4

CIVIL PROCEDURE

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I INTRODUCTION

THE CODE of Civil Procedure, 1908 (CPC) is the principal procedural law that governs the procedural aspects of adjudication of civil disputes in a court of law from the stage of institution of suit to the stage of its final disposal including the appeal, review and revision processes and, thereafter, execution of decrees and orders as well. Ensuring fair justice, more particularly by providing fair opportunity at every stage of the adjudicative process to every stake holder in a civil dispute before the court of law, is the prime purpose of the Code. Though enacted more than a century ago, the necessity to completely overhaul the Code to meet the challenges of contemporary era was never felt so far notwithstanding changes in the litigation trend and the litigation explosion. Though, changes required to improve its efficiency have been introduced through successive amendments in the past, its basic framework still remains intact. The validity and the soundness of the principles envisaged therein are evident from the fact that they are followed even in writ proceedings and proceedings before tribunals in some cases, to ensure fairness, even though they are not made strictly applicable to them.

As it governs the entire adjudicative process, various provisions contained in the CPC are invoked at different stages. In some cases, invocability or applicability of those provisions, their scope and ambit become key or, at times, decisive issues in the adjudicative process. The present survey encapsulates how the judiciary approached and addressed such issues and the principles and propositions laid down in the process during the survey year.

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II JURISDICTION

Jurisdiction of civil courts to enforce common law rights

The apex court in *Subramanian Swamy* v. *Union of India*,[1] while dealing with an issue relating to the constitutional validity of sections 499 and 500 of the Indian Penal Code, 1860 has made an observation, in passing, on the issue of jurisdiction of civil courts to enforce common law rights in India. What prompted the court to make an observation on the issue was an endeavor made, during the course of the hearing, to suggest that 'defamation' may not even call for a civil action in the absence of codified law. The apex court clarified the position by stating that recourse to civil action, under section 9, CPC, can be taken to enforce common law right for which there is no codified law in India unless there is specific statutory bar in that regard. The court fortified its view by placing reliance on the principles laid down in *Supt. and Remembrancer of Legal Affairs*[2] and *Ganga Bai*.[3] The apex court, in *Supt. and Remembrancer of Legal Affairs*,[4] had declared the Common Law of England as 'law in force' under article 372 of the Constitution of India as it was the prevalent law before the Constitution came into force and in *Ganga Bai*, it had ruled:[5]

> There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.

The apex court, thus, once again elucidated the true scope and ambit of section 9, CPC.

Territorial jurisdiction

In *Malati Sardar* v. *Natioinal Insurance Co. Ltd.*,[6] a question relating to the territorial jurisdiction of the tribunal under section 166 of the Motor Vehicles Act, 1988 to decide claim application arose for consideration. In the instant case, the claimant had approached the tribunal at Kolkata even though the place of accident and the residence of the claimant were outside the territorial jurisdiction of the said tribunal. It is, however, to be noted that the respondent insurance company carried on business at Kolkata. The tribunal allowed the claim application and passed the award

1 (2016) 7 SCC 221.
2 *Supt. and Remembrancer of Legal Affairs* v. *Corpn.of Calcutta* (1967) 2 SCR 170.
3 *Ganga Bai* v. *Vijay Kumar* (1974) 2 SCC 393.
4 *Supra* note 2.
5 *Supra* note 3, para 15.
6 (2016) 3 SCC 43.

but the high court, in an appeal, reversed the decision of the tribunal on the ground that it lacked territorial jurisdiction. The apex court was of the opinion that in view of the law laid down in *Mantoo Sarkar* v. *Oriental Insurance Co. Ltd.,*[7] "the High Court was not justified in setting aside the award of the Tribunal in the absence of any failure of justice even if there was merit in the plea of lack of territorial jurisdiction. Moreover, the fact remained that the Insurance Company which was the main contesting respondent had its business at Kolkata."[8] Further, the court, while noting that section 166 is a benevolent provision for the victims of accidents of negligent driving, has observed that:[9]

> The provision for territorial jurisdiction has to be interpreted consistent with the object of facilitating remedies for the victims of accidents. Hypertechnical approach in such matters can hardly be appreciated. There is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting party in such cases, has its business. In such cases, there is no prejudice to any party. There is no failure of justice.

Jurisdiction of family court

In *Balram Yadav* v. *Fulmaniya Yadav*,[10] the apex court held that by virtue of section 7(1) Explanation (b) of the Family Courts Act, 1984 a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person falls within the exclusive jurisdiction of the family court since section 8 thereof excludes the jurisdiction of civil court with respect to those matters falling within the purview of family court under section 7. Thus, in case, there is a dispute on the matrimonial status of any person, a declaration in that regard, whether affirmative or negative, has to be sought only before the family court. What is important is the declaration regarding the matrimonial status. While holding so, the court also referred to section 20 of the Family Courts Act, 1984, which gives the Act an overriding effect on other laws.

Ouster of jurisdiction of civil court

The question as to whether the civil court would cease to have jurisdiction to try the suit for eviction if, during the pendency of the suit, the area, where the suit property is situated, has been brought within the notified area under the Haryana Urban (Control of Rent and Eviction) Act, 1973 came up before the Supreme Court in *Rajender Bansal* v. *Bhuru*.[11]The court answered the question in the negative. It

7 (2009) 2 SCC 244.
8 *Supra* note 6, para 14.
9 *Id*., para 16.
10 (2016) 13 SCC 308.
11 (2017) 4 SCC 202.

relied upon the decisions in *Atma Ram Mittal,*[12] *Vineet Kumar,*[13] *Ram Saroop Rai*,[14] *Ramesh Chandra*,[15] and *Shri Kishan*[16] and culled out the principles, forming the *ratio decidendi* of those cases, which are as follows:

(i) Rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the law applicable on the date of filing of the suit will continue to apply until the suit is disposed of or adjudicated.[17]

(ii) If during the pendency of the suit, the Rent Act becomes applicable to the premises in question, that would be of no consequence and it would not take away the jurisdiction of the civil court to dispose of a suit validly instituted.[18]

(iii) In order to oust the jurisdiction of the civil court, there must be a specific provision in the Act taking away the jurisdiction of the civil court in respect of those cases also which were validly instituted before the date when protection of the Rent Act became available in respect of the said area/premises/tenancy.[19]

(iv) In case the aforesaid position is not accepted and the protection of the Rent Act is extended even in respect of suit validly instituted prior in point of time when there was no such protection under the Act, it will have the consequence of making the decree, that is obtained prior to the Rent Act becoming applicable to the said area/premises, unexecutable after the application of these Rent Acts in respect of such premises. This would not be in consonance with the legislative intent.[20]

Another issue, somewhat complex, relating to the ouster of the jurisdiction of civil court arose before the Supreme Court in *State Bank of Patiala* v. *Mukesh Jain*.[21] In this case, the appellant, which is a nationalized bank, had lent eight lakh rupees to the respondent, who had, for securing the debt, mortgaged his immovable property. On default by the respondent, the appellant bank initiated proceedings under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). When the notice was

12 *Atma Ram Mittal* v. *Ishwar Singh Punia* (1988) 4 SCC 284.
13 *Vineet Kumar* v. *MangalSainWadhera* (1984) 3 SCC 352.
14 *Ram SaroopRai* v. *Lilavati* (1980) 3 SCC 452.
15 *Ramesh Chandra* v. *III Addl. District Judge* (1992) 1 SCC 751.
16 *Shri Kishan* v. *Manoj Kumar* (1998) 2 SCC 710.
17 *Supra* note 11, para 18.1.
18 *Id*., para 18.2.
19 *Id*., para 18.3.
20 *Id*., para 18.4.
21 (2017) 1 SCC 53.

issued to the respondent under section 13 (2) of the said Act, he challenged the proceedings by filing a civil suit. In the said suit, the appellant bank filed an application for rejection of the plaint under order 7 rule 11, CPC on the ground that the civil court had no jurisdiction to entertain the suit in view of the provisions contained in section 34 read with section 13 (2) of the SARFAESI Act. Section 34 expressly bars the jurisdiction of the civil courts in respect of matters over which debt recovery tribunal or the appellate tribunal have jurisdiction. It also prohibits all courts and other authorities from granting injunction in respect of any action taken or to be taken in exercise of the power conferred by or under the SARFAESI Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 17 of the SARFAESI Act authorizes any person aggrieved by any of the measures taken under sub-section (4) of section 13 of the SARFAESI Act to challenge the same by filing an appeal before the debt recovery tribunal. It is pertinent to note that section 17 contemplates challenging only the measures, if any, taken under sub-section (4) of section 13 but it does not provide for challenging of the proceedings immediately after issue of notice under sub-section (2) of section 13. Further, it is also pertinent to note that the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, under which debt recovery tribunals and appellate tribunals are established, are applicable where the amount of debt is not less than ten lakh rupees.[22] The legislative framework, obviously, has lacunae and lacks clarity with regard to the following questions:

(i) Whether the proceedings initiated under the SARFAESI Act can be challenged immediately after the issue of notice under section 13 (2) thereof? If so, where does the challenge to such proceedings lie?

(ii) Whether any of the measures taken under section 13 (more particularly under subs-section (4) thereof), if it is for recovery of amount less than ten lakh rupees, can be challenged before the debt recovery tribunal?

In the present case, though these questions have not been specifically formulated and examined at any stage, the decisions rendered by the civil court, the high court and the apex court provide (different) answers to them. Initially, the civil court, while dealing with the application filed under order 7 rule 11, CPC for rejection of plaint, rejected the application itself stating that the suit is maintainable in view of the fact that the amount of debt sought to be recovered was less than ten lakh rupees and the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are not applicable to the case. The high court affirmed the order of the civil court.

22 S.1(4), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

The apex court, after examination of all the relevant provisions, reversed the decisions of the civil court and the high court. It held that, though, "[I]n normal circumstances, there cannot be any action of any authority which cannot be challenged before a civil court unless there is a statutory bar with regard to challenging such an action",[23] in view of the specific bar contained under section 34 of the SARFAESI Act, "no civil court can entertain any suit wherein the proceedings initiated under Section 13 of the Act are challenged."[24] In the circumstances, the apex court held that the only remedy available to debtor is to approach the debt recovery tribunal under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 read with the provisions of the SARFAESI Act. After having held so, the apex court took note of section 1(4) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which makes the provision of the Act inapplicable to cases where the amount of debt is less than ten lakh rupees. In order to clarify the position, the court stated that section 1(4) "must be read in a manner which would not adversely affect a debtor, who wants to have some remedy against an action initiated under the provisions of Section 13 of the Act."[25]Accordingly, it read down the said provision contained in section 1(4) and said that it applies only to original jurisdiction of the tribunal and not to challenges to proceedings initiated under section 13 of the SARFAESI Act. It clearly and categorically opined that the civil court has no jurisdiction and the debt recovery tribunal has jurisdiction to entertain an appeal as per section 17 of the SARFAESI Act even if the amount sought to be recovered is less than ten lakh rupees.

It must be stated that the court, in reaching the conclusion, has consistently overlooked the language of section 17 of the SARFAESI Act, which contemplates appeal only against any of the measures taken under sub-section (4) of section 13 and not against any of the measures taken under any of the sub-sections of section 13. The court proceeded on the incorrect premise that section 17 contemplates appeal against any of the measures taken under any of the sub-sections of section 13 of the SARFAESI Act. Another important provision, the niceties of which the court does not seem to have fully appreciated is section 34 of the said Act. It does not fully exclude the jurisdiction of the civil court *vis-à-vis* all proceedings under the SARFAESI Act. As stated by the apex court, in another case,[26] in the current survey year itself, section 34 bars the jurisdiction of the civil court only in respect of:[27]

> (i) Any matter in which the Debts Recovery Tribunal or Appellate Tribunal is empowered by or under this Act to determine.

23 *Supra* note 21, para 19.
24 *Id*., para 17.
25 *Id*., para 21.
26 *Robust Hotels (P) Ltd.* v. *EIH Ltd*. (2017) 1 SCC 622.
27 *Id*., para 33.

(ii) Any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. In respect of these, the provision only says, no injunction shall be granted by any court (including civil court) or other authority.

In *Robust Hotels (P) Ltd*.,[28] the apex court clearly opined that the jurisdiction of the civil court is not barred unless it correlates to any of the above conditions. It also reiterated the well-established principle that "the jurisdiction of the civil court is plenary in nature, unless the same is ousted, expressly or by necessary implication, it will have jurisdiction to try all types of suits."[29] It seems the decision of the apex court, in *State Bank of Patiala*,[30] is not in conformity with the said principle. The question relating to the extent of exclusion of the jurisdiction of the civil court under section 34 of the SARFAESI Act, thus, needs to be revisited.

III RES JUDICATA

The principle of *res judicata* accords finality to an issue, which had arisen directly and substantially in an earlier suit and adjudicated upon. Its principal aim is to prevent multiplicity of proceedings by according finality to the earlier adjudication. In order to successfully invoke the defence of *res judicata* to bar the subsequent suit or proceedings, it is necessary to establish that not only the subsequent suit or proceedings is in fact founded upon the same cause of action, which was the foundation of the earlier suit or proceedings but also that the plaintiff has an opportunity of obtaining the same relief, which he or she is now seeking in the earlier suit or proceedings itself. If the cause of action is different, there is no bar for filing of subsequent suit or proceedings. Thus, dismissal of a suit for possession of the entire property based on a settlement deed cannot be a bar for filing subsequent suit for partition, where one half-share in the property is claimed by the plaintiff based on her birth right. Since, in such a case, the cause of action is different, *res judicata* cannot be invoked.[31]

In *Satyendra Kumar* v. *Raj Nath Dubey*,[32] the court held that "previous proceedings would operate as *res judicata* only in respect of issues of facts and not on issues of pure question of law when the subsequent suit or proceeding is based upon a different cause of action and in respect of different property though between the same parties."[33] While upholding the decision of the high court, the court observed:[34]

> The distinction drawn by the High Court in the impugned judgment that an erroneous determination of a pure question of law in a previous

28 *Ibid*.
29 *Id*. para 31.
30 *Supra* note 21.
31 *Nagabhushanammal* v. *C. Chandikeswaralingam* (2016) 4 SCC 434.
32 (2016) 14 SCC 49.
33 *Id*., para 14.
34 *Id*., para 15.

> judgment will not operate as res judicata in the subsequent proceeding for different property, though between the same parties, is clearly in accord with Section 11 CPC. Strictly speaking, when the cause of action as well as the subject-matter i.e. the property in issue in the subsequent suit are entirely different, res judicata is not attracted and the competent court is therefore not debarred from trying the subsequent suit which may arise between the same parties in respect of other properties and upon a different cause of action. In such a situation, since the Court is not debarred, all issues including those of facts remain open for adjudication by the competent court…

The court further went on to state, relying on *Mathura Prasad Bajoo Jaiswal*,[35] that even the principle of equity or estoppel cannot be invoked to preclude the court from deciding the pure question of law differently in different cases. In the opinion of the court neither the principles of equity nor estoppel can impede the powers of the court to decide the question of law correctly in a subsequent suit, though between the same parties but on different cause of action. It categorically asserted that the principle of estoppel operates only against the party and not against the court. It also made an emphatic statement that "nothing comes in the way of a competent court in such a situation to decide a pure question of law differently if it is so warranted."[36] It however, acknowledged that the parties are bound by determination on issues of facts made in an earlier judgment, where equitable principles of estoppel are attracted.

In *Mohhamed Khan (D) th.Lrs.* v. *Ibrahim Khan*,[37] the first suit filed by the respondent – plaintiff against the appellant – defendant claiming possession of the property based on title, was dismissed by the trial court as well as by the first appellate court. Subsequent to the dismissal of the appeal filed thereon, the second suit was filed by the respondent – plaintiff against the appellant – defendant (i.e., same parties) in respect of the same property, claiming the same relief on the same basis. Only difference is that in the second suit, the respondent – plaintiff mentioned a different date of dispossession of the property. The apex court held that, in the circumstances, the principle of *res judicata* applies and the second suit is barred. It observed that merely because the respondent – plaintiff gave a different date of dispossession in the second suit was not enough to hold that the principle of *res judicata* is inapplicable particularly, when, the date of dispossession, pleaded in the second suit, was during the pendency of the proceedings in the earlier suit.

IV PLEADINGS

Filing of counterclaim

Order 8 rule 6-A, CPC permits the defendant, in a suit, to set up, by way of counterclaim against the claim of the plaintiff, any right or claim in respect of cause

35 *Mathura Prasad BajooJaiswal* v. *Dossibai N.B. Jeejeebhoy* (1970) 1 SCC 613.
36 *Supra*note 32, para 16.
37 2016 SCC On Line SC 838.

of action accrued to him against the plaintiff either before or after filing of the suit but before he delivers his defence or before the expiry of the time fixed for delivering his defence. In *Vijay Prakash Jarath* v. *Tej Prakash Jarath*,[38] a question as to whether a defendant can file a counterclaim after filing of written statement and framing of issues arose for consideration of the Supreme Court. While answering the question affirmatively, the court observed that "[A] perusal of sub-rule (1) of Rule 6-A of Order 8, leaves no room for any doubt, that the cause of action in respect of which a counterclaim can be filed, should accrue before the defendant has delivered his defence, namely, before the defendant has filed a written statement."[39] It also distinguished the facts and circumstances of the case from both *Rohit Singh* v. *State of Bihar*[40] and *Bollepanda P. Poonacha* v. *K.M. Madapa*[41] and accordingly held that the judgments rendered in those cases are not applicable to the present case.

It is clear from the decision of the court that a counterclaim can be filed even after the filing of written statement if the cause of action had accrued before the filing of written statement.

Implicit pleading

When a person files a suit claiming the right to inherit the property of the deceased on the ground that he is the son and the only legal heir of the deceased, is it necessary to specifically plead, when he is the adopted son, that he is the 'adopted' son was the issue that came up before the Supreme Court in *Pawan Kumar Pathak* v. *Mohan Prasad*.[42] In this case, when the suit was filed, the respondent contested the suit including the appellant's claim that he is the son of the deceased. The respondent even moved an application for conducting the DNA test of the appellant in order to prove that the appellant was not the son of the deceased. This application was contested and the trial court dismissed it. Thereafter, the appellant filed an application for amendment of the plaint for making a specific pleading that he is the 'adopted' son of the deceased. The said application was dismissed by the trial court and the high court upheld the dismissal on the ground that the amendment would be inconsistent with the earlier plea. The review filed against the said order was also dismissed. Subsequently, when the matter went for trial, the appellant summoned the record of the sub-registrar to bring on record adoption deed in order to plead that the he is the adopted son. The respondent's objected and the trial court accepted the objection and refused to take the said adoption deed on record on the ground that it was beyond the pleading inasmuch as it was nowhere pleaded by the appellant that he was the adopted son. The said order was upheld by the high court.Thereafter, the appellant approached the Supreme Court challenging the said order of refusal and the aforesaid orders denying amendments.

38 (2016) 11 SCC 800.
39 *Id*., para 9.
40 (2006) 12 SCC 734.
41 (2008) 13 SCC 179.
42 (2016) 12 SCC 672.

The Supreme Court, while allowing the appeal, held that when the appellant/ plaintiff has mentioned in the plaint that he is the only son of the deceased, "it was not necessary for him to specifically plead that that he was an adopted son."[43] It relied upon definition of 'son' under section 3 (57) of the General Clauses Act, 1897 in reaching the said conclusion. According to the definition, "son, in the case of any one whose personal law permits adoption, shall include an adopted son." Accordingly, the court opined that once the law recognizes adopted son to be known as son, it was unnecessary for the appellant to specifically plead that he was the adopted son. Since, the respondent contested the claim of the appellant that he is the son, the appellant was constrained to bring on record the adoption deed, which was purportedly registered forty years ago. Refusal to take on record the adoption deed, in such a scenario, is not justified, the court held.

Denial of fact(s) in the written statement

Order 8 rule 3, CPC provides that if the defendant wants to deny the grounds alleged by the plaintiff, it is not sufficient for him to deny that generally in the written statement, he must deny that specifically. He must deal specifically with each allegation of fact of which he does not admit the truth. Rule 5 (1) of the said order further provides that "[E]very allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted…". In *Muddasani Venkata Narsaiah* v. *Muddasani Sarojana*,[44] the apex court dealt with an issue as to whether the denial of fact for want of knowledge is a valid denial or not? It answered the question in the negative by holding that "[I]t is settled law that denial for want of knowledge is no denial at all."[45] The court relied upon *Jahuri Sah*,[46] where it was held that if the defendant lacks the knowledge of the fact pleaded by the plaintiff, that does not tantamount to a denial of existence of fact, not even an implied denial. It also noted the opinion of the High Court of Madhya Pradesh that if the defendant did not know of a fact, denial of the knowledge of such fact is not denial of the fact. Such denial of the knowledge of fact does not even have the effect of putting the fact in issue.[47]It must be noted that if such denial does not even have the effect of putting the fact in issue, the clear implication of the proposition is that such facts are to be treated as admitted. Thus, it is important for the defendants to acquire the knowledge of the facts before filing written statement.

Further, the apex court also opined, relying on *Maroti Bansi Teli*,[48] that "the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by other party must be accepted as fully established."[49]As regards

43 *Id*., para 11.
44 (2016) 12 SCC 288.
45 *Id*., para 14.
46 *JahuriSah* v. *Dwarika Prasad Jhunjhunwala*, AIR 1967 SC 109.
47 *Samrathmal* v. *Union of India*, AIR 1959 MP 305.
48 *Maroti Bansi Teli* v. *Radhabai*, AIR 1945 Nag 60.
49 *Supra* note 44, para 16.

the facts in the instant case is concerned, the court held that when the execution of the sale deed, on the basis of which the plaintiff is claiming possession, was not disputed by the defendants, it was not necessary to examine witnesses to prove it.

Amendment of petition/complaint filed under DV Act

A question as to whether a court dealing with the petition or complaint filed under the provisions of the Protection of Women from Domestic Violence Act, 2005 has power to allow amendment to the petition or complaint originally filed came up for the consideration of the Supreme Court in *Kunapareddy* v. *Kunapareddy Swarna Kumari*.[50] It was contended that the court does not have the power to allow the amendment as the proceedings under the DV Act are governed by the provisions of the Code of Criminal Procedure as prescribed under section 28[51] and there is no provision for amendment in the Code.

The apex court rejected the argument broadly on two grounds. *Firstly*, though section 28 provides that proceedings under some of the sections of the Act are to be governed by the provisions of the Code of Criminal Procedure, most of the remedies provided under the Act are civil in nature. Thereby implying that power to amend the petition or complaint can be derived from the CPC as the trial court did in the instant case, whose order was set aside by the first appellate court and restored by the high court in second appeal. The Supreme Court, in fact, expressly upheld the order of the trial court and of the high court. *Secondly*, even in criminal cases governed by the Code, though it does not contain provision for amendment, the court is not powerless and may allow amendment in appropriate cases in order to avoid, *inter alia*, multiplicity of the proceedings.

Striking out pleadings

Order 6 rule 16 deals with the discretionary power of the court to strike out pleadings. In *Ajay Arjun Singh* v. *Sharadendu Tiwari*,[52] the apex court elucidated the scheme of the said provision. Referring to the said provision it observed:[53]

> It authorises the court to order that any matter in any pleading before it be struck out on the grounds specified under clauses (a), (b) and (c). Each one of them is a distinct ground. For example, clause (a) authorises the court to strike out the pleadings which may be (i) unnecessary, (ii) scandalous, (iii) frivolous, (iv) vexatious. If a pleading or part of it is to be struck out on the ground that it is unnecessary, the test to be

50 (2016) 11 SCC 774.

51 S. 28 (1) reads: "Save as otherwise provided in this Act, all proceedings under Ss. 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)."

52 (2016) 15 SCC 219.

53 *Id.*, para 4.

> applied is whether the allegation contained in that pleading is relevant and essential to grant the relief sought. Allegations which are unconnected with the relief sought in the proceeding fall under this category. Similarly, if a pleading is to be struck out on the ground that it is scandalous, the court must first record its satisfaction that the pleading is scandalous in the legal sense and then enquire whether such scandalous allegation is called for or necessary having regard to the nature of the relief sought in the proceeding. The authority of the court under clause (c) is much wider. Obviously, such authority must be exercised with circumspection and on the basis of some rational principles. The very purpose of the Rule is to ensure that parties to a legal proceeding are entitled *ex debito justitiae* to have the case against them presented in an intelligible form so that they may not be embarrassed in meeting the case.

Rejection of plaint

Order 7 rule 11, CPC makes it incumbent upon the court to reject plaint in certain cases. In *R.K. Roja* v. *U.S. Rayudu*,[54] the apex court held, relying on *Sopan Sukhdeo Sable* v. *Charity Commr.*,[55] that an application under the said provision can be filed at any stage of the suit. The only restriction is that the court, while considering the application for rejection, shall not take into account averments made by the defendant in the written statement or in the application for rejection of plaint itself.The court has to consider only the averments made in the plaint as a whole, and in case, the entire plaint comes under any of the situations listed under clauses (a) to (f) of rule 11 of order 7, the same shall be rejected. The defendant is entitled to file the application under order 7 rule 11 even before filing his written statement. If the application for rejection is filed, before filing of written statement, the court cannot proceed with the trial before disposing of the same. It is obvious that there is no point in proceeding with the trial of the case, where the plaint can be rejected at the threshold. If the application for rejection of the plaint itself is rejected, then the defendant is entitled to file his or her written statement thereafter.

However, in *Madhusri Konar* v. *New Central Book Agency (P) Ltd.*,[56] the apex court refused to interfere with the order passed by the high court declining to issue a direction to the trial court to dispose of an application for rejection of plaint under order 7 rule 11. Though the appellants made, in the opinion of the apex court itself, "persuasive submissions" relying on the decision in *R. K. Roja*,[57] it dismissed the appeal stating that "we are not inclined to interfere in the peculiar facts of this case."[58]

54 (2016) 14 SCC 275.
55 (2004) 3 SCC 137.
56 (2016) 14 SCC 14.
57 *Supra* note 54.
58 *Supra* note 56, para 2.

All that the court stated, in a very short order, in support of its conclusion is that the high court, while passing the impugned order, noted the fact that "similar attempts made by the appellants before this court had already been declined."[59] Since, the order does not contain details of the "similar attempts", it is difficult to appreciate the same. It is also difficult to understand as to why, if similar attempts have been declined in the past, the trial court did not dismiss the application for rejection of plaint filed under order 7 rule 11, on the very ground itself instead of keeping it pending? Why did the high court declined to direct the trial court to do the same keeping in view the principle laid down, rather reiterated, in *R. K. Roja*? Further, why did the apex court, after having declined to interfere with the order passed by the high court, itself proceeded to reject the application filed in the trial court under order 7 rule 11 instead of directing the trial court to dispose of the same? Answers to these questions are indecipherable from the order of the apex court. One would not even get to know, from the order, the ground on which the plaint was sought to be and, in fact, rejected.

In *Central Provident Fund Commr*.v. *Lala J.R. Education Society*,[60] while reiterating that the court, while considering the application for rejection, can only see the pleadings in the plaint and nothing else, the apex court highlighted the distinction between rejection of a plaint on institutional grounds and dismissal of a suit at pre-trial stage on the ground of maintainability. While dismissing the suit on preliminary issue, the court is not only entitled to but also liable to look into the entire documents including those furnished by the defendant.

V PARTIES

In *Robin Ramjibhai Patel*,[61] the apex court held that it is the settled law that the plaintiff in a suit has the status of *dominus litus* and as such he or she has the right to choose his or her defendants. If the plaintiff did not want to join the rival claimants as defendants, he or she cannot be forced to join them. The risk of not doing so is, of course, on him or her. It is, however, pertinent to note that what the court has stated is only a general rule, which has exceptions. The right of the plaintiff, as *dominus litus*, is subject, *firstly*, to the provisions contained in order 1 rule 10 (2) of CPC, which confers discretionary power on the court to add or delete parties[62] and, *secondly*, to the provision contained in the proviso to order 1 rule 9, which makes it mandatory to implead a necessary party. It is also a settled law that a suit is liable to be dismissed for non-joinder of necessary party.

In *Robin Ramjibhai Patel*,[63] the court also dealt with the issue of necessary parties in a suit for specific performance of a contract for sale. The court said, in such

59 *Ibid*.
60 (2016) 14 SCC.
61 *Robin Ramjibhai Patel* v. *Anandibai Rama @ Rajaram Pawar*, 2016 SCC On Line SC 1538.
62 *Mumbai International Airport (P) Ltd.* v. *Regency Convention Centre and Hotels (P) Ltd.* (2010) 7 SCC 417.
63 *Supra* note 61.

a suit, necessary parties "are not only parties to the contract or their legal representatives but also a person who had purchased the contracted property from the vendor… but a person who claims adversely to the claim of a vendor is, however, not a necessary party."[64] This is contrary to the observation made by the apex court in *Thomson Press (India) Ltd*.,[65]where it was held that in a suit for specific performance of agreement to sell, no one other than the parties to an agreement to sell is a necessary and proper party to a suit.

As regards necessary parties in an eviction petition, the apex court, in *Kasthuri Radhakrishnan* v. *M. Chinniyan*,[66] had reiterated, relying on *Dhannalal*,[67]that co-owner(s) can alone and in his or her own right file eviction suit against the tenant and it is not open to the latter to question the maintainability of the suit on the ground that other co-owner(s) was not made party to the suit. The failure to implead all or any of the co-owners is not fatal to the eviction petition. The court also said that even the issue of maintainability of the suit should not be allowed to be raised for the first time before the high court in revision when the said issue was not raised in the courts below.

In *Nandkishor Savalaram Malu* v. *Hanumanmal G. Biyani*,[68] the court held that in a suit for eviction of a tenant, which is a partnership firm, the employee of the firm is not a necessary party and, thus, there is no necessity to implead him.

VI APPEAL

Powers of the appellate court

In *Venkatesh Construction Co.,*[69] the apex court held that the appellate court's interference with the factual findings recorded by the trial court, without considering the oral and documentary evidence, is not justifiable. In addition, it also made a general observation that "the appellate courts may not interfere with the finding of the trial court unless the finding recorded by the trial court is erroneous or the trial court ignored the evidence on record."[70]*Per contra*, in *U.P. SRTC* v. *Mamta*,[71] the court, while considering the scope of appellate power under section 173 of the Motor Vehicles Act, 1988 has observed that an appeal under the said provision is essentially in the nature of first appeal under section 96, CPC and, therefore, "the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence."[72] In reaching the said conclusion the apex

64 *Id*., para 10.
65 *Thomson Press (India) Ltd*. v. *Nanak Builders & Investors (P) Ltd.* (2013) 5 SCC 397.
66 (2016) 3 SCC 296.
67 *Dhannalal v. Kalawatibai* (2002) 6 SCC 16.
68 (2017) 2 SCC 622.
69 *Venkatesh Construction Co.* v. *Karnataka Vidyuth Karkhane Ltd.* (2016) 4 SCC 119.
70 *Id*., para 20.
71 (2016) 4 SCC 172.
72 *Id*., para 21.

court, in *U.P. SRTC*,[73] has relied upon several earlier decisions[74] including *Kurian Chacko* v. *Varkey Ouseph*,[75] where Krishna Iyer J. observed that "[A]n appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him…"[76] Relying on the same observation of Krishna Iyer J., the apex court reiterated the principle in *Union of India* v. *K.V. Lakshman*[77] as well. It observed that the right to file the first appeal under section 96, CPC is a valuable right of the litigant and the first appellate court has the jurisdiction, which is as wide as that of the trial court, to examine all findings of fact or /and law. It has the duty to appreciate the entire evidence and it may come to the conclusion different from that of the trial court. The court also said that the appellate court (including second appellate court for that matter) can permit the parties, under order 41 rule 27, to file additional evidence if any of the parties to the appeal satisfies the appellate court that there is justifiable reason for not filing such evidence at the trial stage and that the additional evidence sought to be filed is relevant and material for deciding the case. Due consideration must be given particularly when additional evidence sought to be adduced is a public document and the party seeking to adduce additional evidence is government having regard to their peculiar set up and way of functioning. Once a party is permitted to file the additional evidence, the appellate court is under an obligation to provide an opportunity to the other side as well to file additional evidence, if they so wish, for rebuttal.

Further, in *Madina Begum* v. *Shiv Murti Prasad Pandey*,[78] the apex court held that the high court is not justified in disposing of the first appeal after deciding merely the issue of limitation without going into the merits of the case. It reiterated that it is the duty of the first appellate court to deal with all the issues and evidence adduced by the parties before recording its findings.

In *Lakshmanan* v. *G. Ayyasamy*,[79] while dealing with the question of relief that may be granted in appeal, the apex court reiterated that in the absence of independent appeal or counterclaim being filed by the respondent, the relief that was denied to him or her by the court below cannot be granted in appeal filed by the appellant.

73 *Supra* note 71.

74 *Santosh Hazari* v. *PurushottamTiwari* (2001) 3 SCC 179; *Madhukar* v. *Sangram* (2001) 4 SCC 756; *H.K.N. Swami* v. *Irshad Basith* (2005) 10 SCC 243; *Jagannath* v. *Arulappa* (2005) 12 SCC 303; *B.V. Nagesh* v. *H.V. Sreenivasa Murthy* (2010) 13 SCC 530; *National Insurance Co. Ltd.* v. *Naresh Kumar* (2000) 10 SCC 158; *State of Punjab* v. *NavdeepKaur* (2004) 13 SCC 680.

75 AIR 1969 Ker 316.

76 *Id.*, para 2.

77 (2016) 13 SCC 124.

78 (2016) 15 SCC 322.

79 (2016) 13 SCC 165.

Second appeal

Since the second appeal lies, under section 100 of CPC, only if the case involves substantial question of law, it is mandatory for the appellant to state precisely, in the memorandum of appeal, the substantial question of law involved in the case and also for the high court, if it is satisfied, to formulate such question while entertaining the second appeal. Formulating a substantial question of law is a *sine – qua – non* for entertaining the second appeal under section 100. If the high court entertains the second appeal without formulating such question, it is not only illegal but also amounts to abdication of the duty cast upon it. It has been reiterated by the apex court in several cases earlier and it was required to repeat it in the current survey year as well. In *Union of India* v. *Diler Singh*,[80]while castigating the high court for entertaining the second appeal without complying with the mandatory requirement of law, the apex court observed:[81]

> That is the command of the provision and has been clearly stated by this Court in a number of occasions. We may unhesitatingly state that we do not remotely get a sprinkle of bliss by ingeminating or repeating the same. It has been done following the rigoristic concept of "duty for duty sake" with the great expectation that this would be the last one.

Notwithstanding the consistent reiteration of the principle by the apex court in umpteen numbers of cases, some judges, while entertaining the second appeal,nonchalantly disregard this legal mandate. The problem was flagged by the apex court several times in the previous years as well.It is disappointing to note that the practice continues unabated.

Another connected issue that often arises in the context of second appeal under section 100, CPC is how to determine what 'substantial question of law' is. The Supreme Court, in several cases, has elucidated what constitutes 'substantial question of law' by distinguishing it from the ordinary 'questions of law' and 'questions of fact'. Notwithstanding such elucidation, it seems the niceties of the distinction between them still elude some judges. In *Damodar Lal* v. *Sohan Devi*,[82] a suit for eviction was filed on the ground of carrying out permanent changes in the property against the terms of the rent agreement. On finding of facts in favour of the plaintiff, the suit was decreed by the trial court and the first appellate court too has reaffirmed it by stating that "the subordinate court has not made any mistake in coming to the conclusion that the tenant has made structural changes in the rented accommodation." In the second appeal filed by the tenant, the high court had formulated two questions as substantive

80 (2016) 13 SCC 71.
81 *Id*., para 19.
82 (2016) 3 SCC 78.

questions of law.[83] The high court interfered with the concurrent findings of facts by the courts below and set aside their decrees. Aggrieved by the same, the landlord approached the Supreme Court. The Supreme Court allowed the appeal. Apart from endorsing the findings of fact by the trial court and the first appellate court as correct, it held that the high court was not justified in upsetting the concurrent findings on pure question of fact. It unhesitatingly held that both the questions of law framed by the high court were not "substantial questions of law". It elaborated further, for the sake of clarity, that even if the finding of fact is wrong, that by itself will not constitute a question of law unless it stems out of a complete misreading of evidence or based only on conjectures and surmises. It reiterated the settled position of law that the first appellate court is the last court of facts and the high court, in second appeal, shall not interfere with the findings of fact unless the findings are based on no evidence or are perverse. In the opinion of the court the "[S]afest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity."[84]

Similarly, in *Syeda Rahimunnisa* v. *Malan Bi*,[85] after referring to all the eight questions[86] formulated by the high court while entertaining the second appeal, the apex court came to the conclusion that none of the questions satisfy the test of being

83 Two questions formulated by the high court as substantial questions of law were: "(i) Whether on the facts and in the circumstances of this case, the learned courts below have erred in granting a decree for eviction on the ground of material alteration while ignoring the relevant considerations and proceeding on irrelevant considerations? (ii) Whether on the facts of this case, the learned courts below have erred in not drawing adverse inference for non-appearance of the plaintiff Damodar Lal in the witness box?"

84 *Supra* note 82, para 12.

85 (2016) 10 SCC 315.

86 Questions formulated by the high court were: (i) Whether the finding of the court below, that the suit site on OS No. 53 of 1993 in S. No. 35/5, Exts. C-1, A-1 and the leased site, surrendered by PW 6 in S. No. 35/5 C1 A19 are one and the same, is vitiated by its failure to consider the admissions of DW 1 and the relevant documentary evidence, which establish that there was a sub-division of S. No. 35/5, the suit site is S. No. 35/5, C1 Ext. A-1 being a government poramboke land and the site of the defendant classified as a "Darga Burial Ground Mosque", each distinct and different from the other? Admissions of DW 1: (ii) Whether the courts below have failed to see that Ext. A-2 (gift deed) being a thirty-year-old document, the presumption under Section 90 of the Evidence Act applies, both with regard to execution and attestation, and as such the opinion of the trial court that it is a suspicious document, is untenable and unsustainable in law? (iii) Whether the lower appellate court erred in law in not framing proper points for consideration, on the validity of Ext. A-2, gift deed and the sub-division of suit property S. No. 35/5, C-1A-1, as required under Order 41 Rule 31 CPC and as such the judgment of the lower appellate court as a final court of fact is vitiated by errors of law? (iv) Whether the lower appellate court has erred in law, in holding that Ext. A-2, gift deed is invalid, because the property gifted is poramboke, when the Government itself (second defendant) has not disputed either the long possession or possessory title of the plaintiff of the suit property? (v) Whether the lower appellate court has erred in law on the question of title, merely by adverting

"substantial question of law" and all of them are essentially questions of fact. The court also observed that "unless the questions framed were debatable, or/and arguable or/and involving any legal question, the High Court had no jurisdiction to formulate such questions treating them to be substantial questions of law."[87]

In *Haryana State* v. *Gram Panchayat Village Kalehri*,[88] the opposite had happened. In this case, the respondent – plaintiff filed a suit for declaration that they are the owner of the suit land and the appellant – defendant has no right, title or interest in the suit land. The claim of the respondent was based on several documents, which, according to them, are sufficient to prove their superior title over every one including the appellant state. The appellant state denied the respondent's claim in its written statement. The trial court, on the basis of pleadings of both the parties, oral and documentary evidence adduced by them, decreed the suit in favour of the respondent. The appeal filed by the appellant was dismissed and the trial court order was affirmed by the first appellate court. The appellant filed the second appeal, which was dismissed *in limine* by the high court on the ground that appeal does not involve substantial question of law and the concurrent findings of the courts below are pure findings of fact. The said order of dismissal was challenged before the Supreme Court, which held that the appeal does involve the substantial question of law and the high court should have admitted and decided it on merits. In the opinion of the court, the substantial question of law involved in the appeal is: "whether the courts below were justified in properly interpreting the documents/exhibits relied upon by the parties for determining the ownership rights over the suit land?"[89] It elucidated further by holding that:[90]

> [w]here the court is required to properly interpret the nature of the documents, it does not involve any issue of fact as such but it only involves legal issue based on admitted documents. It is, therefore, obligatory upon the High Court to decide the legality and correctness of such findings as to which party's documents are to be preferred for conferring title over the suit land.

to Ext. A-3, Ext. A-4, Ext. A-5—tax receipts, and the entire reasoning is based on mere guesswork ignoring the relevant and clinching documentary evidence? (vi) Whether the finding of the lower appellate court that PW 6 (plaintiff's son) did not vacate the site even after the lease period of the site S. No. 35/5 C1 A19 of D.I is not based on any evidence except the word of DW 2 (no witnesses was examined) and the conclusion reached by it that the suit site in OS No. 53 of 1993 and the leased site are the same, is contrary to the evidence on record? (vii) Whether the lower appellate court has erred in law in its failure to consider the admission of DW 2 himself that his father encroached into the plaintiff's site and was issued B-Memos and paid the penalty, which conclusively establishes that the two sites are different and not one and the same? (viii) Whether the very approach of the lower appellate court is essentially erroneous and its findings are liable to be set aside [*Jagdish Singh* v. *Natthu Singh* (1992) 1 SCC 647: AIR 1992 SC 1604] See, *Id*. para 27.

87 *Id*., para 31.

88 (2016) 11 SCC 374.

89 *Id*., para 9.

90 *Ibid*.

Going by this observation and the substantial question of law formulated by the apex court in this case, one fails to understand how none of the question formulated by the respective high courts either in *DamodarLal*[91] or in *Syeda Rahimunnisa*[92] is substantial question of law. It seems both the questions formulated by the high court in *DamodarLal*[93] relates to interpretation of evidence and the inferences that can be drawn from it just as the one formulated by the apex court in *Haryana State.*[94] Further, on perusal of all the eight questions formulated by the high court in *Syeda Rahimunnisa,*[95] the question numbers (ii), (iii) and (viii) are certainly not questions of fact as held by the apex court. They, *prima facie*, appear to be 'questions of law' though may not be 'substantial questions of law'. The remaining questions were also on interpretation of evidence and inferences to be drawn from it.

There is a need to clarify, by more detailed elaboration, as to what constitutes substantial question of law. More particularly what needs to be clarified is whether the questions relating to interpretation of evidence and inferences to be drawn from it can be considered substantial questions of law for the purpose of section 100, CPC.

In *Raghavendra Swamy Mutt* v. *Uttaradi Mutt*,[96] the apex court dealt with an issue as to whether the high court, without duly admitting the second appeal upon formulation of substantial question(s) of law, could grant an interim order or relief?

In the instant case, the high court passed an interim order before admitting the second appeal upon formulation of substantial question of law in terms of section 100, CPC? The respondents then filed an application for vacation of interim order, which was allowed. It is against the said order vacating the interim order, the appellants approached the Supreme Court. It was contended on behalf of them that since order 41 rule 5, CPC confers jurisdiction on the high court, while dealing with an appeal under section 100, to pass an *ex parte order*, such an order can be passed deferring admission of the appeal, after formulation of substantial question of law, in grave situations.

The apex court rejected the said contention. The court said that the second appeal under section 100 can be admitted only on substantial question(s) of law and, thus, it cannot be admitted formally like a first appeal under section 96, CPC. Formulating substantial question of law is the fundamental imperative and it is peremptory in character. Formulation of substantial question of law enables the high court to entertain the second appeal and, thereafter, it can proceed to pass an interim order.It is at that juncture that order 41 rule 5 becomes relevant. It is because the power to pass an interim order is subject to the language employed in order 41 rule 5 (3). The court has emphatically made it clear that:[97]

91 *Supra* note 82.
92 *Supra* note 85.
93 *Supra* note 82.
94 *Supra* note 88.
95 *Supra* note 85.
96 (2016) 11 SCC 235.
97 *Id*., para 24.

> [t]he High Court cannot admit a second appeal without examining whether it raises any substantial question of law for admission and thereafter, it is obliged to formulate the substantial question of law. Solely because the Court has the jurisdiction to pass an ex parte order, it does not empower it not to formulate the substantial question of law for the purpose of admission, defer the date of admission and pass an order of stay or grant an interim relief. That is not the scheme of CPC after its amendment in 1976 and that is not the tenor of precedents of this Court and it has been clearly so stated in *Ram Phal*.[98]

Section 102, CPC bars, outrightly, the second appeal in cases where the subject-matter of the original suit is for recovery of money not exceeding twenty-five thousand rupees. The purpose behind the said provision is to reduce the quantum of litigation by excluding the cases, where stakes are very meagre. In *Nagar palika Thakurdwara* v. *Khalil Ahmed*,[99] the apex court held that in order to invoke section 102, the subject matter of the original suit should be 'only' recovery of money and that too not exceeding twenty – five thousand rupees. If the subject – matter of the suit is anything else or something more than recovery of money, the provisions contained in section 102 have no application.

Maintainability of SLP – Appeal against order dismissing review

In *Bussa Overseas & Properties (P) Ltd.* v. *Union of India*,[100] the apex court dealt with a question as to whether an appeal filed under article 136 of the Constitution of India against the order dismissing review alone is maintainable when the main order i.e., the order passed in the writ petition has not been assailed?

The respondents contended that when the main order passed in the writ petition is not challenged, the appeal challenging only the order dismissing review petition is not maintainable. It was contended on behalf of the appellants that though the contention of the respondents may deserve acceptance in view of the recent decisions rendered by the court,[101] the same needs to be rejected because those recent decisions have been rendered in ignorance of earlier larger bench decisions in *Durga Shankar Mehta* v. *Raghuraj Singh*[102] and *Thungabhadra Industries Ltd.* v. *State of A.P.*[103]

98 *Ram Phal* v. *Banarasi* (2003) 11 SCC 762.
99 (2016) 9 SCC 397.
100 (2016) 4 SCC 696.
101 *ShankerMotiramNale* v. *Shiolalsing Gannusing Rajput* (1994) 2 SCC 753; *Suseel Finance & Leasing Co.* v. *M. Lata* (2004)13 SCC 675; *M.N. Haider* v. *Kendriya Vidyalaya Sangathan* (2004) 13 SCC 677; *Shiv Charan Singh* v. *State of Punjab* (2007) 15 SCC 370; *Ravi* v. *State* (2007) 15 SCC 372; *Vinod Kapoor* v. *State of Goa* (2012) 12 SCC 378; *State of Assam* v. *Ripa Sarma* (2013) 3 SCC 63 and *Sandhya Educational Society* v. *Union of India* (2014) 7 SCC 701.
102 AIR 1954 SC 520.
103 AIR 1964 SC 1372.

The apex court rejected the contention of the appellants holding that neither the principle laid down in *Durga Shankar Mehta* nor the one laid down in *Thungabhadra* lend any support to the argument sought to be advanced in their behalf. In *Durga Shankar Mehta*, the apex court laid down that the plenary jurisdiction of the Supreme Court under article 136 of the Constitution cannot be taken away or abridged by ordinary legislation whereas in *Thungabhadra* the court only dealt with the stage at which such preliminary objection as to the maintainability can be raised. It has not laid down that a special leave petition against the order passed in review petition is maintainable. The court also opined that stand of the court in *Thungabhadra* on the stage of taking objection is also "fact-centric but not principle-oriented" and, thus, it has to be confined to the facts of the said case.

While answering the question in the negative, the court, in the present case, categorically held that the order dismissing review alone cannot be challenged without challenging the order passed in the original petition against which the review petition was filed. In the opinion of the court "[T]he real test is that even if the order passed in review is set aside, the order that is not challenged cannot be set aside."[104] Unless set aside, such order remains valid and enforceable and the judgment setting aside only an order passed in review petition would be redundant.

The court also touched upon the issue of merger of judgments and reiterated that "when the prayer for review is dismissed, there can be no merger. If the order passed in review recalls the main order and a different order is passed, definitely the main order does not exist. In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party."[105] Otherwise, it is clear, that there is definitely a need to challenge both orders.

VII REVIEW AND REVISION

Review of judgment or orders by the Supreme Court

Article 137 of the Constitution of India has conferred on the Supreme Court power to review any judgment pronounced or order passed by it. This power is, however, made subject to the provisions of any law made by the Parliament or any rules framed by the Supreme Court itself under article 145 of the Constitution. Order 47 rule 1 of the Supreme Court Rules, 2013 (SCR) provides that in a civil proceedings, an application for review can be entertained only on the ground mentioned in order 47 rule 1 of CPC. While exercising the power of review, the apex court is generally guided by the doctrine of *ex debitojustitiae* as well as the fundamental principle of the administration of justice that no one should suffer because of a mistake of the court. Accordingly, once an error is found in the judgment pronounced or order passed by the court, which is apparent on the face of the record and meets the test of review

104 *Supra* note 100, para 28.
105 *Id.*, para 29.

jurisdiction as laid down in the above mentioned provisions of the SCR and CPC, the court shall not hesitate to accept such mistakes and rectify the same.[106]

Restoration of the review petition

In *Babu Ram Ashok Kumar* v. *Mushtaq Ali*,[107] the appellant filed an application before the high court for restoration of the review of judgment, which was dismissed on the ground that the applicant had not been prosecuting the case diligently. While allowing the appeal against the said order of dismissal, the apex court, in a very short order, cursorily opined that the review application deserves to be considered on merits and, accordingly, remitted the matter to the high court.

Interference with finding of fact in revision

In *Kalidas Chunilal Patel* v. *Savitaben*,[108] the apex court held that the high court, while hearing revision, shall not interfere with the finding of fact recorded, on appreciation of evidence, by the first appellate court unless such finding is found to be "wholly perverse or dehors to any provision of law or is recorded contrary to pleadings and evidence on record…"[109]

VIII JUDGMENT, DECREE AND ORDERS

What amounts to 'decree'?

Whether an order dismissing the suit, without framing issue(s), amounts to 'decree' within the meaning of section 2 (2), CPC was the issue that came up for consideration of the Supreme Court in *Rishabh Chand Jain* v. *Ginesh Chandra Jain*.[110]

The instant case arose out of a title suit filed against the defendant/appellants. In the said title suit, the defendant/appellants filed an interlocutory application for dismissal of the suit on the ground that the same is barred by *res judicata* and that there is no cause of action. The said application was allowed by the trail court, after hearing the parties but before the commencement of the trial, and the suit was dismissed. Against the said order of dismissal, the plaintiff filed a revision petition in the high court, which, *vide* impugned order, took the view that the approach adopted by the trial court – i.e., dismissing of suit on the said grounds without framing specific issues - is not proper. It also opined that the said order does not come within the definition of 'decree' under section 2 (2), CPC and, thus, it is not appealable. It is only subject to the revision under Section 115, CPC.

106 *Chairman and Managing Director, Central Bank of India* v. *Central Bank of IndiaSC/ST Employees Welfare Assn.* (2016) 13 SCC 135.
107 (2017) 11 SCC 497.
108 (2016) 12 SCC 544.
109 *Id*., para 19.
110 (2016) 6 SCC 675.

While setting aside the impugned order, the apex court held that the "…order dismissing the suit on the ground of res judicata does not cease to be a decree on account of a procedural irregularity of non-framing an issue …What is to be seen is the effect and not the process."[111] It observed:[112]

> In terms of Section 2(2) of the Code, in case, the court adjudicating the case, conclusively determines the rights of the parties with regard to any one or more or all of the matters in controversy in the suit, the requirement of decree is satisfied. Such determination can be preliminary or final. Rejection of a plaint is deemed to be a decree under Section 2(2) of the Code. Only two orders are excluded — (i) any adjudication from which an appeal lies as an appeal from an order, and (ii) any order of dismissal for default. Order 43 of the Code has provided for appeals from orders. The impugned order does not come under Order 43. The order has conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit viz. res judicata. True, it is not an order passed on framing an issue. But at the same time, there is adjudication on the controversy as to whether the suit is barred by res judicata in the sense there is a judicial determination of the controversy after referring to the materials on record and after hearing both sides.

It also clarified that if the order passed amounts to'decree', it cannot be subjected to revision under section 115 in view of the specific bar under sub-section (2) thereof. It is only appealable under section 96 read with order 41, CPC.

Contents of the judgment of the first appellate court

The first appellate court, it is well known, is considered to be the final court of facts. Since, under the scheme of CPC, the second appeal is permitted only in cases that involve "substantial question of law," it can be said that the first appellate court is the final court on (ordinary) questions of law as well. Thus, the judgment of the first appellate court must comprehensively cover and answer all points. In *Laliteshwar Prasad Singh* v. *S.P. Srivastava*,[113] the apex court observed that the judgment of the first appellate court must, as per order 41 rule 31 CPC, explicitly state the points for determination, the decision on each of the points and the reasons in support of its decision. It, however, clarified that, as per the settled law, mere omission to frame point(s) for determination does not vitiate the judgment if the court had recorded its reasons based on evidence adduced by parties to the case. As the final court of appeal

111 *Id*., para 14.
112 *Id*., para 13.
113 (2017) 2 SCC 415.

on facts, the judgment of the first appellate court must reflect its application of mind and specifically cover all important questions involved in a case. When it agrees, particularly on questions of fact, with the finding of the trial court, the first appellate court need not restate evidence and reiterate the reasons given by the trial court in support of its findings. However, when it takes different view and reverses the findings of the trial court, it must advert to the reasons accorded by the trial court and explain how they are erroneous. It should also record its own findings in clear terms.

IX EXECUTION

In the survey year, certain questions relating to execution of foreign judgment in India arose before the Supreme Court in *Alcon Electronics (P) Ltd.* v. *Celem S.A. of France*.[114] In this case, the respondent – plaintiff filed a suit against the appellant – defendant before the English Court alleging infringement of patent and seeking reliefs therefor. The appellant filed an application challenging the jurisdiction of the English court and sought, in the said application itself, summary assessment and award of the cost occasioned by him for filing the application. The English court, after hearing both the parties, dismissed the said application and, consequently, directed the appellant itself to pay the cost of the application as well as the interest on cost to the respondent. The appellant did not challenge the said interim order by filing appeal but, instead, sought for time to make payment. It is to enforce the said interim order, the respondent filed the execution petition in India, which was opposed by the appellant on the ground that the interim order of the English court is not executable. The execution court dismissed the appellant's plea and the high court confirmed the order of dismissal.

Before the apex court, the appellant contended that an interlocutory order of the English court does not amount to a judgment 'on merits of the case' and is, therefore, not conclusive under section 13(b), CPC and, in the alternative, it does not also amount to 'decree' as defined under explanation 2 to section 44-A, CPC. As regards the part of the order that relates to payment of interest on cost, it was specifically contented, without prejudice to the general contentions, that the same is not executable in view of the deletion of section 35 (3) of CPC.

The apex court, after examining the relevant provisions of the CPC and certain case law, rejected all the contentions of the appellant. While doing so, the court laid down certain proposition of law relating to enforcement of foreign judgments in India, which are as follows:

> (i) [a] foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13 CPC. In construing Section 13 CPC we have to look at the plain meaning of the words and expressions used therein and need not look at any other factors.

114 (2017) 2 SCC 253.

Further, under Section 14 CPC there is a presumption that the foreign court which passed the order is a court of competent jurisdiction which of course is a rebuttable presumption.[115]

(ii) The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such order unless it falls under any of the exceptions under Section 13 CPC.[116]

(iii) [a] "foreign judgment" is defined under Section 2(6) as judgment of a foreign court. "Judgment" as per Section 2(9) CPC means the statement given by the Judge on the grounds of a decree or order. "Order" is defined under Section 2(14) CPC as a formal expression of any decision of the civil court which is not a "decree". Then Explanation 2 to Section 44-A(3) says "decree" with reference to a superior court means any "decree" or "judgment". As per the plain reading of the definition "judgment" means the statement given by the Judge on the grounds of decree or order and order is a formal expression of a court. Thus "decree" includes judgment and "judgment" includes "order". On conjoint reading of "decree", "judgment" and "order" from any angle, the order passed by the English Court falls within the definition of "order" and therefore, it is a judgment and thus becomes a "decree" as per Explanation to Section 44-A(3) CPC.[117]

(iv) A bare perusal of Section 35-A shows that bar operates on the Indian Courts with regard to imposition of costs in respect of false or vexatious claims or defences. The bar is not attracted in the present case as the Court that has ordered the costs is the High Court of Justice in England which is not governed by the provisions of CPC and that the respondent merely approached the Indian Courts for the satisfaction of a foreign decree. Moreover, the nature of compensatory costs prescribed in Section 35-A CPC are different from "costs" dealt with in Section 35 CPC as the former are limited to the claims of defences of a party which are frivolous or vexatious. It is settled that before awarding costs under Section 35-A CPC, the court should satisfy itself that the claim was false or vexatious to the knowledge of the party who put it forward and that the interests of justice require the award of such compensatory costs.[118]

115 *Id.*, para 15.
116 *Id.*, para 19.
117 *Id.*, para 24.
118 *Id.*, para 32.

(v) It is to the reciprocal advantage of the courts of all nations to enforce foreign rights as far as practicable. To this end, broad recognition of substantive rights should not be defeated by some vague assumed limitations of the court. When substantive rights are so bound up in a foreign remedy, the refusal to adopt the remedy would substantially deprive parties of their rights. The necessity of maintaining the foreign rights outweighs the practical difficulties involved in applying the foreign remedy. In India, although the interest on costs are not available due to exclusion of Section 35(3), the same does not mean that Indian Courts are powerless to execute the decree for interest on costs. Indian Courts are very much entitled to address the issue for execution of the interest amount. The right to 8% interest as per the Judgments Act, 1838 of UK can be recognised and as well as implemented in India.[119]

In *Bool Chand* v. *Rabia*,[120] the apex court dealt with the issue of frivolous objections to execution proceedings. The court said, while genuine objections can certainly be considered, the courts in execution proceedings cannot be oblivious of frivolous objections being filed to further delay the execution of decree passed in a long-drawn contested court proceedings. Attempt to deprive the benefit of the decree to the decree holder shall be discouraged.

X MISCELLANEOUS

Overriding effect of high court's letters patent

In *Pankajakshi* v. *Chandrika*,[121] the five judge bench of the apex court observed that clause 36 of Letters Patent of the High Court of Kerala, which is a special provision, prevails over section 98, CPC and section 23 of the Travancore – Cochin High Court Act, being *pari materia* to the said clause 36, same analogy is applicable. Hence, the court declared that section 23 of the Travancore – Cochin High Court Act prevails over section 98, CPC. The court overruled *P.V. Hemalatha* v. *Kuttamkondi Puthiya Maliackal Saheed*,[122] where contrary view had been taken.

Supreme Court's power to grant special leave to appeal

Section 112, CPC saves the power of the Supreme Court to grant special leave to appeal conferred under article 136 of the Constitution of India. It is a residuary, some even say extraordinary, appeallate jurisdiction of the Supreme Court, Article 136 confers a wide discretionary power on the Supreme Court to grant special leave to appeal against any judgment, decree, determination or order passed or made by any

119 *Id*., para 37.
120 (2016) 14 SCC 270.
121 (2016) 6 SCC 157.
122 (2002) 5 SCC 548.

court or tribunal in any cause or matter. Though, apex court, in some cases, has emphasized on the need to adopt somewhat a uniform standards in granting special leave,[123] unfortunately, so far no such uniform standard has been laid down. As a result, what was considered to be an extraordinary provision to be invoked in exceptional cases, has become the main source under which more than eighty percent of the cases are filed in the Supreme Court.[124] Litigants have started approaching the apex court routinely by treating it as a regular court of appeal though it was not intended to be one. Thus, in 2010, the two judge bench of the apex court, in *Mathai* v. *George*,[125] referred the matter to the larger bench to lay down certain broad guidelines for exercise of discretionary power under article 136.

In the year under survey, the five judge constitutional bench of the Supreme Court disposed of the matter stating that the question referred to it need not be answered as it had already been answered in earlier cases, especially in *Pritam Singh*,[126] *Penu BalarkishnaIyer*[127] and *Union Carbide Corporation*.[128]It also observed:[129]

> Upon perusal of the law laid down by this Court in the aforesaid judgments, in our opinion, no effort should be made to restrict the powers of this Court under Article 136 because while exercising its powers under Article 136 of the Constitution of India, this Court can, after considering facts of the case to be decided, very well use its discretion. In the interest of justice, in our view, it would be better to use the said power with circumspection, rather than to limit the power forever.

If the power under article 136 remains totally unrestricted, even without broad guidelines, it is more likely to be used widely and routinely and it would continue to be the single most important source of largest number of cases before the Supreme Court. It confers a vast discretionary power. If the power is permitted to be invoked by each bench of the Supreme Court, *inter alia*, where "the decision sought to be impugned before the Supreme Court shocks its conscience", then the conscience become the only guide. It may be true that no definitive guidelines or parameters can be laid down in this regard but as long as 'conscience' continues to be a guide, no uniformity in judicial approach can emerge. It may be worth remembering what George Eliot said "[O]ur consciences are not all of the same pattern."

123 *Pritam Singh* v. *State*, AIR 1950 SC 169.

124 See Nick Robinson, "The Indian Supreme Court by the Numbers", *available at*: http://www.azimpremjiuniversity.edu.in/SitePages/pdf/LGDI_WorkingPaper_14December2012_The%20Indian-Supreme-Court-by-the-Numbers_NickRobinson.pdf (visited on October 10, 2017).

125 (2010) 4 SCC 358.

126 *Supra* note 123.

127 *Penu Balakrishna Iyer* v. *Ariya M. Ramaswami Iger* (1964) 7 SCR 49.

128 *Union Carbide Corporation* v. *Union of India* (1991) 4 SCC 584.

129 *Mathai* v. *George* (2016) 7 SCC 700 [Para 6].

Suit under section 92, CPC

Section 92, CPC deals with filing of suits relating to public trusts. It deals with the aspects such as who can file suit, where suits can be filed and what reliefs can be claimed in case of breach of any trust created for public purposes of a charitable or religious nature or for seeking direction for proper administration of such trust. In *Aurobindo Ashram Trust* v. *R. Ramanathan*,[130] the apex court reiterated that in order to determine whether the suit falls within the ambit of section 92, only the allegations made in the plaint needs to be looked into in the first instance. While dealing with the question, the court must also consider the purpose for which the suit is filed. If the suit has been filed for vindication of a private right, then the suit would not fall within the ambit of the provision.

Imposition of costs

In *Sciemed Overseas Inc.* v. *BOC India Ltd.*,[131] the order of the high court imposing costs of Rs. 10 lakhs on the petitioner for filing a false or misleading affidavit was challenged before the Supreme Court. While dismissing the SLP, the court held that the cost imposed by the high court, although somewhat steep, was fully justified in the fact and circumstances of the case. It also observed:[132]

> A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This "trend" is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair.

The court granted six weeks' time to deposit the costs with the Jharkhand Legal Services Authority (JHALSA) as directed by the high court. The JHALSA was, in turn, directed to forward the amount deposited to the respondent i.e., BOC India Ltd.

In *Land Acquisition Officer* v. *Ravi Santosh Reddy*,[133] the apex court imposed cost on the appellant state payable to the respondent for filing misconceived appeal. While imposing the cost, it observed:[134]

> In our considered opinion, the State unnecessarily pursued this petty matter to this Court in this appeal, which does not involve any arguable point either on facts or in law nor it involves any point of public

130 (2016) 6 SCC 126.
131 (2016) 3 SCC 70.
132 *Id*., para 2.
133 (2016) 14 SCC 238.
134 *Id*., para 14.

> importance and nor it involves any substantial money claim. What was involved was only the calculation of payment of interest on the decretal sum for a particular period. In this Court (sic: count) also, the learned counsel was unable to show any kind of illegality or perversity in the said calculation made by the executing court while working out the liability of the State in paying Rs 50,000 towards interest.

The observation of the court is quite instructive for the state as to when to and when not to file appeals. It is high time that the state, which is the largest litigant before the courts, must formulate a litigation policy and follow scrupulously. It is necessary to do so not only for the purpose of avoiding the imposition of cost, at times, by courts but also to ensure speedy justice by not burdening the court with unnecessary and avoidable litigation.

In *Gayathri* v. *M. Girish*,[135] the apex court castigated the practice of seeking adjournments after adjournments. Looking at the entire case record, the number of adjournments sought at different stages and interlocutory applications filed, the apex court said that the non – concern of the party shown towards the proceedings of the court is absolutely manifest. It imposed a cost of rupees fifty thousand to be paid to the State Legal Services Authority, Karnataka. While also expressing dissatisfaction over the conduct of the lawyer, the court observed:[136]

> A counsel appearing for a litigant has to have institutional responsibility. The Code of Civil Procedure so command. Applications are not to be filed on the grounds… that too in such a brazen and obtrusive manner. It is wholly reprehensible. The law does not countenance it and, if we permit ourselves to say so, the professional ethics decries such practice. It is because such acts are against the majesty of law.

Consumer Forum: Maintainability of second complaint

The question as to whether a second complaint to the district forum under the Consumer Protection Act, 1986 is maintainable, on the same facts and cause of action, when the first complaint was dismissed for default arose before the Supreme Court in *Indian Machinery Co.* v. *Ansal Housing & Construction Ltd.*[137]

The apex court, relying on *New India Assurance Co. Ltd.* v. *R. Srinivasan*,[138] had answered the question in the affirmative. It was of the opinion that in the absence of any rule in the Consumer Protection Act, 1986 or the Rules made thereunder similar to order 9 rule 9(1) of the CPC, the second complaint is maintainable in the facts and circumstances of the case.

135 (2016) 14 SCC 142.
136 *Id.*, para 9.
137 (2016) 3 SCC 689.
138 (2000) 3 SCC 242.

Recall and examination of witnesses

The question as to whether a witness can be recalled, in exercise of the discretionary power under order 18 rule 17, CPC, for further elaboration of aspects left out in evidence already closed, arose for consideration of the apex court in *Ram Rati* v. *Mange Ram*.[139] The question, in fact, was not *res integra*, there being express decisions of the apex court rendered in *Vadiraj Naggappa Vernekar*[140] and *K.K. Velusamy*.[141] Relying on the said decisions, the apex court reiterated the legal position that the said rule 17 only enables the court to recall any witness, either *suo motu* or at the request of any party, for clarifying any issue or doubt by putting any questions itself or permitting the parties to do so. But, it 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 on record additional material or evidence which could not be produced earlier when the evidence was being recorded. Recourse to the inherent power of the court under section 151, CPC is the only option for the parties to recall the witnesses for the said purposes. In the opinion of the court "[T]he rigour under Rule 17, however, does not affect the inherent powers of the court to pass the required orders for ends of justice to reopen the evidence for the purpose of further examination or cross-examination or even for production of fresh evidence.This power can also be exercised at any stage of the suit, even after closure of evidence."[142] In the end, taking into account the settled position of law, the court categorically stated that recalling of witnesses at the instance of any of the parties "for further elaboration on the left out points", is wholly impermissible in law.

Enlargement of time

Section 148 of CPC empowers the court, in its discretion, to enlarge period, from time to time, for the doing of any act prescribed or allowed by CPC beyond the period originally fixed or granted by the court. The Civil Procedure Code (Amendment) Act, 1999 imposed a cap on such enlargement of time by inserting the words "not exceeding thirty days in total." Thus, enlargement of time, whether granted once or more than once, cannot exceed thirty days in total. But, according to the *ratio* laid down in *Salem Advocate Bar Assn. (2)*,[143] this provision prescribing the limit of thirty days is subject to the inherent power of the courts under section 151, CPC. Relying on the same, the apex court in *Nashik Municipal Corpn.* v. *R.M. Bhandari*,[144] observed that "if the act could not be performed within thirty days for the reasons beyond the control of the parties, the time beyond maximum thirty days can be extended under Section 151 CPC."[145]

139 (2016) 11 SCC 296.
140 *Vadiraj Naggappa Vernekar* v. *Sharadchandra PrabhakarGogate* (2009) 4 SCC 410.
141 *K.K. Velusamy* v. *N. Palanisamy* (2011) 11 SCC 275.
142 *Supra* note 139, para 14.
143 *Salem Advocate Bar Assn. (2)* v. *Union of India* (2005) 6 SCC 344.
144 (2016) 6 SCC 245.
145 *Id.*, para 15.

Effect of withdrawal of suit on interlocutory orders

The object of interim order is to provide "a reasonable solution to the matter which should govern the parties until disposal of the suit where the main controversy is required to be decided."[146] It is axiomatic that if the suit is withdrawn after obtaining the interlocutory order, such orders cannot remain in force thereafter. In *Messer Holdings Ltd.* v. *Shyam Madanmohan Ruia*,[147] it was reiterated that any interlocutory order passed during the subsistence of a suit by any court including the Supreme Court in any proceeding arising out of such suit automatically lapses when the suit is withdrawn. A logical consequence of such lapsing is that any act or omission of any party to the said suit, either in pursuance of or in obedience to such interlocutory orders would be without any legal efficacy.

Remanding a case

In *A.A. Prakasan* v. *Anupama*,[148] the apex court, in a very short order, stated when a case can be remanded back by the appellate court. In this case, the high court, as a consequence of its decision to permit amendment, simply set aside the judgment of the trial court and remanded the case back to it for reconsideration. The said order of the high court was challenged before the Supreme Court, which observed that even after permitting the amendment, the high court, before setting aside the judgment, is required to go into the question whether any fresh issue was required to be framed or fresh evidence was to be led. In case it is necessary to do so, a report could be called for from the trial court on such additional issue. Remand could be ordered only if the judgment of the trial court was erroneous and the appellate court could not decide the matter. A case shall not be remanded back merely on an amendment being allowed. While setting aside the order of the high court remanding the case to the trial court, the apex court remanded the case back to the high court.

In *Syeda Rahimunnisa*,[149] the apex court held that unless the appellants raise the plea and make out a case for remand on facts, the appellate court shall not remand the case back to the trial court. It is obligatory for the appellants, while claiming remand, to bring the case under any of the provisions contained in rules 23, 23-A or 25 of order 41, CPC which deal with the power of the appellate court to remand the case. It is also obligatory for the appellate court to accord reasons as to why it has taken recourse to any one of these provisions for remanding the case. In the absence of plea taken and grounds furnished as to why the remand order is called for, the high court is not justified in remanding the case, instead, it should decide the appeals on merit.

In *Energy & Resources Institute* v. *Suhrid Sudarshan Shah*,[150] the apex court remanded back the matter to the high court for the second time. In the initial round,

146 Per Ranjan Gogoi, J. in *International Confederation of Societies of Authors and Composers (ICSAC)* v. *Aditya Pandey* (2017) 11 SCC 437.
147 (2016) 11 SCC 484.
148 (2017) 11 SCC 392.
149 *Supra* note 85.
150 (2016) 14 SCC 115.

when the special leave petition was filed challenging the order of high court summarily dismissing the writ petition, the apex court remanded the matter back to the high court with a direction to adjudicate upon specific issues after hearing all the parties concerned. The high court disposed of the case without any discussion on points raised by the Supreme Court and addressing all the diverse pleas raised by the parties. Thus, the matter was remanded back to the high court again.

Leave to defend in a summary suit

Under order 37 rule 3, CPC the court has the discretionary power to grant leave to defend in a summary suit. The principles governing the exercise of the said discretion were earlier enunciated by the apex court in *Mechelec*.[151]Subsequent to the decision in the said case, certain changes were introduced to order 37 rule 3 through the statutory amendment brought in 1976. In the year under survey, the apex court, in *IDBI Trusteeship Services Ltd.* v. *Hubtown Ltd*.,[152]explicitly acknowledged that the principles enunciated in *Mechelec*[153] stood superseded by the amendment made in 1976 to the said provision. As per the position in law, as it stands today, the court has the discretion either to grant conditional or unconditional leave to defend or to refuse to grant leave to defend. It confers a wide discretion, which is, in the words of the apex court, "akin to Joseph's multi-coloured coat — a large number of baffling alternatives present themselves."[154] Thus, in order to obviate the possibility of exercising the judicial discretion in an arbitrary manner, the apex court laid down new set of broad principles for the guidance of the trial judge. They are as follows:

> (i) If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.[155]
>
> (ii) If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.[156]
>
> (iii) Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing

151 *Mechelec Engineers & Manufacturers* v. *Basic Equipment Corpn.*(1976) 4 SCC 687.
152 (2017) 1 SCC 568.
153 *Supra* note 151.
154 *Supra* note 152, para 16.
155 *Id.*, para 17.1.
156 *Id.*, para 17.2.

security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.[157]

(iv) If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.[158]

(v) If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.[159]

(vi) If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.[160]

Application of CPC to arbitration proceedings

The apex court, in *MTNL* v. *Applied Electronics Ltd*.,[161] has dealt with a question relating to applicability of the CPC to the proceedings under the Arbitration and Conciliation Act, 1996. The court, after detailed examination of case law and the material differences in the scheme of the Arbitration and Conciliation Act, 1996 compared to the erstwhile Arbitration Act, 1940, has opined that the 1996 Act is a complete code in itself and it has not conceived the application of CPC to arbitration proceedings unlike the 1940 Act. The court, however, referred the matter to be placed before the larger bench in view of its disagreement with the contrary law laid down in *ITI Ltd*.,[162] which is a binding precedent.

Another important question as to whether 'arbitration proceeding' is a 'civil proceeding' for the purpose of application of section 69 (3) of the Partnership Act, 1932 came up before the Supreme Court in *Umesh Goel* v. *H.P. Coop. Group Housing*

157 *Id*., para 17.3.
158 *Id*., para 17.4.
159 *Id*., para 17.5.
160 *Id*., para 17.6.
161 (2017) 2 SCC 37.
162 *ITI Ltd.* v. *Siemens Public Communications Network Ltd.* (2002) 5 SCC 510.

Society Ltd.[163]It was contended, relying on sections 35 and 36 of the Arbitration and Conciliation Act, 1996, that arbitral proceeding is a civil proceeding. Section 36 provides that the arbitral awards can be enforced under CPC in the same manner as if it were a decree of the court and section 35 says that the award will be, subject to the other provisions of the Act, final and binding on the parties and persons claiming under them. The apex court rejected the argument holding that it is difficult to draw such an inference based on the deeming provisions, contained in sections 35 and 36, which are meant for the enforcement and execution of an award. Based on the said provisions, in the opinion of the apex court, the arbitral proceeding cannot be equated to civil court proceedings.

Duty of the court to assist in arriving at settlement

Under order 27 rule 5 – B, the court has the duty, in suits filed by or against the government or public officer, to make every endeavor to assist the parties in arriving at a settlement in respect of the subject – matter of the suit. In *Haryana State* v. *Gram Panchayat Village Kalehri*,[164] the apex court, after having noted that no such endeavor was made by the courts below, has observed that "it should have been done and only on failure being reported, the case should have been finally decided on merits in accordance with law."[165]

Power to recall the order passed in Income Tax Appeal

In [*T]he Commissioner of Income Tax Central-I, Kanpur* v.*Subrata Roy*,[166] the apex court dealt with the question relating to the power of the high court to recall the order passed in income tax appeals in exercise of jurisdiction under section 260A(7) of the Income Tax Act, 1961 read with order 41 rule 21, CPC. The court opined that unless the order passed is an *ex parte* order, the high court has no jurisdiction, under order 41 rule 21, to recall the order. It said that "[T]he power available under Order XLI rule 21 is hedged by certain pre-conditions and unless the pre-conditions are satisfied the power there under cannot be exercised."

Transfer of civil (or criminal) cases from or to the State of Jammu and Kashmir

An important question as to whether a case pending in a court in the State of Jammu and Kashmir can be transferred to a court outside the state and the *vice versa* came up for the consideration of the apex court in *Anita Kushwaha* v. *Pushap Sudan*.[167]When the question was raised in a bunch of transfer petitions – eleven civil and two criminal transfer petitions – the three judge bench of the apex court referred the matter to the constitution of bench of five judges.

163 (2016) 11 SCC 313.
164 *Supra* note 88.
165 *Id*., para 15.
166 2016 SCC OnLine SC 769.
167 (2016) 8 SCC 509.

It was argued by the respondents, before the constitution bench, that the provisions contained in section 25 of the CPC and section 406 of the Criminal Procedure Code, which deal with transfer of civil and criminal cases, respectively, do not extend to the State of Jammu and Kashmir and cannot, therefore, be invoked to direct transfer of any case pending in any court in the state to a court outside the state. They also contended that the corresponding civil and criminal procedural laws applicable in the state *viz*., the Jammu and Kashmir Code of Civil Procedure, 1977 and the Jammu and Kashmir Code of Criminal Procedure, 1989 do not contain any provision on *pari materia* empowering the Supreme Court to direct transfer of any case from that State to a court outside the State or *vice versa*. It was further argued that even article 139-A of the Constitution of India, which was inserted by the Constitution (Forty – Second Amendment) Act, 1976, cannot be invoked in the cases at hand as the said amendment has not been extended to the State of Jammu and Kashmir. Their point of view was that in the absence of any enabling provision in the civil and criminal procedural codes or in the Constitution, the litigants have no right to seek transfer of civil or criminal cases to a court outside the state or *vice versa*.

The petitioners, who were seeking transfer, have partly agreed with the contention of the respondents that the central civil and criminal procedure codes do not apply to the State of Jammu and Kashmir; civil and criminal procedure codes of Jammu and Kashmir do not contain any provision authorizing the Supreme Court to transfer cases from that State to outside and also with the contention that article 139-A of the Constitution does not apply to the State of Jammu and Kashmir. They contended, on the other hand, that inapplicability of the central codes to the state or the absence of enabling provisions in the state codes do not necessarily imply that the Supreme Court cannot exercise the power of transfer. They also emphasized on the aspect that there was no specific or implied prohibition in the said codes or any other law of the state against the exercise of power of transfer by the Supreme Court. They also argued that the inapplicability of article 139-A of the Constitution to the State of Jammu and Kashmir does not constitute disability, leave alone, a prohibition against the exercise of the power of transfer by the Supreme Court if such power could, otherwise, be traced to any other source within the constitutional framework. They further proceeded to suggest the source of such power. They submitted that access to justice being a fundamental right under article 21 of the Constitution, any litigant whose fundamental right to access to justice is denied or jeopardized can invoke the jurisdiction of the Supreme Court, under article 32, seeking appropriate remedy. The court can, in such cases, issue appropriate direction or order for the protection of fundamental right and that may include, in appropriate cases, the direction to transfer cases. They vehemently argued that article 142 of the Constitution read with article 32 confer ample power on the Supreme Court to intervene and issue suitable directions, wherever necessary, to do complete justice to the parties. Under the said provisions of the Constitution, the Supreme Court can issue direction to transfer cases from any court within the State of Jammu and Kashmir to any other state or *vice versa* in order to ensure that litigants engaged in legal proceedings get a fair and reasonable opportunity to access justice.

The constitution bench of the apex court, after detailed examination of the issues in the light of plethora of cases, concluded that the access to justice is indeed a fundamental right under article 21 of the Constitution of India and, thus, articles 32 and 142 empower the Supreme Court to issue directions, in suitable cases, for transfer of cases to and from the State of Jammu and Kashmir. It observed thus:[168]

> The absence of an enabling provision, however, cannot be construed as a prohibition against transfer of cases to or from the State of Jammu and Kashmir. At any rate, a prohibition simpliciter is not enough. What is equally important is to see whether there is any fundamental principle of public policy underlying any such prohibition. No such prohibition nor can any public policy be seen in the cases at hand much less a public policy based on any fundamental principle. The extraordinary power available to this Court under Article 142 of the Constitution can, therefore, be usefully invoked in a situation where the Court is satisfied that denial of an order of transfer from or to the court in the State of Jammu and Kashmir will deny the citizen his/her right of access to justice. The provisions of Articles 32, 136 and 142 are, therefore, wide enough to empower this Court to direct such transfer in appropriate situations, no matter the Central Codes of Civil and Criminal Procedure do not extend to the State nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers this Court to transfer cases.

The question referred to the constitution bench, thus, stood answered in the affirmative. The transfer petitions were ordered to be listed before the regular bench for hearing and disposal on merits.

Trial of election petition

By virtue of section 87 of the Representation of People Act, 1951, the trial of an election petition shall be conducted in accordance with the provisions of CPC. The apex court reiterated the said rule in *Rajendra Kumar Meshram*.[169] The court also held that the high court is not justified in holding that the election of the retuned candidate is void under section 100(1)(a) of the Act, when the election petition did not contain a pleading to that effect and when no issue is formulated on that score and no opportunity was afforded to the returned candidate to adduce evidence in support of his case.

168 *Id*., para 45.
169 *Rajendra Kumar Meshram* v. *Vanshmani Prasad Verma* (2016) 10 SCC 715.

Law of limitation

The inflexible side of the law of limitation that applies to the filing of suit is evident in the decision of the Supreme Court rendered in *Ajay Gupta* v. *Raju*,[170] It is an interesting case. As per the period of limitation prescribed, the last date for filing of recovery suit was December 31, 2010, which was also the last day of winter vacation of the court, thus, the court was closed. Section 4 of the Limitation Act, 1963 provides that "[W]hen the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens."Accordingly, the suit could have been filed on the reopening day after the winter vacation i.e., on January 01, 2011, which was a Saturday. It, in fact, also happened to be "non-working" Saturday for the judges, which they were supposed to utilize for writing judgments and regular hearing of cases are not held on that day. It was, however, not a holiday for the Registry and it was functioning for the entire day. Unfortunately, the respondent – plaintiff had not filed the suit on that day, he filed it on Monday, January 03, 2011. The appellant – defendant had filed an application under order 7 rule 11 for rejection of the plaint on the ground that it is barred by limitation. The trial court rejected his application for rejection and the high court, in civil revision, affirmed the order of the trial court while holding that although the suit could have been filed on a non-working Saturday, if it is not filed under the assumption that it is non-working day, then the mistake of non-filing is a *bona fide* mistake.

The Supreme Court set aside the orders of both the trial court and the high court holding that they have "gravely gone wrong on the first principles on the law of limitation."[171] However, the court did not even mention what those "first principles" are let alone explaining how the courts below have gravely gone wrong on them. It was of the opinion that since the Registry was working for the entire day on January 01, 2011, the suit should have been filed on the said day itself and any confusion about the non-working day cannot save limitation to file the suit. It also added that, as far as filing of suits are concerned, the provision relating to extension of limitation period contained in section 5 of the Limitation Act, 1963 is also not applicable. It applies only to appeals or applications and not to suits. Therefore, the court said, "no court or tribunal can extend the period of limitation for filing a suit. Even if any cause, beyond the control of the plaintiff is shown also, the only extension is what is permitted under Section 4 of the Act, the period coming under court holiday."[172] The Supreme Court allowed the application for rejection of plaint and the suit was, accordingly, dismissed.

On perusal of section 4 of the Limitation Act, 1963, it appears, *prima facie*, that it was possible to adopt an alternative construction, which would have been reasonable than the one adopted by the court. Section 4 says if the limitation period expires on

170 (2016) 14 SCC 314.
171 *Id*., para 6.
172 *Id*., para

the day when the 'court'is closed, the case can be filed on the day when the 'court' reopens. It does not specifically refer to closing or reopening of the 'registry' and there is nothing in the Limitation Act, 1963 which states that the day of reopening of the registry shall be deemed to be reopening of the court for the purpose of section 4. The interpretation given by the court seems to be hyper technical.

In *Suryachakra Power Corpn. Ltd.* v. *Electricity Deptt*.,[173] the apex court dealt with issues relating to computation of limitation period and condonation of delay in filing appeal under section 125 of the Electricity Act, 2003. The said provision provides for filing of appeal to the Supreme Court within sixty days from the date of communication of decision or order of the appellate tribunal. The proviso to the said provision empowers the court to allow the appellant, if there exist "sufficient cause", to file the appeal within a further period not exceeding sixty days. It is amply clear that the maximum period that can be allowed for filing the appeal under this provision is one hundred and twenty days. The court said, relying on *Chhattisgarh SEB* v. *Central Electricity Regulatory Commission*,[174] that the Supreme Court cannot condone the delay beyond the period prescribed in the proviso to the said provision by invoking section 5 of the Limitation Act, 1963. It, however, said that even though section 5 of the Act is not applicable for condonation of delay, for the purpose of computing the period of limitation, the principles under section 14 of the Limitation Act, 1963 can be applied provided two main ingredients required for attracting the said principles are present *viz*., the party must have exercised due diligence while prosecuting another civil proceedings and that the said prosecution should be in good faith. Both must be established.

XI CONCLUSION

The area of civil procedural law is enriched by many landmark or significant rulings of the apex court during the survey year. The year has witnessed three constitution bench decisions. In *Pankajakshi*,[175] the constitution bench upheld the primacy of section 23 of the Travancore – Cochin High Court Act over section 98 of CPC and in *Mathai*,[176] the bench declined to lay down broad guidelines for exercise of discretionary power under article 136 of the Constitution of India, which provision is invoked mostly to seek special leave to appeal before the apex court even in civil cases. In *Anita Kushwaha*,[177] the bench held, notwithstanding the inapplicability of the central civil and criminal procedure codes to State of Jammu and Kashmir and the absence of provisions relating to transfer of cases in the state civil and criminal procedure codes, the apex court has the power to transfer cases, both civil and criminal,

173 (2016) 16 SC C 152.
174 (2010) 5 SCC 23.
175 *Supra* note 121.
176 *Supra* note 129.
177 *Supra* note 167.

from the State of Jammu and Kashmir to a court outside the state and *vice – versa*. It relied upon articles 21, 32 and 142 of the Constitution and the jurisprudence evolved on them to lay down the said proposition.

Several other important issues relating to civil procedure came up before many smaller benches of the apex court. In majority of the cases, their rulings brought greater clarity. In some cases, the apex court has even laid down certain principles/ guidelines to be followed by courts. However, it must also be noted, that certain decisions rendered during the year failed to provide required clarity or they are inconsistent with the decisions rendered in other cases. Conflicting views were expressed on certain questions relating to, for example, the extent of exclusion of jurisdiction of civil courts under section 34 of the SARFAESI Act; necessary parties in a suit for specific performance of agreement to sale; power of the first appellate court to interfere with the findings of facts by the trial court. In some cases, issues relating to civil procedure have been cursorily dealt with and disposed of without detailed analysis and reasoned judgments. In view of the fact that procedural issues may, at times, become decisive in a case, it is important to pay adequate attention in deciding such issues in order to ensure clarity, certainty and predictability to the desirable extent.