisdiction of all courts having jurisdiction and conferring jurisdiction on a court not otherwise having jurisdiction would be invalid". The court reiterated that the parties cannot, by agreement, confer jurisdiction on a court which does not have jurisdiction. In the opinion of the court, it is only when two or more courts have the jurisdiction to try a suit or proceeding, an agreement that the disputes shall

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1 *Mahadev Govind Gharge, infra* note 84. Also see *Pragati Mahila Mandal, infra* note 36.

2 (2011) 7 SCC 463.

3 *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies* (1989) 2 SCC 163.

be tried in one of such courts is permissible and such an agreement is then not contrary to public policy. The ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred, had jurisdiction.

Further, as regards the standard clause on exclusion of jurisdiction made applicable to all contracts of carriages with the appellant in the instant case, the court observed that:[4]

> [I]f the clause had been made to apply only where a part of cause of action accrued in Delhi, it would have been valid. But as the clause provides that irrespective of the place of cause of action, only courts at Delhi would have jurisdiction, the said clause is invalid in law, having regard to the principle laid down in *A.B.C. Laminart*. The fact that in this case, the place of embarkation happened to be Delhi, would not validate a clause, which is invalid.

Exclusion of jurisdiction of the civil court

By virtue of section 9 of the CPC, a civil court can entertain any suit of civil nature except those, cognizance of which is expressly or impliedly barred. In *A. P. D. Jain Pathshala* v. *Shivaji Bhagwat More,*[5] the apex court held that the express or implied bar necessarily refers to a bar created by the CPC itself or by any statute enacted by the legislature. The high court in the exercise of power of judicial review, cannot issue a direction that civil courts shall not entertain any suit or application in regard to a particular type of disputes nor create exclusive jurisdiction in a quasi-judicial forum to be established as per its direction. The high court cannot, by a judicial order, nullify, supersede or render ineffective the express provisions of an enactment.

It is now a well settled law that the exclusion of jurisdiction of civil court is not to be readily inferred and the statutory provisions relating to exclusion of jurisdiction shall be strictly interpreted.[6] The apex court reiterated the position in *Ramkanya Bai* v. *Jagdish*[7] while constructing section 257 of the Madhya Pradesh Land Revenue Code, 1959. After reading section 257 and section 131(2) of the said Code together, the court held that section 257 providing for exclusion of jurisdiction of the civil court in regard to certain matters, does not apply to any suit involving or relating to easementary rights.

Exclusion of the jurisdiction of the high court under its letters patent

Whether an order, though not appealable under section 50 of the Arbitration and Conciliation Act, 1996, would nevertheless be subject to appeal under the relevant provision of the letters patent of the high court was the question that arose for consideration of the Supreme Court in *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd*.[8]

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4 *Supra* note 2, para 22.
5 (2011) 13 SCC 99.
6 See *Dhulabhai* v. *State of M.P.*, AIR 1969 SC 78.
7 (2011) 7 SCC 452.
8 (2011) 8 SCC 333.

In this case, the apex court, firstly, after taking into consideration several decisions on the question regarding the availability of an appeal under the relevant clause of the letters patent under different circumstances and in cases arising under different Acts, has formulated certain broad principles, which are as follows:[9]

(i) Normally, once an appeal reaches the High Court it has to be determined according to the rules of practice and procedure of the High Court and in accordance with the provisions of the charter under which the High Court is constituted and which confers on it power in respect to the method and manner of exercising that power.

(ii) When a statute merely directs that an appeal shall lie to a court already established then that appeal must be regulated by the practice and procedure of that court.

(iii) The High Court derives its intra-court appeal jurisdiction under the Charter by which it was established and its powers under the Letters Patent were recognised and saved by Section 108 of the Government of India Act, 1915, Section 223 of the Government of India Act, 1935 and finally, by Article 225 of the Constitution of India. The High Court, therefore, cannot be divested of its Letters Patent jurisdiction unless provided for expressly or by necessary intendment by some special statute.

(iv) If the pronouncement of the Single Judge qualifies as a "judgment", in the absence of any bar created by a statute either expressly or by necessary implication, it would be subject to appeal under the relevant clause of the Letters Patent of the High Court.

(v) Since Section 104(1) CPC specifically saves the letters patent appeal; it could only be excluded by an express mention in Section 104(2). In the absence of any express mention in Section 104(2), the maintainability of a letters patent appeal is saved by virtue of Section 104(1).

(vi) Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred. The appellate jurisdiction of a superior court cannot be taken as excluded simply because a subordinate court exercises its special jurisdiction.

(vii) The exception to the aforementioned rule is where the special Act sets out a self-contained code and in that event the applicability of the general law procedure would be impliedly excluded. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred.

Secondly, having regard to the above mentioned principles of law and the legislative history, objectives, scheme and the provisions of the Arbitration and Conciliation Act, 1996, the apex court answered the question in the negative. The decision of the court clearly implies that the provisions of the 1996 Act constitute complete code for matters arising out of an arbitration proceeding, the making of the award and the enforcement of the award.

9 *Id.* para 36.

III RES JUDICATA

In legal ordering, as Robert S. Summers said, "procedural systems also seek to serve values that stand apart from achieving result efficacy".[10] Principles of *res judicata,* which are envisaged in the procedural law, serve purposes that are distinct and important in legal ordering. Recapitulating the importance of *res judicata*, the apex court observed:[11]

> The principles of res judicata are of universal application as they are based on two age-old principles, namely, *interest reipublicae ut sit finis litium* which means that it is in the interest of the State that there should be an end to litigation and the other principle is *nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause. This doctrine of res judicata is common to all civilised system of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest.
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> That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of *res judicata* has been evolved to prevent such an anarchy. That is why it is perceived that the plea of *res judicata* is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties.

In *Nagabhushana*,[12] The appellant filed a writ petition before the high court contending that two plots of land, specified in the petition, were outside the purview of the framework agreement and notification issued for acquisition under the provisions of the Karnataka Industrial Areas Development Act, 1966. While dismissing the writ petition, the single judge held that the petition is barred by *res judicata* as the acquisition proceedings in question were challenged by the petitioner in a previous writ petition, which was initially allowed and then reversed by the division bench of the high court in an appeal. It also took note of the fact that even the appeal filed before the Supreme Court was also dismissed. The division bench of the high court, which heard the appeal against the dismissal of the second writ

10 Robert S. Summers, "Evaluating and Improving Legal Processes – A Plea for Process Values," 60 *Cornell L. Review* 1, 51 (1974).

11 *M. Nagabhushana* v. *State of Karnataka* (2011) 3 SCC 408 [paras 12 and 13].

12 *Ibid.*

petition, held that the second round of litigation is misconceived inasmuch as the acquisition proceedings were upheld even by the apex court in an earlier round of litigation. Notwithstanding these concurrent findings of the single judge and the division bench, the appellant filed the present appeal before the Supreme Court. The court, while dismissing the appeal, held that the attempt by the appellant to reagitate the same issues, along with an additional issue, which were considered by the apex court in a previous case and were rejected expressly is a clear instance of an abuse of process of the court apart from the fact that such issues are barred by principles of *res judicata* or constructive *res judicata* and principles analogous thereto. The main purpose, in the opinion of the court, behind filing of the second writ petition was to hold up, on one or the other pretext, the land acquisition proceeding, which was initiated to achieve a larger public purpose. Thus, the court imposed costs of Rs.10 lakhs on the appellant. Further, the court, apart from reiterating that the principles of constructive *res judicata* are applicable to writ proceedings also laid down that while applying the principles of *res judicata* the court should not be hampered by any technical rules of interpretation.

In *Dunlop India Ltd.* v. *A. A. Rahna,*[13] the apex court held that the second rent control petition for eviction, which is filed on the same ground on which the first petition was filed but based on different causes of action, is not barred by *res judicata* and in *Union of India* v. *Association of Unified Telecom Service Providers of India*,[14] the apex court quoted with approval the observation made in an earlier case[15] that "an order passed without jurisdiction would be a nullity. It will be a coram *non judice* [and] *non est* in the eye of the law. Principles of *res judicata* would not apply to such cases".

In *Fida Hussain* v. *Moradabad Development Authority,*[16] it was reiterated that the principles of *res judicata* would apply only where the *lis* was inter parties and had attained finality on the issues involved. The said principles will, however, have no application *inter alia* in a case where the judgment or order had been passed by a court having no jurisdiction thereof or in a case involving a pure question of law.

Decision on *res judicata* in a proceeding under section 11 of the Arbitration and Conciliation Act, 1996

A decision on *res judicata* requires consideration of the pleadings, in particular, the claims, issues, points and also the award in the first round of arbitration, in juxtaposition with the issues, points and claims made in the pleadings in the second round of arbitration proceedings. Thus, the question whether a claim is barred by *res judicata* does not arise for consideration in a proceeding under section 11 of the Arbitration and Conciliation Act, 1996. It is for the arbitral tribunal to examine and decide whether the claim was barred by *res judicata*. There can be no threshold consideration and rejection of a claim on the ground of *res judicata*, while considering an application under section 11 of the said Act.[17]

13 (2011) 5 SCC 778.
14 (2011) 10 SCC 543.
15 *Chandrabhai K. Bhoir* v. *Krishna Arjun Bhoir* (2009) 2 SCC 315.
16 (2011) 12 SCC 615.
17 *Indian Oil Corporation Ltd.* v. *SPS Engineering Ltd.* (2011) 3 SCC 507.

IV PLEADINGS

Pleadings and particulars provided therein are required to enable the court to decide the rights of the parties in the trial.[18] It is one of the fundamental principles that litigants must observe total clarity and candour in their pleadings.[19] The pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned of the question in issue, so that the parties may adduce appropriate evidence on the said issue. They actually enable the court to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. It is a settled legal proposition that as a rule relief not founded on the pleadings should not be granted. Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties.[20] However, the pleadings should be liberally construed and relief should not be denied by applying the technical rules of procedure embodied in CPC and other procedural laws.[21]

Material facts: Meaning

Order 6, rule 2 of the CPC states that "[E]very pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be…" However, the phrase "material facts" has not been defined in the CPC. Taking note of the same, the apex court, while dealing with section 83 (1) (a) of the Representation of People Act, 1951 – which also states that the election petition shall contain a concise statement of the material facts observed thus:[22]

> The phrase "material facts" as used in Section 83(1) (a) of the Act or Order 6 Rule 2 of the Code of Civil Procedure has not been defined in the Act or the Code of Civil Procedure. In our opinion all specific and primary facts which are required to be proved by a party for the relief claimed are material facts. It is settled legal position that all material facts must be pleaded by the party on which the relief is founded. Its object and purpose is to enable the contesting party to know the case which it has to meet. An election petition can be summarily dismissed if it does not furnish the material facts to give rise to a cause of action. However, what are the material facts always depend upon the facts of each case and no rule of universal application is possible to be laid down in this regard.

Amendment of written statement at appellate stage

CPC, under order 6, rule 17, confers discretionary power on the court to allow either party to the litigation to alter or amend pleadings at any stage of the proceedings provided such amendments are necessary for the purpose of determining the real questions in controversy between the parties. The proviso to the said rule, however, provides that the application for amendment shall not be entertained after

18 *National Textile Corporation Ltd*. v. *Nareshkumar Badrikumar Jagad* (2011) 12 SCC 695.
19 *Amar Singh* v. *Union of India* (2011) 7 SCC 69.
20 *State of Orissa* v. *Mamata Mohanty* (2011) 3 SCC 436.
21 *Radhy Shyam* v. *State of Uttar Pradesh* (2011) 5 SCC 553.
22 *Nandiesha Reddy* v. *Kavitha Mahesh* (2011) 7 SCC 721 [para 37].

the commencement of the trial unless the court comes to the conclusion that in spite of the due diligence, the party could not have raised the matter before the commencement of trial. Thus, it is clear that the amendment cannot be claimed as a matter of right and under all circumstances. However, it was held, in *State of M.P.* v. *Union of India*,[23] that the courts while deciding such prayers should not adopt hyper technical approach. Liberal approach should be the general rule, particularly in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigation.

The principles relating to amendment of pleadings in original proceedings apply to the amendment at the appellate stage as well.[24] One of the circumstances that will be taken into consideration while allowing application for amendment is the delay in making the application seeking such amendment and, if made at the appellate stage, the reason why it was not sought in the trial court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than in other cases. However, there is no prohibition against an appellate court permitting an amendment at the appellate stage merely because the necessary material is not already before the court.[25] Thus, the power to allow an amendment is undoubtedly wide and it may be exercised at any stage of the proceedings. The Supreme Court has time and again reiterated that such a far-reaching discretionary power has to be exercised upon judicial considerations and only in the interest of justice. In *Gayathri Women's Welfare Association* v. *Gowramma,*[26] the apex court castigated the approach of the high court in allowing an application for amendment of the counter claim at the appellate stage to incorporate a new claim. In this case, the original suit for permanent injunction was decreed by the trial court. In an appeal, the matter was remanded back to the trial court. After remand from the high court, the respondents amended their written statement and incorporated counter claim. The trial court again decreed the suit of the appellants (plaintiff in O.S.) and dismissed the counter claim for reasons stated in the judgment. When the regular first appeal was filed challenging the said decree before the high court, the respondents made an application under order 6 rule 17 of CPC for amendment of the original written statement to incorporate an additional prayer in the counter claim. The said application was allowed by the high court. While setting aside the judgment of the high court, the apex court observed that "permitting a counter claim at this stage would be to reopen a decree which has been granted in favour of the appellants by the trial court".

V ISSUE AND SERVICE OF SUMMONS

Presumption of service by registered post

In *Parimal* v. *Veena*,[27] the Supreme Court, relying upon *Greater Mohali Area Development Authority* v. *Manju Jain*[28] and *Sunil Kumar Sambhudayal Gupta (Dr.)*

23 (2011) 12 SCC 268.
24 *State of Maharashtra* v. *Hindustan Construction Co. Ltd*. (2010) 4 SCC 518.
25 *Ishwardas* v. *State of M.P*. (1979) 4 SCC 163.
26 (2011) 2 SCC 330.
27 (2011) 3 SCC 545.
28 (2010) 9 SCC 157.

v. *State of Maharashtra*,[29] reiterated that in view of the provisions of section 114, illustration (f) of the Evidence Act, 1872 and section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post.[30] However, the presumption is rebuttable on a consideration of evidence of impeccable character. Further, with reference to presumption in case of refusal to accept the summons sent under a registered cover, the court quoted with approval the observation made in *Gujarat Electricity Board* v. *Atmaram Sungomal Poshani*,[31] where it was observed thus:[32]

> There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service.

VI PARTIES

Impleadment of necessary party

The proviso to order 1 rule 9 makes it mandatory to implead a necessary party to a suit. In a case of non - joinder of necessary party, the plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. The underlying principle of such a rule is that no order can be passed behind the back of a person adversely affecting him. Such an order, if passed, is liable to be set aside as the same has been passed in violation of the principles of natural justice.[33]

In service disputes, if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place must be impleaded as a necessary party for the reason that even if the petitioner succeeds, it may not be possible for the court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner.[34]

Effect of death of the sole petitioner on the writ petition in the nature of PIL: Is there a need to bring legal representatives or anyone else on record?

The concept of public interest litigation (PIL) was introduced, by diluting the

29 (2010) 13 SCC 657.
30 See also *Chairman-cum-Managing Director, Coal India Ltd.* v. *Ananta Saha* (2011) 5 SCC 142 [para 23].
31 (1989) 2 SCC 602.
32 *Id.* para 8.
33 *J. S. Yadav* v. *State of Uttar Pradesh* (2011) 6 SCC 570.
34 *Ibid.*

concept of *locus standi*, in India in order to help "vulnerable sections of society who have no means, no facilities and, in fact, no possibilities on their own to approach the Court even in cases of glaring injustice and discrimination".[35] Given the nature and the underlying philosophy of PIL, the courts entertaining PIL enjoy a great degree of flexibility unknown to the trial of traditional court litigation. The concept of PIL made the judicial process in India more dynamic and democratic. It is now firmly rooted in the Indian legal system. In the last over three decades, various issues relating to PIL have been raised before and answered by the courts. In the year under survey, the apex court has considered another import question in *Pragati Mahila Mandal, Nanded* v. *Municipal Council, Nanded*.[36] In the instant case, originally a writ petition in the nature of PIL was filed by one, Anil Tryambakarao Kokil before the high court challenging certain allotment of lands made in favour of the appellant therein and certain other persons. During the pendency of the writ petition, the sole petitioner – Anil Tryambakarao Kokil – expired. Following his demise, no application to bring his legal representatives (LRs) on record was preferred. However, instead of directing the petition to have abated or to have made some alternative arrangements (since legal representatives of the deceased petitioner were not brought on record), to ensure that some other public spirited person to be brought in as petitioner to prosecute the petition in place of the deceased petitioner, the counsel, who was appearing for the deceased petitioner, was appointed as *amicus curiae* and was directed to continue to prosecute the said petition in that capacity of *amicus curiae*.

In the context of the case, the apex court felt it is necessary to examine the effect of death of the sole petitioner in PIL, *viz*., whether the same would stand abated or can be allowed to be continued without bringing anyone else in place of the deceased petitioner? The apex court answered the question on the following premise:[37]

> Though the Courts entertaining PIL enjoy a degree of flexibility unknown to the trial of traditional court litigation but the procedure to be adopted by them should be known to the judicial tenets and adhere to established principles of a judicial procedure employed in every judicial proceedings which constitute the basic infrastructure along whose channels flows the power of the court in the process of adjudication. It would thus clearly mean that the Courts have to, in the normal course of business, follow traditional procedural law. However, minor deviations are permissible here and there in order to do complete justice between the parties.

After, taking note of section 141 and order 22 rule 4-A, CPC, the court observed that "even if it is held that order 22 of the Code, which relates to the subject of 'abatement of suits,' is not applicable to writ proceedings, it does not mean that

35 Somnath Chatterjee, "Separation of Powers and Judicial Activism in India," Dr. K. N. Katju Memorial Lecture delivered on April 26, 2007, New Delhi, *available at* http://speakerloksabha.nic/speechDetails.asp?SpeechId=212 (last visited on March 09, 2012).

36 (2011) 3 SCC 464.

37 *Id.* para 16.

death of the petitioner can be totally ignored".[38] Further, the court was of the opinion that, in the circumstances of the case, any of the following options could have been exercised by the high court:[39]

i. As soon as the information is received that a sole petitioner to the writ petition in the nature of a PIL filed *pro bono publico*, is dead, the Court can issue a notice through newspapers or electronic media inviting public-spirited bodies or persons to file applications to take up the position of the petitioner. If such an application is filed, the Court can examine the antecedents of the person so applying and find out if allowing him to be impleaded as petitioner could meet the ends of justice.
ii. If the matter is already pending and the Court is of the opinion that the relief sought could be granted in the PIL, without having to take recourse to adversarial style of proceedings, then it can proceed further as if it had taken *suo motu* cognizance of the matter.
iii. The Court can still examine and explore the possibility, if any of the non-contesting respondents of the writ petition could be transposed as petitioner as ultimately the relief would be granted to the said party only. The Court in a suitable case can ask any lawyer or any other individual or an organisation to assist the Court in place of the person who had earlier filed the petition.

Considering the various options suggested by the apex court, it is humbly submitted that even the method adopted by the high court, in the instant case, was not all that erroneous. It can also be treated as one of the options that the court can adopt in addition to the above three suggested by the apex court.

Substitution/ impleadment of legal representatives on the death of a party

In *Mangaluram Dewangan* v. *Surendra Singh*,[40] the apex court after considering the relevant provisions in order 22 of the CPC, restated the legal position as follows:[41]

(a) When the sole Plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased Plaintiff to be brought on record and proceed with the suit.
(b) If the court holds that the right to sue does not survive on the death of the Plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.
(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the Plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

38 *Id*. para 21.
39 *Id.* para 23, 24 and 25.
40 (2011) 12 SCC 773.
41 *Id*. para 10.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased Plaintiff to come on record and continue the suit. Abatement is not dependent upon any formal order of the court that the suit has abated.
(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.
(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased Plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9(2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.
(g) A person claiming to be the legal representative cannot make an application under Rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative.

Relief to non-applicants

In a service matter, where the dispute relating to promotion has been raised, it was contended before the apex court, in *BSNL* v. *Ghanshyam Dass* (2),[42] that all the respondents have to be given the benefit of the order dated July 7, 1992 of the Tribunal in *Santhosh Kapoor,*[43] which was confirmed by the apex court even though they were not parties before the tribunal or before the apex court in that case. In support of their contention, the respondents relied on the decision of the apex court in *K.I. Shephard* v. *Union of India*,[44] where it was held that it is not necessary for every person to approach the court for relief and it is the duty of the authority to extend the benefit of a concluded decision in all similar cases without driving every affected person to court to seek relief. While distinguishing the present case from *K. I. Shepherd,* the apex court rejected the contention. Further, the court restricted the application of the principle laid down in *K. I. Shepherd* only to the following circumstances:[45]

(a) Where the order is made in a petition filed in a representative capacity on behalf of all similarly situated employees;
(b) Where the relief granted by the court is a declaratory relief which is intended to apply to all employees in a particular category, irrespective of whether they are parties to the litigation or not;

42 (2011) 4 SCC 374.
43 *Santhosh Kapoor* v. *Union of India*, OA No. 1455 of 1991, order dated July 7, 1992 (CAT).
44 (1987) 4 SCC 431.
45 *Supra* note 42, para 25.

(c) Where an order or rule of general application to employees is quashed without any condition or reservation that the relief is restricted to the petitioners before the court; and
(d) Where the court expressly directs that the relief granted should be extended to those who have not approached the court.

However, the court clearly stated that where only the affected parties approach the court and relief is given to those parties, the fence-sitters who did not approach the court cannot claim that such relief should have been extended to them thereby upsetting or interfering with the rights which had accrued to others.

Representative suit filed by an aggrieved person: Need for compliance with order 1, rule 8, CPC

In cases where there are numerous persons having the same interest in one suit, by virtue of order 8, rule 1 of CPC, one or more of such persons may, with the permission of the court, sue or defend such suit on behalf of, or for the benefit of, all persons so interested. In such cases, it is mandatory to comply with the requirements specified under the said provision. However, if such suit has been filed by one of the affected persons himself, it cannot be dismissed on the ground of alleged non-compliance with the provisions of order 1 rule 8 of the CPC.[46]

VII APPEAL

An appeal is a proceeding where a higher forum reconsiders the decision of a lower forum, on questions of fact and/or questions of law, with power to confirm, reverse, modify the decision or remand the matter to the lower forum for fresh decision. A right of appeal, unless the statute conferring it limits it in some way, carries with it a right of rehearing on law as well as fact.[47]

First appeal

The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts. Order 41, rule 31 of CPC provides guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general

46 *Hari Ram* v. *Jyoti Prasad* (2011) 2 SCC 682.
47 *Uttar Pradesh Avas Evam Vikas Parishad* v. *Sheo Narain Kushwaha* (2011) 6 SCC 456.

expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions.[48] Further, without opening the whole case for rehearing both on questions of law and facts, the first appellate court should not interfere with the valuable rights of the parties which stood crystallized by the trial court's judgment.[49]

Second appeal

Under section 100 of the CPC, second appeal lies to the high court if the case involves a substantial question of law. If there is no substantial question of law involved in the case, the second appeal cannot be entertained by the high court.[50] It is important to formulate the substantial question of law at the time of admission of the second appeal.

While dealing with the scope of the power of high courts under section 100 of the CPC, the apex court observed:[51]

> The very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question.

However, it may be noted, the power of the high court is not fettered to hear a second appeal on question which was not formulated by it at the time of admission.[52]

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48 *H. Siddiqui* v. *A. Ramalingam* (2011) 4 SCC 240.
49 *Parimal* v. *Veena, Supra* note 27. Also see *SBI* v. *Emmsons Internatinal Ltd*. (2011) 12 SCC 174.
50 *Mritunjoy Sett* v. *Jadunath Basak* (2011) 11 SCC 402.
51 *Umerkhan* v. *Bismillabi* (2011) 9 SCC 684. Also see *Shiv Cotex* v. *Tirgun Auto Plast (P) Ltd.* (2011) 9 SCC 678.
52 *Yomeshbhai Pranshankar Bhatt* v. *State of Gujarat* (2011) 6 SCC 312.

It may also be interesting to note, in this context, that the finding of fact may give rise to a substantial question of law in certain cases. It was so held by the Supreme Court in *Chandna Impex Private Limited* v. *Commissioner of Customs, New Delhi*.[53] While speaking in the context of section 130 of the Customs Act, 1962, it observed thus:

> It is trite law that a finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread.

It is submitted that the meaning of the phrase "substantial question of law", despite attempts made, over the years, in several cases to define it, still remains unclear.

Statutory appeal

It is well settled that when a statute confers a right of appeal, the conditions for the exercise of such right can also be laid down while granting the right. So long as the conditions so laid down are not so onerous as to amount to unreasonable restriction, rendering the right almost illusory, they can be justified. In *Narayan Chandra Ghosh* v. *UCO Bank*,[54] the apex court held that the condition laid down in the proviso to sub-section (1) of section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 cannot be said to be onerous. Section 18 (1) of the said Act confers a right of appeal on a person aggrieved by any order made by the debt recovery tribunal subject to the conditions laid down in the second proviso to the said provision. The second proviso stipulates that no appeal shall be entertained unless the borrower has deposited with the appellate tribunal fifty percent of the amount of debt due from him, as claimed by the secured creditors or determined by the debt recovery tribunal, whichever is less. The court further held that the requirement of pre-deposit under the said provision is mandatory.

New plea before the Supreme Court

A new plea that goes to the root of the matter, for consideration of which no further investigation into facts is necessary, and which is based on the admitted records of the case may be allowed to be raised for the first time before the Supreme Court in an appeal arising out of special leave petition.[55]

Power of the appellate court under order 41, rule 11, CPC

Order 41 of the CPC regulates appeals from original decrees. Rule 11 thereof relates to power of the appellate court to dismiss appeals after preliminary hearing. Sub-rule (1) of rule 11 authorises the appellate court to dismiss an appeal after

53 (2011) 7 SCC 289.
54 (2011) 4 SCC 548.
55 *Shehla Burney* (Dr.) v. *Syed Ali Mossa Raza* (2011) 6 SCC 529.

preliminary hearing without calling for the records of the trial court and without issuing notice to the respondent, if it is satisfied that the appeal has no merit. Sub – rule (1) does not, however, state that such dismissal can be without assigning any reasons. Further, sub-rule (4) of rule 11 provides that where the appellate court, not being the high court, dismisses an appeal under sub – rule (1), it shall deliver a judgment, recording in brief its grounds for doing so. Sub – rule (4) by implication, therefore, provides that if the appellate court is the high court, and it chooses to dismiss a first appeal at the stage of preliminary hearing, it need not deliver a formal brief judgment as is required by other appellate fora. A 'judgment,' even a brief one, which is required to be rendered by appellate courts other than high courts, should necessarily refer to the pleadings, nature of relief, the points for consideration and the decision thereon. But, sub - rule (4) does not say that if the appellate court which dismisses the appeal is the high court, no reasons be assigned for dismissing the appeal.[56]

According to the Supreme Court,[57] the sub – rule (4) of rule 11 does not enable the high court to dismiss first appeals by one – line orders to the effect that "appeal is dismissed" or by non – speaking orders. The order of the high court dismissing the first appeal should be sufficiently reasoned to disclose the application of mind to the grounds of appeal and make out that the high court was resorting to the dismissal *in limine* as it found the appeal either to be vexatious or wholly without merit. Thus, in the opinion of the Supreme Court, "order 41, rule 11 of the CPC, while relieving the high court from the obligation to write a 'judgment,' does not dispense with the obligation to assign reasons in brief, when summarily dismissing the appeal". This conclusion was justified on the following premise:[58]

> Unless the order is reasoned, there will be no way of knowing whether the appellate court has examined the appeal before deciding that it did not deserve admission. As a limited right to appeal to the Supreme Court is available against the appellate judgments of the High Court, unless there are reasons in the order of dismissal, it will not be possible for the Supreme Court to examine whether the High Court has rightly rejected the appeal.

VIII REVIEW AND REVISION

Review under article 137 of the Constitution of India

In *Delhi Pradesh Regd. Medical Practitioners' Association* v. *Union of India*,[59] a review application was filed on the ground that when the connected matters were heard, the counsel for the review applicant was not present and therefore, there was a flagrant violation of the principles of natural justice. Since the advocate appearing for the applicant failed to point out any material on the basis of which any of the findings so recorded can be held to be worth reconsidering, the apex court dismissed

56 *Uttar Pradesh Avas Evam Vikas Parishad*, *Supra* note 47.
57 *Ibid.*
58 *Id.* para 10.
59 (2011) 4 SCC 296.

the review petition holding that the review petition cannot be argued merely on technicalities that the applicant's counsel remained absent on the day the connected matters involving same questions of fact and law had been argued and decided. The court was of the opinion that entertaining the review petition, under the circumstances, is not only futile exercise but a sheer wastage of judicial time. In support of its decision, the apex court relied upon the decision in *Buddhi Kota Subbarao*,[60] where it was observed that "[N]o litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner *as he wishes*. [However], access to justice should not be misused as a licence to file misconceived [and] frivolous petitions".

Further, in *Indian Council for Enviro-Legal Action* v. *Union of India,*[61] the court clearly opined that reviewing or recalling of the apex court's judgment must be done in extremely exceptional circumstances where there is gross violation of principles of natural justice.

Revision

Generally, high courts, in exercise of revisional jurisdiction, do not interfere with concurrent findings of fact, unless the findings recorded by the lower authorities are perverse or based on apparently erroneous principles which are contrary to law or where the findings of the lower authority was arrived at by a flagrant abuse of the judicial process or it brings about a gross failure of justice.[62]

In *V. Sumatiben Maganlal Manani* v. *Uttamchand Kashiprasad Shah*,[63] the apex court held that where lower appellate court had taken into consideration overall picture emerging from all material facts and circumstances, the interference by the high court, in exercise of its revisional jurisdiction under section 11 of the CPC, by taking perfunctory view of the matter, is not justified.

Revisional powers of National Commission under CP Act, 1986

Revisional powers of the National Commission are derived from section 21 (b) of the Consumer Protection Act, 1986 under which the said power can be exercised only if there is some *prima facia* jurisdictional error appearing in the impugned order. Interference not based on any legal principle that was ignored by the courts below but on a different interpretation of the same set of facts is not permissible under revisional jurisdiction.[64]

IX JUDGMENT, DECREE AND ORDERS

Essential elements of a "decree"

The word "decree" is defined under section 2 (2) of the CPC. After considering the definition, the apex court restated the essential elements of a decree, which are as follows:[65]

60 *Buddi Kota Subbarao (Dr.)* v. *V. K. Parasaran* (1996) 5 SCC 530.
61 *Infra* note 80.
62 *Agarwal Oil Refinery Corp.* v. *Commissioner of Trade Tax* (2011) 13 SCC 275.
63 (2011) 7 SCC 328.
64 *Rubi (Chandra) Dutta* v. *United India Insurance Co. Ltd*. (2011) 11 SCC 269.
65 *Mangaluram Dewangan*, *Supra* note 40, para 44.

(i) there should be an adjudication in a suit;
(ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it;
(iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and
(iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under Section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default.

Contents of the judgment of the appellate court

Order 41, rule 31 of CPC specifies the contents, which the written judgment of the appellate court shall contain. They are: (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. In *Parimal* v. *Veena*,[66] the apex court held that the substantial compliance with the said provisions is the requirement of the law. While talking about the importance of the first appeal, the court further observed that the first appellate court being the final court on facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The appellate court should not modify the decree of the trial court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate court would fall short of considerations expected from the first appellate court in view of the provisions of order 41, rule 31 of CPC and such judgment and order would be liable to be set aside.

Modification of preliminary decree for partition of joint family property in the final decree proceedings

In *Prema* v. *Nanje Gowda*,[67] a suit for partition and separate possession of the joint family property was filed and same was decreed by the trial court *vide* judgment dated August 11, 1992. The first and second appeals against the preliminary decree were dismissed, respectively, by the lower appellate court and the high court. In the meanwhile final decree proceedings were instituted by the respondent in the trial court. On receiving notice, the appellant filed an application under sections 151, 152 and 153 of the CPC for amendment of the preliminary decree and for grant of declaration that in terms of section 6 – A of the Hindu Succession Act, 1956, which was inserted by the Hindu Succession (Karnataka Amendment) Act, 1990,[68] she was entitled for higher share (2/7th share) in the suit property. The said application was dismissed by the trial court, by an order dated July 10, 2000, on the ground that section 6-A of the Act is not retrospective. The appeal against the aforesaid order was also dismissed by the single judge of the high court, who held that "with the dismissal of the second appeal, the preliminary decree passed by the trial court had

66 *Supra* note 27.
67 (2011) 6 SCC 462.
68 It received the Presidential assent on July 28, 1994 and published in the Karnataka Gazette on July 30, 1994. Section 6-A to 6-C were inserted for ensuring that the unmarried daughter get equal share in the coparcenary property.

become final and during the pendency of the second appeal, the appellant had not prayed for enhancement of her share in terms of newly inserted section 6-A of the Act". The appellant challenged the same before the Supreme Court. The Supreme Court allowed the appeal and set aside the impugned judgment and the order passed by the trial judge. It observed thus:[69]

> By virtue of the preliminary decree passed by the trial court, which was confirmed by the lower appellate court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before the conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the court seized with the final decree proceedings is not only entitled but is duty-bound to take notice of such change and pass appropriate order.

Similar view was taken by the apex court in *Ganduri Koteshwaramma* v. *Chakiri Yanadi.*[70] The court further observed, in this case, that section 97 of the CPC - which provides that where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree - does not create any hindrance or obstruction in the power of the court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.

Reasoned decisions

Like in the previous year,[71] the apex court took strong exception to the practice of passing order without proper reasoning and expressed concerns over the manner in which some of the judges show aversion to decide disputes which are complex. It may be more appropriate to refer to the observations of the court to understand its concerns. The court observed thus:[72]

> Of late, we have come across several orders which would indicate that some of the Judges are averse to decide the disputes when they are complex or complicated, and would find out ways and means to pass on the burden to their brethren or remand the matters to the lower courts not for good reasons. Few Judges, for quick disposal, and for statistical purposes, get

69 *Supra* note 67, para 16.
70 (2011) 9 SCC 788.
71 See P. Puneeth, "Civil Procedure" XLVI ASIL 118 – 122 (2010).
72 *State of Uttaranchal* v. *Sunil Kumar Vaish* (2011) 8 SCC 670 [Paras 17, 18 and 19].

> rid of the cases, driving the parties to move representations before some authority with a direction to that authority to decide the dispute, which the Judges should have done. Often, causes of action, which otherwise had attained finality, resurrect, giving fresh causes of action. Duty is cast on the Judges to give finality to the litigation so that the parties would know where they stand.
>
> Judicial determination has to be seen as an outcome of a reasoned process of adjudication initiated and documented by a party based mainly on events which happened in the past. Courts' clear reasoning and analysis are basic requirements in a judicial determination when parties demand it so that they can administer justice justly and correctly, in relation to the findings on law and facts. Judicial decision must be perceived by the parties and by the society at large, as being the result of a correct and proper application of legal rules, proper evaluation of the evidence adduced and application of legal procedure. The parties should be convinced that their case has been properly considered and decided.
>
> Judicial decisions must in principle be reasoned and the quality of a judicial decision depends principally on the quality of its reasoning. Proper reasoning is an imperative necessity which should not be sacrificed for expediency. The statement of reasons not only makes the decision easier for the parties to understand and many a times such decisions would be accepted with respect. The requirement of providing reasons obliges the Judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful and it enables the society to understand the functioning of the judicial system and it also enhances the faith and confidence of the people in the judicial system.

It is submitted that these remarks should be taken seriously by those to whom they are meant. It may be appropriate to recall guidelines issued by the apex court in the previous year in CIT v. *Saheli Leasing and Industries Ltd*.[73] Adherence to those guidelines, while writing judgments, would go a long way in improving the quality of judgments.

X UNCALLED FOR AND FRIVOLOUS LITIGATIONS

Law confers on every person a right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be unless barred by statutes.[74] However, certain safeguards are provided in the CPC to prevent and discourage frivolous, vexatious, uncalled for or speculative suits. Provision relating to imposition of compensatory costs in respect of false or vexatious claims or defences is one such safeguard. However, section 35A of the CPC, which provides for imposition of compensatory costs, is not, owing to the limit on the maximum amount that can be imposed, realistic enough to prevent frivolous or vexatious

73 (2010) 6 SCC 384 [para 5].
74 *Abdul Gafur* v. *State of Uttarakhand* (2008) 10 SCC 97.

litigation. Thus, the apex court, in *Vinod Seth* v. *Devinder Bajaj*,[75] has opined that the said provision needs realistic revision. Keeping in view the increase in the number of uncalled for litigations, it was felt that there is an urgent need for the legislature and the Law Commission of India to revisit the provisions relating to costs and compensatory costs.

In the year under survey also, the Supreme Court, in *Ramrameshwari Devi* v. *Nirmala Devi*,[76] took serious note of the problem of mushrooming of vexatious, frivolous and speculative civil litigation in the country. Though the actual issue involved in the case, which required adjudication was very trivial and insignificant, the apex court considered the present case as "a classic example which abundantly depicts the picture of how the civil litigation moves in our courts and how unscrupulous litigants can till eternity harass the respondents and their children by abusing the judicial system". Looking to the importance of the matter, the court appointed Arun Mohan, Senior Advocate and the author of the book *Justice, Courts and Delays*,[77] as amicus curiae to assist.

Taking note of the submissions made by the amicus that "90% the court time and resources are consumed in attending to uncalled for litigation, which is created only because our current procedure and practices hold out an incentive for the wrongdoer" and "in our legal system, uncalled for litigation gets encouragement because courts do not impose realistic costs", the apex court observed that:[78]

> In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases.

Further, keeping in view the problem of delay in civil litigation, the apex court recommended following steps to be taken by the trial court while dealing with the civil trials:[79]

a. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinise, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.
b. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.

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75 (2010) 8 SCC 1.
76 (2011) 8 SCC 249.
77 Arun Mohan, *Justice, Courts and Delays* (Universal Law Publishing Co. 2009).
78 *Supr*a note 76, para 43.
79 *Id.* para 52.

c. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.
d. The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.
e. The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.
f. Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.
g. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.
h. Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.
i. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.
j. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

According to the court, the existing system can be drastically changed or improved if the steps mentioned above are taken by the trial courts.

The apex court had encountered a similar issue of abuse of judicial process in another case in the year under survey, i.e., *Indian Council for Enviro-Legal Action* v. *Union of India,*[80] where even after fifteen years of the final judgment of the apex court, the litigation was kept alive by filing one interlocutory application or the other in order to avoid compliance with the judgment. The final judgment of the court, in the matter, was delivered on February 13, 1996. The review petition filed subsequently was also dismissed. Thereafter, a curative petition was filed and that

80 (2011) 8 SCC 161. Also see *Khatri Hotels (P) Ltd.* v. *Union of India* (2011) 9 SCC 126 and *State of Haryana* v. *Mukesh Kumar* (2011) 10 SCC 404 where the apex court dismissed the appeal/ petition with heavy costs for abusing judicial process.

was also dismissed on July 18, 2002. Even thereafter, several interlocutory applications have been filed and the said judgment was not allowed to acquire finality. Taking serious note of this blatant abuse of the judicial process, the court observed thus:[81]

> In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorised or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.

Further, in order to prevent unjust enrichment and undeserved gain by prolonging litigations, the apex court issued certain guidelines to be kept in mind by courts while adjudicating. They are as follows:[82]

(1) It is the bounden duty and obligation of the court to neutralise any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.
(2) When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.
(3) Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the court.
(4) A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.
(5) No litigant can derive benefit from the mere pendency of a case in a court of law.
(6) A party cannot be allowed to take any benefit of his own wrongs.
(7) Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.
(8) The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts.

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81 *Indian Council for Enviro-Legal Action, Id*. para 191.
82 *Id*. para 197.

It was also felt that to do complete justice, prevent wrongs, remove incentive for wrong doing and delay; the court, in case of delay in payment, must award interest on the amount to be paid in terms of the judgment. It was of the opinion that the interest, in such cases, has to be calculated on compound basis and not simple for the latter leaves much uncalled for benefits in the hands of the wrong doer. It was of the view that in a case, which does not arise from a suit for recovery under the CPC, the inherent power in the court and the principles of justice and equity are each sufficient to enable an order directing payment of compound interest. In addition, taking note of the limits on the power to award interest under section 34 of the CPC, the court requested the Law Commission to consider and recommend necessary amendments to the said provision.

Proceeding further, the court observed that in a country governed by rule of law, finality of the judgment is absolutely imperative. Permitting the parties to reopen the concluded judgment of the apex court by filing repeated interlocutory applications is clearly an abuse of the process of the law and would have far-reaching adverse impact on the administration of justice. Thus, on consideration of the pleadings and relevant judgments of the various courts, the apex court came to the following conclusions:[83]

(i) The judgment of the Apex Court has great sanctity and unless there are extremely compelling, overriding and exceptional circumstances, the judgment of the Apex Court should not be disturbed particularly in a case where review and curative petitions have already been dismissed.
(ii) The exception to this general rule is where in the proceedings the Judge concerned failed to disclose the connection with the subject-matter or the parties giving scope of an apprehension of bias and the judgment adversely affected the petitioner.
(iii) The other exception to the rule is where the circumstances incorporated in the review or curative petition are such that they must inevitably shake public confidence in the integrity of the administration of justice if the judgment or order is allowed to stand.

It was, however, stated that these categories are illustrative and not exhaustive but only in such extremely exceptional circumstances can the order be recalled in order to avoid irremediable injustice.

Finally, having regard to the fact and circumstances of the entire case, the apex court dismissed the applications with heavy costs.

XI MISCELLANEOUS

The concept of "hearing by the court"

The concept of "hearing by the court", in fact, has common application both under civil and criminal jurisprudence. Even in a criminal matter the hearing of the case is said to be commenced by the court only when it applies its mind to frame charges, etc. Similarly, under civil law also it is only when the court actually applies

83 *Id*. para 196.

its mind to averments made by the party/parties, can it be considered as hearing of the case. Thus, the date of hearing must not be confused with the expression "step in the proceedings". These are two different concepts of procedural law and have different connotation and application. What may be a "step in the proceeding", essentially, may not mean a "hearing" by the court. Necessary ingredients of hearing are application of mind by the court and address by the party to the suit.[84]

Hearing of the appeal, in particular, can be classified into two different stages: One at the admission stage and the other at the final stage. Date of hearing has normally been defined as the date on which the court applies its mind to the merits of the case.[85]

Filing of cross-objections: Interpretation of order 41, rule 22 of CPC

An interesting question involving interpretation of order 41, rule 22 of CPC came up for the consideration of the Supreme Court in *Mahadev Govind Gharge*.[86] The said provision allows the respondent in an appeal to take cross-objections to the decree, which he could have taken by way of appeal. It prescribes a limitation period of one month, for filing such objections, from the date of service of notice of the day fixed for hearing the appeal. However, filing of cross-objection may be allowed even after the expiry of the said period of one month if the appellate court deems it fit to allow. The Supreme Court, after considering several earlier decisions, observed that:

> Rule 22 is not only silent on the consequences flowing from such default from filing appeal within one month, from the period fixed hereunder, but it even clothes the court with power to take on record the cross-objections even after the expiry of the said period. Thus, the right of the cross-objector is not taken away in absolute terms in case of such default. The courts exercise this power vested in them by virtue of specific language of Rule 22 itself and thus, its provisions must receive a liberal construction.

The apex court further opined that the provisions of order 41, rule 22 are akin to the provisions of the Limitation Act, 1963, i.e., when such provisions bar a remedy, by efflux of time, to one party, they give consequential benefit to the opposite party. Thus, in the opinion of the court, before such vested benefit can be taken away, the court has to strike a balance between respective rights of the parties on the plain reading of the statutory provisions to meet the ends of justice. If a cross-objector fails to file cross-objections within the stipulated time, then his right to file cross-objections is taken away only in a limited sense. To that extent a benefit is granted to the other party, i.e., the appellant, of having their appeal heard without such cross-objections. Still, however, if the court is of the view that it is just and proper to permit the filing of cross-objection even after the expiry of the statutory limitation of one month, it is certainly vested with power to grant the same, but of

84 *Mahadev Govind Gharge* v. *Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka* (2011) 6 SCC 321.
85 *Ibid.*
86 *Ibid.*

course, only after hearing the other party. That is how the rights of the parties are to be balanced in consonance with the scheme of order 41 rule 22 of the CPC.

Further, having examined the provisions of order 41, rule 22 in detail, the apex court formulated certain guidelines for their application. They are as follows:[87]

(a) The respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order 41 Rule 22 of the Code.
(b) The limitation of one month for filing the cross-objection as provided under Order 41 Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal.
(c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/ caveator, it shall be deemed to be service of notice within the meaning of Order 41 Rule 22. In other words, the limitation of one month shall start from that date.

Adjournments

In *Shiv Cotex* v. *Tirgun Auto Plast (P) Ltd*.,[88] the apex court has criticized the practice of seeking and granting of adjournments at the drop of the hat. The apex court felt that it is high time that courts become sensitive to delays in justice delivery system and realise that adjournments do dent the efficacy of the judicial process. Further, as regards the maximum cap on number of adjournments prescribed in the CPC, the court observed thus:[89]

> It is true that cap on adjournments to a party during the hearing of the suit provided in the proviso to Order 17 Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order 17 Rule 1 CPC should be maintained. When we say "justifiable cause" what we mean to say is, a cause which is not only "sufficient cause" as contemplated in sub-rule (1) of Rule 1 of Order 17 CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive.

The court, however, stated that the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike

87 *Id*. para 60.
88 *Supra* note 51.
89 *Id*. para 16.

call or the change of a lawyer or the continuous illness of the lawyer or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The court suggested that the past conduct of a party in conducting the proceedings must be considered by the court whenever a request for adjournment is made. The court made it clear that a party to the suit is not at liberty to proceed with the trial at its leisure and pleasure.

Power to award 'interest' for the period prior to institution of the suit

Section 34, CPC empowers the court to award interest, where and in so far as the decree is for the payment of money, at such rate as it deems reasonable on the principal sum adjudged from the date of the institution of suit to the date of decree. It is in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit. Under the provision, further interest may also be awarded at such rate not exceeding six percent per annum on such principal amount from the date of decree to the date of payment. However, an exception has been made, by a subsequent amendment,[90] as regards the rate of interest in cases of commercial transactions.

An interesting question as to whether the interest on arrears of rent can be awarded, under section 34, for entire period of suit including the period of inordinate delay in re-presenting the suit which was returned to the plaintiff for rectification of defects arose for consideration before the Supreme Court in *Secretary/General Manager, Chennai, Central Cooperative Bank Ltd.* v. *S. Kamalaveni Sundaram.*[91] While answering the question in the negative, the court made the following two important observations:

(i) The interest is awardable pendente light by the court after taking into consideration the facts and circumstances of the case and not as a matter of course.[92]
(ii) Section 34, CPC empowers the court to award interest for the period from the date of the suit to the date of the decree and from the date of the decree to the date of payment where the decree is for payment of money. The said provision does not empower the court to award pre-suit interest. The pre-suit interest would ordinarily depend on the contract (express or implied) between the parties or some statutory provisions or the mercantile usage.[93]

The observation of the court that "section 34 does not empower the court to award pre-suit interest" is not based on sound reasoning. The court had reached the said conclusion without analysing the text of the said provision, where there is not much ambiguity. It is difficult to infer such a conclusion on a plain reading of the provision. The court has not referred to any previous decisions on the point. It is pertinent to note the observations made by the apex court on this point in *Ramnik*

90 Act No. 104 of 1976, s. 13 (w.e.f. July 1, 1977)
91 (2011) 1 SCC 790.
92 *Id*. Para 12.
93 *Id*. para 13.

Vallabhdas Madhvani v. *Taraben Pravinlal Madhvani*.[94] While commenting on the scope of section 34, as it stood before amendment in 1977, the court observed thus:[95]

> Section 34 CPC, as it stood before amendment in February 1977, deals with the question of interest in three stages. First is, interest prior to the date of institution of suit, the second stage is interest from the date of institution of suit till the date of decree and the third stage is from the date of decree till realisation of the decretal amount. About the first stage, Section 34 does not say anything while about the second stage it says that the interest to be awarded should be as considered reasonable by the court. About the third stage i.e. from the date of decree till realisation, the power of the court to award interest is circumscribed i.e. it cannot be more than 6% per annum.

As stated in the above observation, section 34 is silent only as to the *rate of interest* that can be awarded in the first stage, i.e., prior to the date of institution of the suit but not with regard to *power to award interest*. The court is empowered, under the said provision, to award interest even in the first stage. The words "… in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit" in the said provision are clear enough.

Awarding of 'interest' in cases under CP Act, 1986

The Consumer Protection Act, 1986 does not contain any provision for grant of interest. However, interest can still be awarded by taking recourse to section 34 of CPC in order to do complete justice between the parties.[96]

Raising time barred claims as counterclaims in SLPs

In *Land Acquisition Officer* v. *A. Ramachandra Reddy*,[97] the land acquisition officer filed an SLP seeking the leave of the court to challenge the judgment passed by the high court enhancing the compensation amount. The leave was granted. Some of the claimants filed counter affidavits alleging that their special leave petitions challenging the judgment of the high court and seeking higher compensation were dismissed as barred by time and, therefore, they may be permitted to make a counterclaim for a higher compensation. While rejecting the claim, the apex court held that "such counter claims in counter – affidavits in special leave petitions are impermissible and not maintainable and cannot be entertained".[98]

Doctrine of merger: Dismissal of SLP and subsequent filing of review petition

In *Gangadhara Palo* v. *Revenue Divisional Officer*,[99] the judgment and order passed by the High Court of Andhra Pradesh dismissing the review petition as well as the application for condonation of delay in filing the review petition has been

94 (2004) 1 SCC 497.
95 *Id*. para 15.
96 *Rubi (Chandra) Dutta* v. *United India Insurance Co. Ltd*. (2011) 11 SCC 269.
97 (2011) 2 SCC 447.
98 *Id*. para 18.
99 (2011) 4 SCC 602.

challenged before the Supreme Court. On the issue of delay, the apex court was of the opinion that the high court should have taken a liberal view and the delay of 71 days in filing the review petition should have been condoned. However, on the issue of maintainability of review petition, on behalf of the respondent, it was contended that the same was not maintainable as the appellant had filed the special leave petition before the Supreme Court against the main judgment of the high court, which was dismissed. Relying upon the decision in *K. Rajamouli* v. *A.V.K.N. Swamy*,[100] it was further submitted that there is a distinction between a case where the review petition was filed in the high court before the dismissal of the special leave petition and a case where the review petition was filed after the dismissal of the special leave petition. While disagreeing with the contentions of the respondent, the apex court observed:[101]

> In our opinion, it will make no difference whether the review petition was filed in the High Court before the dismissal of the special leave petition or after the dismissal of the special leave petition. The important question really is whether the judgment of the High Court has merged into the judgment of this Court by the doctrine of merger or not.
>
> When this Court dismisses a special leave petition by giving some reasons, however meagre (it can be even of just one sentence), there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition. According to the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court. Hence, if some reasons, however meagre, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist.
>
> The situation is totally different where a special leave petition is dismissed without giving any reasons whatsoever. It is well settled that special leave under Article 136 of the Constitution of India is a discretionary remedy, and hence a special leave petition can be dismissed for a variety of reasons and not necessarily on merits. We cannot say what was in the mind of the Court while dismissing the special leave petition without giving any reasons. Hence, when a special leave petition is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of this Court. Hence, the judgment of the High Court can be reviewed since it continues to exist, though the scope of the review petition is limited to errors apparent on the face of the record. If, on the other hand, a special leave petition is dismissed with reasons, however meagre (it can be even of just one sentence), there is a merger of the judgment of the High Court in the order of the Supreme Court. (See the decisions of this Court in

100 (2001) 5 SCC 37.
101 *Supra* note 99, paras 5, 6, 7 and 8.

Kunhayammed v. *State of Kerala*,[102] *S. Shanmugavel Nadar* v. *State of T.N.*,[103] *State of Manipur* v. *Thingujam Brojen Meetei*[104] and *U.P. SRTC* v. *Omaditya Verma*.[105])

A judgment which continues to exist can obviously be reviewed, though of course the scope of the review is limited to errors apparent on the face of the record but it cannot be said that the review petition is not maintainable at all.

Further, the apex court did not appreciate the view taken in an earlier case[106] that if the review petition is filed in the high court after the dismissal of the special leave petition, "it would be treated as an affront to the order of the Supreme Court". While rejecting the said view, the court observed:[107] "In our opinion, the above observations cannot be treated as a precedent at all. We are not afraid of affronts. What has to be seen is whether a legal principle is laid down or not. It is totally irrelevant whether we have been affronted or not".

The apex court has dealt with a similar issue in *Bakshi Dev Raj (2)* v. *Sudheer Kumar*[108] as well. In this case, it was reiterated that the party is entitled to file a review petition even after dismissal of special leave petition, with or without reasons. In the instant case, of course, the special leave petition was dismissed as withdrawn. Further, as regards the application of the doctrine of merger, the court reiterated the conclusions summed up in *Kunhayammed* v. *State of Kerala*,[109] which are as follows:[110]

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger.

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102 (2000) 6 SCC 359.
103 (2002) 8 SCC 361.
104 (1996) 9 SCC 29.
105 (2005) 4 SCC 424.
106 *K. Rajamouli, supra* note 100.
107 *Supra* note 99 para 10.
108 (2011) 8 SCC 679.
109 *Supra* note 102.
110 *Id*. para 44. Reiterated in *Supra* note 108, para 34.

The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.

On careful examination of the observation made by the Supreme Court in *Gangadhara Palo*[111] in the light of the summary of conclusions made in *Kunhayammed*[112] on the doctrine of merger, conflict between the propositions laid down in those cases become evident. In *Gangadhara Palo*, the court said that "[W]hen this court dismisses a special leave petition by giving some reasons, however meagre (it can be even of just one sentence), there will be merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition". In *Kunhayammed*, on the other hand, it was stated that "[A]n order refusing special leave to appeal may be a non-speaking order or a

111 *Supra* note 99.
112 *Supra* note 102.

speaking one. *In either case it does not attract the doctrine of merger*".[113] It is submitted that the view expressed in *Kunhayammed* appears to be the correct one. The *per incuriam* judgment of *Gangadhara Palo* needs reconsideration.

Inherent power to permit withdrawal of withdrawal application

Whether an application filed by the plaintiff to withdraw the suit can be subsequently withdrawn was the interesting issue considered by the apex court in *Rajendra Prasad Gupta* v. *Prakash Chandra Mishra.*[114] In the instant case, the appellant, at the first instance, filed a suit before the court of civil judge (junior division), Varanasi. Thereafter, he filed an application to withdraw the said suit. But subsequently he changed his mind and before an order was passed on the withdrawal application, he filed another application praying for the withdrawal of the earlier withdrawal application. The second application was dismissed by the court. An appeal filed against the said order was dismissed by the high court, which observed that "once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without any order on the withdrawal application". While setting aside the judgment of the high court, the apex court disagreed with the observation made therein. It was of the view that "[R]ules of procedure are handmaids of justice. Section 151 of the code of civil procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application".[115]

Granting of relief against defendant against whom no reliefs claimed

The Supreme Court, in *Shehla Burney (Dr.)* v. *Syed Ali Mossa Raza*,[116] has held that it is not within the jurisdiction of a court to grant relief against a defendant against whom no reliefs have been claimed.

Setting aside of *ex parte* decree: Meaning of "sufficient cause"

Order 9 rule 13, CPC provides for setting aside of an ex parte decree against the defendant, if he satisfies the court that *summons had not been duly served* or he was *prevented by sufficient cause* from appearing when the suit was called on for hearing. Explaining the meaning of the words "sufficient cause" used in the said provision, the apex court observed:[117]

> "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a

113 Emphasis supplied.
114 (2011) 2 SCC 705.
115 *Id.* para 4.
116 (2011) 6 SCC 529.
117 *Parimal* v. *Veena*, *Supra* note 27, para 13.

> reasonable standard of a cautious man. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.

With regard to the test to be applied to determine the application under order 9 rule 13, CPC, the court stated that "the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances… There cannot be a straitjacket formula of universal application".[118]

Tenability of claim to set-off: Order 8 rule 6, CPC

The Supreme Court, in *Indian Oil Corporation Limited* v. *SPS Engineering Limited*,[119] has stated that the ascertained and crystallized sum under executable award or decree cannot be adjusted against a mere claim for damages which is yet to be adjudicated upon.

Recalling of witness: nature and scope of power under order 18, rule 17 and scope for invoking section 151, CPC

In *K. K. Velusamy* v. *N. Palanisamy*,[120] the apex court delineated nature and scope of power under order 18, rule 17 of CPC and also examined the scope for invoking section 151, CPC for the purpose of recalling witnesses for further examination-in-chief or cross examination. Order 18, rule 17 of CPC enables the court, at any stage of the suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power under the said provision can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The court has categorically held that the said power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. It further delineated that:[121]

> Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could

118 *Id*. at 16.
119 *Supra* note 17.
120 (2011) 11 SCC 275.
121 *Id*. para 10.

not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to *clarify any issue or doubt*, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

Further, taking note of the fact that there is no specific provision, after the deletion of order 18, rule 17-A,[122] in the CPC enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross examination, the court held that the inherent power under section 151 of CPC, subject to its limitations, can be invoked in appropriate cases for the purpose. The said inherent power of the court is not affected by the express power conferred upon the court under order 18, rule 17 of CPC, which is limited to recalling of witness to enable the court to put questions to elicit any clarifications. The court rejected the contention of the respondent that section 151 cannot be used for reopening evidence or for recalling witnesses. However, it accepted the submission that section 151 cannot be routinely invoked for reopening evidence or recalling witnesses. In this context, the court also summarised the legal position, emanating from several cases,[123] on the scope of section 151 of CPC. Summary is as follows:[124]

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with

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122 Or. 18, rl. 17 – A enabled the court to permit a party to produce any evidence even at a later stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. The said provision was deleted with effect from July 01, 2002. In the opinion of the court "the deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence." See *Id*. Para 13.

123 *Padam Sen* v. *State of U.P*., AIR 1961 SC 218; *Manohar Lal Chopra* v. *Seth Hiralal*, AIR 1962 SC 527; *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993; *Ram Chand and Sons Sugar Mills (P) Ltd*. v. *Kanhayalal Bhargava*, AIR 1966 SC 1899; *Nain Singh* v. *Koonwarjee* (1970) 1 SCC 732; *Newabganj Sugar Mills Co. Ltd*. v. *Union of India* (1976) 1 SCC 120; *Jaipur Mineral Development Syndicate* v. *CIT* (1977) 1 SCC 508; *National Institute for Mental Health and Neuro Sciences* v. C. Parameshwara (2005) 2 SCC 256 and *Vinod Seth* v. *Devinder Bajaj* (2010) 8 SCC 1.

124 K. K. Velusamy, *Supra* note 120, para 12.

such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

Temporary injunctions

In *Supreme Court Bar Association* v. *B. D. Kaushik*,[125] the Supreme Court reiterated the principle followed in catena of cases that the interim relief, which has the tendency to allow the final relief claimed in the proceedings should not be granted lightly. In the instant case, the trial judge had allowed the applications filed by the plaintiffs/respondents under order 39 rules 1 and 2 and restrained the defendants/appellants from implementing the resolution dated February 18, 2003 amending the rule 18 of the Rules and Regulations of the Supreme Court Bar Association till the final disposal of the suit. Against the said order of the trial judge granting temporary injunction, the appellants straightaway approached the Supreme Court by filing special leave petition. While allowing the same, for reasons not entirely convincing, the apex court observed that "the learned judge has decreed the suit partially by granting injunction without adjudicating rival claims of the

125 (2011) 13 SCC 774.

parties". In the opinion of the court, the relief granted at the interim stage was not warranted by the facts of the case at all.

Remedies available against the order of the civil courts

In *Mangluram Dewangan,*[126] the apex court restated the normal remedies available under the CPC against the orders of the civil court. They are as follows:[127]

(i) Where the order is a 'decree' as defined under Section 2 of the Code, an appeal would lie under Section 96 of the Code (with a provision for a second appeal under Section 100 of the Code).
(ii) When the order is not a 'decree', but is an order which is one among those enumerated in Section 104 or Rule 1 of Order 43, an appeal would lie under Section 104 or under Section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal).
(iii) If the order is neither a 'decree', nor an appealable 'order' enumerated in Section 104 or Order 43 Rule 1, a revision would lie under Section 115 of the Code, if it satisfies the requirements of that section.

In addition, the court stated, when a party is aggrieved by any decree or order, he can also seek review as provided in section 114 subject to fulfilment of the conditions contained in that section and order 47 rule 1 of CPC.

Interference with the interim order

In *Purshottam Vishandas Raheja* v. *Shrichand Vishandas Raheja*,[128] the apex court has laid down the test to be applied to decide as to whether the interim order passed by the single judge of the high court should be interfered with at an interlocutory stage in an intra-court appeal. The court said that the proper test to be applied would be whether the order is so arbitrary, capricious or perverse that it should be interfered with at that stage.

Adjudication of mortgage suits

The scheme relating to adjudication of mortgage suits is contained in order 34 of the CPC. Provisions of order 34 replace some of the repealed provisions[129] of the Transfer of Property Act, 1882 relating to suit on mortgages and also provide for implementation of some of the other provisions[130] of the said Act. Order 34 of the CPC does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. In *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Limited*,[131] the apex court opined that "[T]he provisions of the Transfer of Property Act read with Order 34 of the Code… make it clear that such suits are intended to be decided by public fora (courts) and therefore, impliedly barred from being referred to or

126 *Supra* note 40.
127 *Id*. para 11.
128 (2011) 6 SCC 73.
129 Ss. 85 – 90, 97 and 99.
130 Ss. 92 – 94 and 96.
131 (2011) 5 SCC 532.

decided by a private fora (Arbitral Tribunals)". The court substantiated its conclusion with the following reasons:[132]

(i) Rule 1 of Order 34 provides that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this Rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree. A person who has an interest in the mortgage security or right or redemption can therefore make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, cannot get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration, thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with the likelihood of divergent results.

(ii) In passing a preliminary decree and final decree, the court adjudicates, adjusts and safeguards the interests not only of the mortgagor and mortgagee but also puisne/mesne mortgagees, persons entitled to equity of redemption, persons having an interest in the mortgaged property, auction-purchasers, persons in possession. An Arbitral Tribunal will not be able to do so.

(iii) The court can direct that an account be taken of what is due to the mortgagee and declare the amounts due and direct that if the mortgagor pays into court, the amount so found due, on or before such date as the court may fix (within six months from the date on which the court confirms the account taken or from the date on which the court declares the amount due), the petitioner shall deliver the documents and if necessary re-transfer the property to the defendant; and further direct that if the mortgagor defaults in payment of such dues, then the mortgagee will be entitled to final decree for sale of the property or part thereof and pay into court the sale proceeds, and to adjudge the subsequent costs, charges, expenses and interest and direct that the balance be paid to the defendant/mortgagor or other persons entitled to receive the same. An Arbitral Tribunal will not be able to do so.

(iv) Where in a suit for sale (or in a suit for foreclosure in which sale is ordered), subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the court while making the preliminary decree for sale under Rule 4(1), could provide for adjudication of the respective rights and liabilities of the parties to the suit in a manner and form set forth in Forms 9, 10 and 11 of Appendix 'D' to

132 *Id.* paras 48 (48.1 – 48.5) and 49.

the Code with such variations as the circumstances of the case may require. In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the court may, at the instance of any party to the suit or any other party interested in the mortgage security or the right of redemption, pass a like decree in lieu of a decree for foreclosure, on such terms as it thinks fit. But an Arbitral Tribunal will not be able to do so.

(v) The court has the power under Rule 4(2), on good cause being shown and upon terms to be fixed by it, from time to time, at any time before a final decree is passed, extend the time fixed for payment of the amount found or declared due or the amount adjudged due in respect of subsequent costs, charges, expenses and interest, upon such terms as it deems fit. The Arbitral Tribunal will have no such power.

(vi) A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an Arbitral Tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration.

Further, with reference to a specific contention of one of the parties that the core issues raised by the suit are arbitrable and can be decided by a private forum, the court opined that "[e]ven if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided".

Affidavit in support of petition under article 32

In *Amar Singh* v. *Union of India*[133] the apex court held that the petition under article 32 ought not to be entertained if the petitioner has failed to file proper affidavit. The court made it clear that the perfunctory and slipshod affidavits, which are not consistent either with order 19, rule 3 of CPC or with order 11 rules 5 and 13 of the Supreme Court Rules should not be entertained. It was of the opinion that these rules, which are aimed at protecting the court against frivolous litigation, must not be diluted or ignored. Accordingly, the court directed the registry that it must henceforth strictly scrutinise all the affidavits, all petitions and applications and will reject or note as defective all those which are not consistent with the mandate of order 19, rule 3 of CPC and order 11 rules 5 and 13 of the Supreme Court Rules.

Sovereign immunity and consumer disputes

In *Ethiopian Airlines* v. *Ganesh Narain Saboo*[134] the Supreme Court considered an issue relating to applicability of sovereign immunity envisaged under section 86 of the CPC to proceedings before consumer fora. The court, relying on the settled

133 *Supra* note 19.
134 (2011) 8 SCC 539.

principles of statutory interpretation that specific statute that come later in time prevails over the older and more general statute, held that the provisions of section 86 CPC has been excluded by the provisions of the Consumer Protection Act, 1986. Accordingly, the court held that the Ethiopian Airlines is not entitled to sovereign immunity in proceedings before the consumer fora. The court also opined that its conclusions are in consonant with the stands taken by the courts in other countries and growing international law principle of restrictive immunity. It is now an accepted principle that the sovereign immunity cannot be allowed with respect to commercial transactions.

Condonation of delay: Section 5 of the Limitation Act

Courts in India generally adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under section 5 of the Limitation Act. However, while considering the applications for condonation of delay under the said provision, the courts do not enjoy unlimited and unbridled discretionary powers.[135] While commenting upon it, the apex court, in *Lanka Venkateswarlu*[136] observed that all discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers. It was further stated that the concepts such as "liberal approach", "justice oriented approach", or "substantial justice" cannot be employed to jettison the substantial law of limitation.

There is no exhaustive list of grounds on which delay can be condoned. It has to be decided on the facts and circumstances of each case. In *State of Orissa* v. *Mamata Mohanty,*[137] while considering an explanation offered for the condonation of delay, the apex court observed:[138] "This Court has consistently rejected the contention that a petition should be considered ignoring the delay and laches in case the petitioner approaches the court after coming to know of the relief granted by the court in a similar case as the same cannot furnish a proper explanation for delay and laches. A litigant cannot wake up from deep slumber and claim impetus from the judgment in cases where some diligent person had approached the court within a reasonable time".

Delay in filing writ petition

There is no limitation prescribed for filing a writ petition under article 226 of the Constitution of India. However, the superior courts have evolved several rules, in the form of self-imposed restraints, in this regard. One such rule is that the high court will not entertain petitions filed after long lapse of time because that may adversely affect the settled or crystallized rights of the parties. If the writ petition is

135 *Lanka Venkateswarlu* v. *State of Andhra Pradesh* (2011) 4 SCC 363.

136 *Ibid.*

137 *Supra* note 20.

138 *Id.* para 54. The court relied upon *Rup Diamonds* v. *Union of India* (1989) 2 SCC 356; *State of Karnataka* v. *S. M. Kotrayya* (1996) 6 SCC 267; and *Jagdish Lal* v. *State of Haryana* (1997) 6 SCC 538.

filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the high court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits.[139] The apex court has stated the rationale for the said rule as follows:[140]

> The principle underlying this rule is that the one who is not vigilant and does not seek intervention of the court within reasonable time from the date of accrual of cause of action or alleged violation of the constitutional, legal or other right is not entitled to relief under article 226 of the Constitution. Another reason for the high court's refusal to entertain belated claim is that during the intervening period rights of third parties may have crystallised and it will be inequitable to disturb those rights at the instance of a person who has approached the court after long lapse of time and there is no cogent explanation for the delay. We may hasten to add that no hard-and-fast rule can be laid down and no straightjacket formula can be evolved for deciding the question of delay/laches and each case has to be decided on its own facts.

It was, however, opined that in exercise of power under article 136 of the Constitution of India, the apex court should be extremely slow to interfere with the discretion exercised by the high court to entertain a belated petition under article 226 of the Constitution. Interference in such matters would be warranted only if it is found that the exercise of discretion by the high court was totally arbitrary or was based on irrelevant consideration.

In *Banda Development Authority,*[141] the apex court cautioned that in matters involving challenge to acquisition of land for public purpose, in particular, the delay in filing the writ petition should be viewed seriously and relief be denied to the petitioner if he fails to offer plausible explanation for the delay. The delay of even few years would be fatal to the cause of the petitioner, if the acquired land has been partly or wholly utilized for the public purpose.

Tenability of plea of bar of limitation in continuing tort cases

Encroachment to a public property like road would be a graver wrong, as such wrong prejudicially affects a number of people, it would amount to public wrong. Such an encroachment on a public street by any person constitutes a continuing cause of action. Such an encroachment being a continuing source of wrong or injury, a fresh period of limitation begins to run at every moment of the time during which the tort continues. Thus, section 22 of the Limitation Act, 1963 would apply in such cases. The plea that the suit against tortfeasor is barred by limitation has no merit in such cases.[142]

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139 *Banda Development Authority, Banda* v. *Moti Lal Agarwal* (2011) 5 SCC 394.
140 *Royal Orchid Hotels* v. *G. Jayarama Reddy* (2011) 10 SCC 608 [para 25].
141 *Supra* note 139.
142 *Hari Ram* v. *Jyoti Prasad, supra* note 46.

***Ex parte* condonation of delay in filing special leave petition**

Proviso to sub-rule (1) of rule 10 of order 16 of the Supreme Court Rules, 1966 mandates that the court shall not condone the delay in filing special leave petition without notice to the respondent. Contrary to the said requirement, there is a consistent practice in the apex court that delay is condoned *ex parte* without issuing notice to the respondent, if the bench hearing the special leave petition is of the opinion that sufficient cause is made out for condonation of delay and the petitioner has good case on merits. Having noticed the same, the apex court, in *High Court of Judicature of Patna* v. *Madan Mohan Prasad*,[143] observed:[144]

> There is no manner of doubt that once the court forms an opinion that sufficient cause is made out for condonation of delay then issuance of notice to the respondent calling upon him to show cause as to why delay should not be condoned may become an empty formality and in order to see that the respondent has not to incur unnecessary expenditure for coming to Delhi from far-off places and engage an advocate for contesting application for condonation of delay, delay is condoned ex parte.

However, the court felt that, in view of the requirements of proviso to sub-rule (1) of rule 10 of order 16 of the 1966 Rules, it may be prudent to issue notice to the respondent before condoning the delay caused in filing the special leave petition. But, in case if the notice is not issued to the respondent, then a right would be available to him at the stage of hearing to point out that the court was not justified in condoning the delay and that the leave, if granted, should be revoked or notice issued should be dismissed.

XII CONCLUSION

In the year under survey, as the discussion reveals, the apex court has made significant contributions in clarifying, articulating and restating several provisions of the procedural law. In majority of the cases, the court reiterated and restated with more clarity the existing principles and propositions of law. Lacunas in the existing legal provisions have also been highlighted in some cases with suggestions to revisit the same. Absence of provision authorising awarding of compound interest in appropriate cases, inefficacy of provisions to prevent and discourage frivolous, vexatious or uncalled for suits are some of the lacunas in the CPC highlighted by the apex court. Growing number of frivolous and uncalled for litigations, which is one of the main causes for judicial delay in India, has, however, been seriously taken note of by the apex court. Apart from imposing heavy costs in certain cases, the apex court has formulated guidelines to be followed by courts to discourage frivolous and uncalled for suits.

Though, the apex court, as indicated earlier, had adopted a liberal approach in dealing with issues relating to compliance with procedural requirements, it was highly critical of the manner in which adjournments are sought and granted in civil

143 (2011) 9 SCC 65.
144 *Id.* para 37.

proceedings. The court noted that such practice is one of the main reasons for delay in adjudication of disputes.

It is also to be noted that, in the year under survey, the apex court, in some cases, has taken stands contrary to the earlier positions. The question relating to the power to award interest for the period prior to institution of suit under section 34 of the CPC and the question of merger of impugned judgment of the high court with the order dismissing special leave petition are, thus, to be reconsidered and the position needs to be settled at the earliest to bring more clarity and predictability.

On the whole, it can be stated that judicial decisions delivered during the year are a value addition to the existing legal literature on civil procedure.