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CIVIL PROCEDURE

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I INTRODUCTION

IT IS important to underscore, time and again, the importance of procedural laws in adjudication of disputes having regard to the tendency of courts to often disregard them in the purported pursuit of substantive justice. The apex court, in the survey year, has emphasized on the necessity to adhere to rules and principles envisaged in the procedural laws in several cases. In *Satyanand* v. *Shyam Lal Chauhan*,[1] the court even explicitly stated, while dealing with an issue relating to non-compliance with the provisions contained in the Code of Civil Procedure, 1908 (CPC), that even though the procedural laws are meant to advance justice, "[A] procedure contemplated under the code which is mandatory in nature shall not be skipped or ignored by the courts."[2]

The present survey discusses all the important decisions rendered in the survey year in which issues relating to civil procedural laws are dealt with. Though the focus is on decisions concerning interpretation and application of the provisions of CPC, the present survey also covers decisions on the procedural provisions of certain other laws such as the Employee's Compensation Act, 1923; the Motor Vehicles Act, 1988; SARFAESI Act, 2002; Commercial Courts Act, 2015. An attempt has been made to bring out the essence of each decision and to succinctly statethe same with, wherever required, some explanations and insights.

II JURISDICTION

In the words of the apex court, the word 'jurisdiction' "is a coat of many colours, and that the said word displays a certain colour depending upon the context in which it is mentioned."[3] Issues relating to jurisdiction had arisen before the apex court in several cases in the survey year. How the court has dealt with such issues having regard to the context in which such issues arose has been elucidated in this section.

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1 (2018) 18 SCC 485.

2 *Id*., para 11.

3 *IFFCO Ltd*. v. *Bhadra Products* (2018) 2 SCC 534, para 21.

Jurisdiction of labour court to decide service disputes between cooperative society and its employee

In *K.A. Annamma* v. *Cochin Coop. Hospital Society Ltd*.,[4] the apex court considered the question as to whether a service dispute between a cooperative society and its employee is triable by the labour court established under the Industrial Disputes Act, 1947 or by an authority under the Kerala Cooperative Societies Act, 1969 or do both have concurrent jurisdiction leaving the choice with an aggrieved person to select which forum to be approached?

This is a question on which different benches of the High Court of Kerala have expressed different opinions in the past. Even the five judge bench of the High Court of Kerala did not render a unanimous verdict on the question in *Santhosh*[5] case. In that case, the majority held that such service dispute is triable only by the forum established under the Kerala Cooperative Societies Act, 1969 (KCS Act) and not under the Industrial Disputes Act, 1947 (ID Act), whereas the minority held that both have concurrent jurisdiction. The apex court did not agree with the majority view. Agreeing with the minority, it ruled that, "the KCS Act and the ID Act both possess and enjoy the concurrent jurisdiction to decide any service dispute arising between the cooperative society's employee and his/her employer (cooperative society)."[6] The court also ruled that it is the choice of the employee to choose any one of the two forums available under the two Acts. However, approaching the forum under the ID Act is subject to the tests laid down therein *i.e.*, "the employee concerned is a 'workman', the dispute raised by him/her is an 'industrial dispute' and the cooperative society (employer) is an 'industry' as defined under the ID Act."[7]

Declaratory suit claiming legal heirship

In *R. Kasthuri* v. *M. Kasthuri*,[8] a suit was filed by plaintiffs seeking declaration of the first plaintiff as wife, second and third plaintiffs as children and the third defendant as mother, thus, as the legal heirs of the deceased. The same was opposed by the defendants one and two, who also claimed to be the wife and son of the deceased. The suit was decreed by the trial court and affirmed by the first appellate court. The high court, in the second appeal, reversed the decision holding that, "having regard to the nature of the suit and the reliefs claimed the civil court had no jurisdiction to entertain the suit which lay within the domain of the Family Court constituted under the Family Courts Act, 1984."

The apex court found the decision of the high court untenable. Looking into the 'statement of objects and reasons' and the scheme of the Family Courts Act, 1984, it held that "there is no family dispute between the plaintiffs and the defendants".[9] In its opinion:[10]

4 (2018) 2 SCC 729.

5 *Chirayinkeezhu Service Coop. Bank Ltd.* v. *K. Santhosh* (2015) 4 KLT 163.

6 *Supra* note 4, para 67.

7 *Id*., para 68.

8 (2018) 5 SCC 353.

9 *Id*., para 6.

10 *Id*., para 7.

> …[t]he dispute between the parties is purely a civil dispute and has no bearing on any dispute within a family which needs to be resolved by a special procedure as provided under the Act. No issue with regard to the institution of marriage and the need to preserve the same also arises in the present case. That apart, the dispute between the parties can only be resolved on the basis of evidence to be tendered by the parties, admissibility of which has to be adjudged within the four corners of the provisions of the Evidence Act, 1872. In such a proceeding it would be clearly wrong to deprive the parties of the benefit of the services of counsel.

The apex court set aside the order of the high court and remitted the case back to the high court for deciding it on merits.

Inter-country dispute: Jurisdiction to determine guardianship

In *Jasmeet Kaur* v. *Navtej Singh*,[11] the apex court examined the correctness of rejection of guardianship petition under order 7 rule 11, CPC. The appellant and respondents, both nationals of the United States (US), got married in US and from the wedlock two children were born – one in US and the second in India. The appellant, who came to India before the delivery of the second child, filed a guardianship petition before the family court in India. The court, after taking into account the facts, rejected the petition under order 7 rule 11 on the ground that the appropriate court in US should be approached as it would have "intimate contact with the matter." The rejection was confirmed by the high court.

While allowing the appeal against rejection of the petition, the apex court, relying on the law laid down in *Nithya Anand Raghavan* v. *State (NCT of Delhi)*,[12] observed that for determining the threshold bar of jurisdiction to entertain guardianship petitions, the courts cannot rely on "principle of comity of courts or principle of forum convenience alone."[13] It said that in such cases the,"[P]aramount consideration is the best interest of the child"[14] and "[T]he same cannot be the subject-matter of final determination in proceedings under Order 7 Rule 11 CPC."[15] It accordingly set aside the order of rejection and directed the family court to decide the matter expeditiously.

SARFAESI Act, 2002: Ouster of civil courts jurisdiction

In *SBI* v. *Allwyn Alloys (P) Ltd.*,[16] a decision of the Debt Recovery Appellate Tribunal (DRAT) was challenged before the high court in a writ petition. The high court, without examining the concurrent findings of the Debt Recovery Tribunal (DRT) and the DRAT, disposed of the writ petition stating that the case involves disputed facts and, thus, it would require production of evidence and full-fledged trial. It gave liberty to the writ petitioners to "approach proper forum" for adjudication of the

11 (2018) 4 SCC 295.
12 (2017) 8 SCC 454.
13 *Supra* note 11, para 4.
14 *Ibid*.
15 *Ibid*.
16 (2018) 8 SCC 120.

disputes. The apex court, while setting aside the order of the high court, has termed the approach adopted by the high court as "completely fallacious and untenable in law." It observed:[17]

> …[t]he mandate of Section 13 and, in particular, Section 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 clearly bars filing of a civil suit. For, no civil court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or DRAT is empowered by or under this Act to determine and no injunction can be granted by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

Objection as to the competence of the court

Section 21 (2), CPC prohibits the appellate and revisional courts from allowing objections as to the pecuniary jurisdiction of the court of first instance unless such objection was taken in the court of first instance at the earliest possible time and also proves that decision by a court without jurisdiction has led to failure of justice. Relying on the said provision and plethora of judicial decisions on the point, the apex court, in *Om Prakash Agarwal* v. *Vishan Dayal Rajpoot*,[18] observed that a party, who did not raise any objection regarding the pecuniary jurisdiction of the court and took a chance to obtain judgment in his favour on merits, cannot be allowed to turn around and take the plea before the revisional court that the judgment was rendered by a court without jurisdiction and, thus, it is a nullity. Section 21 has been enacted to prevent a party from taking such a plea only after the decision on merit goes against him. The court stated that, "[S]ection 21 contains a legislative policy which policy has an object and purpose. The object is also to avoid retrial of cases on merit on basis of technical objections."[19] Taking note of the law laid down by the single judge of the high court in *Tejumal* v. *Mohd. Sarfraz*,[20] where it was held that "defects of jurisdiction whether pecuniary or territorial or to the subject matter cannot be cured and can be set up at any stage of the proceeding", the apex court held that the same cannot be approved as it does not lay down the correct law.

III RES JUDICATA

The doctrine of *res judicata*, though stated to belong to the realm of procedural law, is not a mere technical doctrine. It is a doctrine of fundamental importance that seeks to ensure that there is an end to all litigation. This is the public policy of Indian law as well.[21] This doctrine is statutorily embodied in section 11, CPC, which bars the court from trying "any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties…".For the purpose of applying the principle, the case needs to be subjected to

17 *Id*., para 8.

18 2018 SCC OnLine SC 1942.

19 *Id*., para 57.

20 (2017) (121) ALR 392.

21 *Canara Bank* v. *N.G. Subbaraya Setty* (2018) 16 SCC 228.

the triple tests regarding – (i) factum of the identity of the parties, (ii) cause of action, and (iii) the subject – matter.[22] To answer the subject – matter test, it is necessary to determine, in the first place, what matter has been "directly and substantially in issue" in a previous case. Such questions often arise before the courts for determination. In the survey year, the apex court, in *Rithwik Energy Generation (P) Ltd*.,[23] endorsed the two tests laid down by Mulla[24] for determination of what matter has been "directly and substantially in issue" as opposed to being "collaterally and incidentally" in issue in a case. The two tests laid down are:

(i) Whether the issue was "necessary" to be decided for adjudicating on the prime issue involved in a case? If yes, was it decided? Or

(ii) Whether adjudication of the said issue is considered material and essential for its decision by the court. The question must be decided keeping in view the facts of each case.

Further, in *Municipal Corpn. of Greater Mumbai* v. *Pankaj Arora*,[25] the apex court took into account the cautions issued by Mulla against misapplication of *res judicata*. The court quoted him with approval.[26]

> It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.

In *Sucha Singh Sodhi* v. *Baldev Raj Walia*,[27] two interesting question with regard to application of order 2 rule 2 (2), CPC arose for the consideration of the apex court.

(i) Whether a bar contained in order 2 rule 2 (2) applies to the second suit for'specific performance'filed after withdrawing the first suit filed for 'permanent injunction'?

(ii) Whether the plaintiff was entitled to file a second suit for 'specific performance' in the absence of permission or liberty granted to him by the trial court at the time of withdrawing the first suit for permanent injunction?

22 *Andanur Kalamma* v. *Gangamma* (2018) 15 SCC 508.

23 *Rithwik Energy Generation (P) Ltd*. v. *Bangalore Electricity Supply Co. Ltd.*(2018) 17 SCC 223.

24 Sir Dinshaw Farduji Mulla*, The Code of Civil Procedure* (Lexis Nexis India; Fifteenth edition (2012).

25 (2018) 3 SCC 699. Also see, *M. Siddiq (D) Thr. Lrs.* v. *Mahant Suresh Das* 2018 SCC Online SC 1677. In this case the apex court examined whether the issues raised in the instant case were directly and substantially in issue in *M. Ismail Faruqui* v. *Union of India* [(1994) 6 SCC 360] ? The court answered the question in the negative and held that the present petition was not barred by *res judicata*.

26 As cited in *Municipal Corpn. of Greater Mumbai*, *Id*., para 18.

27 (2018) 6 SCC 733.

In the present case, the plaintiff – appellant had filed a first suit for permanent injunction. In the plaint he had averred that the defendant – respondent had agreed to sell suit property to him and accordingly an agreement to sell had been entered into between them. On payment of advance, the appellant was placed in possession of the property and later the respondent had threatened to dispossess him from the same. It is on this cause of action the suit was filed for permanent injunction. In the said suit, the respondent had filed his written statement stating, *inter alia*, that he had already transferred the suit property to another person and, therefore, the proper remedy for the plaintiff would be to file suit for specific performance and not seeking permanent injunction. After this, the plaintiff sought to withdraw the suit for the purpose of initiating the proceedings before the "competent forum for appropriate relief." The respondent did not object for the withdrawal. The trial court, after recording the statement of both the parties, allowed plaintiff to withdraw the suit. The order allowing the withdrawal of the suit did not, however, explicitly state that the plaintiff has the liberty to file a subsequent suit for appropriate relief.

When the second suit for specific performance was filed, the defendants, apart from filing a written statement, also filed an application under order 7 rule 11 for rejection of the plaint on the ground that the suit is hit by the provisions of order 2 rule 2 (2), CPC. According to them, "non-claiming of relief of specific performance of the agreement in the previously instituted suit though available to the plaintiff for being claimed on the cause of action pleaded in the previous suit would attract the bar contained in Order 2 Rule 2…"[28] The trial court allowed the said application and dismissed the suit. The said decision was upheld by the high court.

While dealing with the appeal against the aforesaid decisions, the apex court answered the first question in the negative and the second in the affirmative. As regards the first question the apex court observed:[29]

> In our opinion, the *sine qua non* for invoking Order 2 Rule 2(2) against the plaintiff by the defendant is that the relief which the plaintiff has claimed in the second suit was also available to the plaintiff for being claimed in the previous suit on the causes of action pleaded in the previous suit against the defendant and yet not claimed by the plaintiff.

Having noted the facts of the case, the apex court held thatthe plaintiff could not have claimed a relief of specific performance of agreement in the earlier suit on the basis of the cause of action pleaded therein. It further observed:[30]

> …[w]hen both the reliefs/claims, namely, (1) permanent injunction, and (2) specific performance of agreement are not identical, when the causes of action to sue are separate, when the factual ingredients necessary to constitute the respective causes of action for both the reliefs/claims are different and lastly, when both the reliefs/claims are governed by separate articles of the Limitation Act, then, in our opinion,

28 *Id*., para 15.
29 *Id*., para 26.
30 *Id*., para 29.3.

> it is not possible to claim both the reliefs together on one cause of action.

As regards the second question, even though the court thought that the same does not survive for consideration as a result of answering the first question in the negative, it opined, relying on *Gurinderpal*,[31]that both the statement of the plaintiff and order of the court granting permission to withdraw the suit are to be read together to understand whether the court has granted liberty to file a subsequent suit or not. In the instant case, reading them together would satisfy the requirement of order 23 rule 1 (3) and, thus, the plaintiff was entitled to file the second suit.

Exceptions to *res judicata*

The doctrine of *res judicata*, which is of fundamental importance in our legal system, has certain notable exceptions. The doctrine cannot be invoked to confer finality to:

(i) An erroneous decision on the jurisdiction of the court.

(ii) An erroneous judgment on a pure question of law.

In *Canara Bank* v. *N.G. SubbarayaSetty*,[32] the apex court dealt with issues concerning application of the second exception. After comprehensive analysis of the doctrine, the statutory provisions embodying it and the case law, the court cleared the ambiguities concerning its application. It succinctly stated the general rule and the exceptions to it. It observed:[33]

> The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.

This general rule, the court said, has certain exceptions when it comes to issues of law. The court elucidated them as follows:[34]

> Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding…

An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only

31 *Gurinderpal* v. *Jagmittar Singh* (2004) 11 SCC 219.

32 (2018) 16 SCC 228.

33 *Id*., para 34.1.

34 *Id*., paras 34.2.1, 34.2.2 and 34.2.3.

matter for consideration (as is the case of an erroneous interpretation of a statute interpartes), as the public policy contained in the statutory prohibition cannot be set at naught…

> Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding. Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different.

Res - Sub judice* and *judicata

In *Canara Bank* v. *N.G. Subbaraya Setty*,[35] the apex court dealt with another important question as to when does *res* cease to be *sub judice* and become *judicata*.

After examining the case law, the court reiterated the legal position that *res* is not to be considered *judicata* until the limitation period for filing an appeal is over. Till that time *res* remains *sub judice*. It is only after the limitation period is over, *res* (subject matter) can be considered *judicata* (stand adjudicated).

The court had also explained the procedure that should be followed in the second suit or proceedings initiated by a party to a previous suit before the expiry of limitation period for filing appeal or immediately after its expiry. In such cases, the apex court opined that:[36]

> …[t]he court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the court hearing the second proceeding would be justified in treating the first proceeding as res judicata.

The court, however, stated that no hard-and-fast rule can be laid down and what needs to be done has to be decided on case to case basis. The court hearing the second proceedings must take into account the entire facts and circumstances of the case for deciding whether to dismiss the same on the basis of *res judicata* or to stay/adjourn the proceedings by treating the earlier proceedings as *sub judice*. The apex court was of the view that:[37]

> …[t]he judicious use of the weapon of stay would, in many cases, obviate a court of first instance in the second proceeding treating a

35 *Supra* note 32.

36 *Id*., para 24.

37 *Ibid*.

> matter as res judicata only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the res becomes sub judice again because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial court judgment in the second proceeding, and a de novo hearing on merits in the second proceeding commencing on remand, thereby wasting the court's time and dragging the parties into a second round of litigation on the merits of the case.

In cases where the appeal is grossly belated or where it is unlikely that the appellate court would condone the delay owing to creation of the third-party right in the interregnum, etc., the court hearing the second proceedings may proceed to decide the case on the basis of *res jurdicata*.

Application of res – judicata between co-defendants

It is well settled that in certain cases principles of *res judicata* may be invoked to prevent a co-defendant(s) in a previous suit from filing fresh suit against other co-defendant(s) if certain conditions are satisfied. In *Govindammal* v. *Vaidiyanathan*,[38] the apex court reiterated the requisite conditions for applying the principle of *res judicata* between the co-defendants. They are: "(a) there must be conflict of interest between the defendants concerned, (b) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims and (c) the question between the defendants must have been finally decided." The court made it clear that if these conditions are not fulfilled, the principles of *res judicata* cannot be made applicable between the co-defendants in a subsequent suit.

IV PLEADINGS

Pleadings serve two important purposes: *Firstly*, they inform the parties of each other's cases and, *secondly*, they enable the court to determine what is really at issue between the parties. It is a settled law that the court cannot grant relief to a party which is not based on the pleadings.[39] In civil suits, parties cannot be permitted to travel beyond the pleadings.[40] The parties, however, are not expected to state the provisions of law applicable to their case in their pleadings.[41]

Application for amendment of pleadings and production of documents

In *N.C. Bansal* v. *U.P. Financial Corpn*.,[42] the apex court reiterated the principles that shall be born in mind while considering applications seeking permission to amend the pleadings or to produce additional documents. As regards application seeking permission to amend the pleadings filed under order 6 rule 17, CPC is concerned, the

38 2018 SCC OnLine SC 2117.

39 *Shyam Narayan Prasad* v. *Krishna Prasad* (2018) 7 SCC 646; *Jharkhand State Housing Board* v. *Anirudh Kumar Sahu* (2018) 18 SCC 330 and *Akhil Bhartvarshiya Marwari Agarwal Jatiya Kosh* v. *Brijlal Tibrewal* (2019) 2 SCC 684.

40 *Ponnayal* v. *Karuppannan* (2019) 11 SCC 800.

41 *Sonell Clocks and Gifts Ltd.* v. *New India Assurance Co. Ltd.* (2018) 9 SCC 784.

42 (2018) 2 SCC 347.

apex court opined that the courts should be liberal in allowing amendments in the following cases:[43]

(i) When the suit is at the initial stage *i.e.,* where the trial has not begun;
(ii) When the proposed amendment does not change the nature of the suit;
(iii) When the application is not filed at the belated stage.

The apex court said that even the application seeking production of documents filed under order 7 rule 14, CPC shall also be allowed on the same grounds.

In *Gurbakhsh Singh* v. *Buta Singh*,[44]the apex court allowed the application for amendment of pleadings filed after the commencement of the trial taking into account the following factors:

(i) Inability of the party to obtain correct particulars well in time *i.e.,* before filing of the suit or commencement of the trial.
(ii) Trial had not progressed much. Only two official witnesses were examined, when the application for amendment was filed.
(iii) The proposed amendment neither changes the nature and characters of the suit nor does it introduce any fresh grounds.

Rejection of plaint

In *Soumitra Kumar Sen* v. *Shyamal Kumar Sen*,[45] the apex court, relying on *Kamala*,[46] had reiterated that while considering the application under order 7, rule 11, CPC seeking rejection of plaint, the court has to only look into the plaint and not the averments made in the written statement by the defendant. This aspect was further emphasized in *Chhotanben* v. *Kiritbhai Jalkrushnabhai Thakkar*[47]as well. The court observed:[48]

> What is relevant for answering the matter in issue in the context of the application under Order 7 Rule 11(d) CPC, is to examine the averments in the plaint. The plaint is required to be read as a whole. The defence available to the defendants or the plea taken by them in the written statement or any application filed by them, cannot be the basis to decide the application under Order 7 Rule 11(d). Only the averments in the plaint are germane.

In *Madiraju Venkata Ramana Raju* v. *Peddireddigari Ramachandra Reddy*,[49] a three judge bench of the apex court further elaborated on the scope of power and procedure to be followed, while dealing with an application filed under order 7 rule 11 along with another application for striking out pleadings filed under order 6 rule 16. In this case, the court was examining the correctness of rejection of an election petition in *limine* by the high court. The apex court reiterated that application for

43 *Id*., para 17.
44 (2018) 6 SCC 567.
45 (2018) 5 SCC 644. Also see *Urvashiben* v. *Krishnakant Manuprasad Trivedi* (2019) 13 SCC 372.
46 *Kamala* v. *K.T. EshwaraSa* (2008) 12 SCC 661.
47 (2018) 6 SCC 422.
48 *Id*., para 15.
49 (2018) 14 SCC 1.

rejection of plaint shall be taken up at the threshold for "it has to be considered only on the basis of institutional defects in the election petition in reference to the grounds specified in clauses (a) to (f) of Rule 11."[50]The court also opined that the power of rejection, under order 7 rule 11, can be exercised on admitting the petition or even before, when it is presented, if the court is of the opinion that the same does not fulfill the statutory and institutional requirements referred to in the aforementioned clauses of rule 11. This power may also be exercised by the court on a formal application moved by the defendant, when (s)he appears before the court. An application for striking out pleadings, on the other hand, can be moved by the respondent under order 6 rule 16 at any stage of the proceedings. The court can strike off the pleadings on any grounds specified in clauses (a) to (c) of rule 16.

The court also clarified that the court is not expected to decide the merits of the controversy either for the purpose of striking out pleadings or for rejecting the plaint altogether.

Further, the court also delineated the procedure to be followed in cases, where two separate applications – one under order 7 rule 11 for rejection of plaint and the other under order 6 rule 16 for striking out pleadings – are filed at the same time. In such cases, the court observed:[51]

> …[i]t would be open to the court in a given case to consider both the applications together or independent of each other. If the court decides to hear the application under Order 7 Rule 11 in the first instance, the court would be obliged to consider the plaint filed as a whole. But if the court decides to proceed with the application under Order 6 Rule 16 for striking out the pleadings before consideration of the application under Order 7 Rule 11 for rejection of the plaint, on allowing the former application after striking out the relevant pleadings then the court must consider the remainder pleadings of the plaint in reference to the postulates of Order 7 Rule 11, for determining whether the plaint (after striking out pleadings) deserves to be rejected in limine.

Cause of action

The 'cause of action' embodies a bundle of facts. It is necessary for the petitioner to prove them in order to get a relief from the court. For the purpose of determining, whether the election petition discloses a 'cause of action' or not, the court has to read the election petition as a whole and cannot dissect it sentence – wise or paragraph – wise.[52]

Delay in filing written statement

Order 8 rule 1, CPC stipulates that the defendant shall submit the written statement within thirty days from the date of receipt of summons. The proviso to the said provision confers discretion on the court to extend the time for a maximum period of ninety days after recording reasons in writing. It is, however, well settled that the

50 *Id*., para 24.

51 *Id.*, para 26.

52 *Supra* note 49.

provision, being part of the procedural law, does not take away the power of the court to accept written statement beyond the period of 90 days in exceptionally hard cases.[53]

In *Atcom Technologies Ltd.* v. *Y.A. Chunawala* and *Co*.,[54] the trial court had condoned the delay of more than five years and permitted the defendant to file the written statement after imposing cost of Rs. 5 lakh even when the defendant has not tendered satisfactory explanation for such a long delay. The high court also upheld the order of the trial court. The apex court, while setting aside the orders of the courts below, observed:[55]

> No doubt, the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 are procedural in nature and, therefore, handmaid of justice. However, that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing and cogent reasons for delay and the High Court has to condone it mechanically.

Contentions contrary to pleadings

The apex court, in *Suzuki Parasrampuria Suitings (P) Ltd.* v. *Official Liquidator*,[56] had reiterated that the party cannot contend what is contrary to the pleadings. The court stated that though "[A] litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands."[57]

V PARTIES

Necessary and proper parties

As it is well known a person whose presence is necessary for effectively and completely adjudicate upon all the questions involved in a dispute is called a necessary party. In the absence of necessary party no order can be made effectively. The presence of the proper party on the other hand is not very much required to pass an effective order.

In *Swapna Mohanty* v. *State of Odisha*,[58] the service of the appellant who was appointed to the first post of lecturer in a college was terminated and another person (respondent no. 4) who was holding the second post of lecturer was appointed to the first post. The appellant challenged the termination order before the competent authority and the said authority set aside the impugned order. The appellant was re-appointed to the first post and, as per the direction of the state education tribunal and the high court, her appointment was approved by the state government and the grant-in-aid was released. In the meantime, the respondent no. 4 also approached the state education tribunal seeking direction to the state to approve his appointment in the first post and release grant-in-aid. It may be noted that out of the two posts of lecturers

53 *Atcom Technologies Ltd.* v. *Y.A. Chunawala & Co.* (2018) 6 SCC 639.

54 *Ibid*.

55 *Id*., para 22.

56 (2018) 10 SCC 707.

57 *Id*., para 12.

58 (2018) 17 SCC 621.

in English, only one of the posts was admitted to grant-in-aid. The tribunal dismissed the application of respondent 4. The high court reversed the order of the tribunal and granted the relief. The high court also declared the earlier order passed by the tribunal in favour of the appellant as void as, in its opinion, the same was passed in violation of the principles of natural justice since the respondent no. 4 was not impleaded.

The apex court was of the opinion that the high court was wrong in declaring the earlier order of the tribunal void on the ground of non-impleadment of the respondent no.4 as his impleadment was not necessary for passing an effective order in the case. In holding so, the apex court emphasized on the following aspects:[59]

> The subject-matter of GIA Case No. 120 of 2006 filed by the appellant was approval of her appointment against the 1st post of Lecturer in English in the College. There is no doubt about the order of termination of the services of the appellant being set aside. The said order became final when the appeal filed by the Government was rejected by the High Court. There is no dispute that the appellant was holding the 1st post of Lecturer in English in the College on the date of termination of her services. It was only after the termination of the services of the appellant, Respondent 4 was appointed to the 1st post of Lecturer in English in the resultant vacancy. The natural consequence of the order of termination being set aside is that the appellant has to be appointed to the 1st post of Lecturer in English in the College.

Suit on behalf of a minor: Next friend/guardian

Who can be the 'next friend' to file a suit on behalf of a minor was the question dealt with by the apex court in *Nagaiah* v. *Chowdamma*.[60] In this case, the first plaintiff filed a suit on behalf of himself and his younger (second plaintiff), who is a minor at the time of filing of the suit as his next friend/guardian.

The suit was dismissed by the trial court on merits. The appeal was allowed by the first appellate court, which decreed the suit. In the second appeal for the first time, the competency of the first plaintiff to file a suit on behalf of the second plaintiff was questioned. The high court allowed the question to be raised in the second appeal, since it was pure question of law. After examination, it was held that the first plaintiff could not act as the guardian of the second plaintiff during the life of his father (first defendant) as he was the natural guardian. In reaching the said conclusion, it relied upon section 4 (b) of the Hindu Minority and Guardianship Act, 1956. On this ground, the appeal was allowed and the suit was dismissed.

The apex court was of the opinion that by relying on section 4 (b) of the Hindu Minority and Guardianship Act, 1956, "the High Court has totally misdirected itself".[61] It was of the opinion that the present case is not governed by the said provision rather it is governed by order 32, CPC. It referred to rules 1, 2, 3, 6, 7, 9, 12, 13 and 14 (as amended by the State of Karnataka as the case arose from there) of the said order.

59 *Id*., para 11.

60 (2018) 2 SCC 504.

61 *Id*., para 8.

The apex court held that from the bare reading of order 32, rule 1, it is amply clear that every suit by a minor shall be instituted in his name by a 'next friend', who "need not necessarily be a duly appointed guardian as specified under clause (b) of Section 4 of the Hindu Guardianship Act."[62] Relying on the aforementioned provisions of order 32 and precedents, the court observed:[63]

> It is by now well settled and as per the provisions of Order 32 of the Code that any person who is of sound mind, who has attained majority, who can represent and protect the interest of the minor, who is a resident of India and whose interest is not adverse to that of the minor, may represent the minor as his next friend. Such person who is representing the minor plaintiff as a next friend shall not be party to the same suit as defendant. Rules 6 and 7 of Order 32 of the Code specifically provide that the next friend or guardian in the suit shall not without the leave of the court receive any money or immovable property and shall not without the leave of the court enter into any agreement or compromise. The rights and restrictions of the natural guardian provided under the Hindu Guardianship Act do not conflict with the procedure for filing a suit by a next friend on behalf of the minor. Not only is there no express prohibition, but a reading of Order 32 of the Code would go to show that wherever the legislature thought it proper to restrict the right of the next friend, it has expressly provided for it in Rules 6 and 7 of Order 32 of the Code. Rule 9 of Order 32, apart from other factors, clarifies that where a next friend is not a guardian appointed or declared by the authority competent in this behalf and an application is made by the guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the court shall remove the next friend unless it considers, for reasons to be recorded, that the guardian ought not to be appointed as the next friend of the minor.

The apex court, accordingly, set aside the impugned order and remitted the matter back to the high court for fresh decision on merits.

Parties in an eviction suit

In an eviction suit filed by the plaintiff against his tenants, whether a person, who claims to be a co-sharer/co-owner of the suit property along with the plaintiff, seek impleadment as co-plaintiff was the question that arose for consideration of the apex court in *Kanaklata Das* v. *Naba Kumar Das*.[64]

In this case an eviction suit was filed by the appellant – plaintiff against respondents - 2 to 5 (who were defendants). In the said suit, respondent -1 filed an application under order 1 rule 10 (2) seeking impleadment as a co-plaintiff on the ground that "he is a member of the appellants' family and being so, has a right, title and interest not only in the suit premises but also in other family properties as one of

62 *Id*., para 10.

63 *Id*., para 17.

64 (2018) 2 SCC 352.

the co-owners."[65] The said application was dismissed by the trial court. The high court allowed the appeal against the said dismissal and impleaded him as a party. The apex court reversed the decision of the high court and restored the order of the trial court, while holding that the respondent – 1 is neither a necessary nor a proper party to the suit. The court assigned following reasons in support of its decision:

> First, in an eviction…only two persons are necessary parties for the decision of the suit, namely, the landlord and the tenant.[66]
>
> Second, the landlord in such suit is required to plead and prove only two things to enable him to claim a decree for eviction against his tenant… First, there exists a relationship of the landlord and tenant between the plaintiff and the defendant and second, the ground(s) on which the plaintiff landlord has sought defendant tenant's eviction under the Rent Act exists. When these two things are proved, the eviction suit succeeds.[67]
>
> Third, the question of title to the suit premises is not germane for the decision of the eviction suit. The reason being, if the landlord fails to prove his title to the suit premises but proves the existence of relationship of the landlord and tenant in relation to the suit premises and further proves existence of any ground on which the eviction is sought under the Tenancy Act, the eviction suit succeeds. Conversely, if the landlord proves his title to the suit premises but fails to prove the existence of relationship of the landlord and tenant in relation to the suit premises, the eviction suit fails.[68]
>
> Fourth, the plaintiff being a *dominuslitis* cannot be compelled to make any third person a party to the suit, be that a plaintiff or the defendant, against his wish unless such person is able to prove that he is a necessary party to the suit and without his presence, the suit cannot proceed and nor can be decided effectively.[69]
>
> Fifth, a necessary party is one without whom, no order can be made effectively, a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.[70]
>
> Sixth, if there are co-owners or co-landlords of the suit premises then any co-owner or co-landlord can file a suit for eviction against the

65 *Id*., para 5.

66 *Id*., para 11.1.

67 *Id*., para 11.2.

68 *Id*., para 11.3. On this point, the court relied upon *Ranbir Singh* v. *Asharfi Lal* (1995) 6 SCC 580.

69 *Id*., para 11.4. On this point, the court relied upon *Ruma Chakraborty* v. *Sudha Rani Banerjee* (2005) 8 SCC 140.

70 *Id*., para 11.5.Relied upon *Udit Narain Singh Malpaharia* v. *Board of Revenue*, AIR 1963 SC 786.

> tenant. In other words, it is not necessary that all the owners/landlords should join in filing the eviction suit against the tenant.[71]

The apex court, thus, crystalized the legal position. It also added that, "[I]n the eviction suit, the question of title or the extent of the shares held by the appellants and Respondent 1 against each other in the suit premises cannot be decided and nor can be made the subject-matter for its determination."[72] The court, however, made clear that it is open to the said respondent to file an independent suit seeking declaration of his right, title and interest in the family properties including the suit property and any observation made by the trial court in an eviction suit on the question of title over the suit property is not binding on him.

Determination of legal representative of the deceased

Order 22 rule 5, CPC mandates that the question as to legal representative of a deceased party shall be determined by the court. It further provides that if such a question arises before the appellate court, it may direct any subordinate court to try such question and return the records together with evidences, if any, recorded by it, its findings and reasons in support. On receipt of such record, the appellate court may take the same into consideration for determining the question.

In *Satyanand* v. *Shyam Lal Chauhan*,[73] during the pendency of the second appeal, one of the original defendants, who is a *mahanth*, passed away. Two persons claiming to be the *chelas* of the deceased *mahanth* filed separate applications, each one contending to be his legal representative. The high court referred the matter to the subordinate judge for determination under order 22 rule 5. The trial court, after taking into account the factual and legal aspects, recorded definitive finding that only Swami Satyanand Maharaj(one of the applicant) is the legal representative and returned the records to the high court. Aggrieved by the same, the other applicant filed the objections for the same before the high court. Swami Satyananda Maharaj, who is identified as the legal representative by the trial court has also filed a counter – affidavit. The high court, without deciding the question as to legal representative, passed the impugned order allowing both the applicants/contenders to take part in the proceedings.

The apex court set aside the impugned order and remitted the matter back to the high court to decide who, among the contending applicants, can substitute the deceased defendant as his legal representative. It relied upon *Jaladi Suguna*,[74]and reiterated the following principles of law:[75]

(i) The question as to legal representative, who can be brought on record in place of the deceased in a pending case, shall be decided in a manner prescribed under order 22 rule 5, CPC.

(ii) When the said question as to who can be brought on record arises in a pending matter, the court shall first and foremost decide such a question.

71 *Id*., para 11.6. Relied upon *Kasthuri Radhakrishnan* v. *M. Chinniyan* (2016) 3 SCC 296.

72 *Id*., para 14.

73 (2018) 18 SCC 485.

74 *Jaladi Suguna* v. *Satya Sai Central Trust* (2008) 8 SCC 521.

75 See *supra* note 72, para 10.

It is only after deciding it, the court can proceed to decide the substantive issues involved in the case.

(iii) When there are rival contenders claiming to be recognized as legal representatives, the court has a duty to decide who can be recognized as legal representative. Without deciding the question, it cannot simply make all the rival contenders as parties.

(iv) When the question arises, the court must decide it. It cannot postpone the same with a view to decide it at the time of final disposal of the case on merit.

Abetment of suit as a result of non-impleadment of legal representatives

According to order 22 rule 4, CPC, if no application is made to implead the legal representatives of deceased defendants within the time prescribed by law, the suit shall abet as against such deceased defendant(s). As may be noted it does not provide for the abetment of the suit as a whole. The suit can continue against the other surviving defendant(s) if their interests are separate. If the interests of the co-defendants are not separate, then the suit as a whole shall abet. In *Sunkara Lakshminarasamma* v. *Sagi Subba Raju*,[76] the apex court reiterated the legal position on abetment of suits. It observed:[77]

> …[t]he question of the abatement of the appeal in its entirety…depends upon general principles. If the case is of such a nature that the absence of the legal representatives of the deceased respondent prevents the court from hearing the appeal as against the other respondents, then the appeal abates in *toto*. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject-matter. The court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the court has no alternative but to dismiss the appeal as a whole. If on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the court should not hear the appeal and adjudicate upon the dispute between the parties.

VI APPEAL

Maintainability of appeal against final decree

As per section 97, CPC, if a person aggrieved by the preliminary decree has not preferred an appeal from such decree, he or she is not allowed to dispute the correctness of the findings in the preliminary decree in an appeal filed against the final decree. In *Selvi* v. *Gopalakrishnan Nair*,[78] an aggrieved defendant had not preferred an appeal against the preliminary decree but he contested the findings thereof in an appeal against

76 (2019) 11 SCC 787.

77 *Id*., para 12.

78 (2018) 7 SCC 319.

the final decree. Keeping in view the peculiar facts and circumstances of the case, where the trial court had not enquired into consistent averments made by the defendant disputing the boundaries and description of the suit property, the apex court made an exception and remanded the case back to the trial court to decide the disputed question on the basis of evidence.

Second appeal

The apex court, in *Surat Singh* v. *Siri Bhagwan*,[79] delineated the general scheme of section 100, CPC, which provides for second appeal. It observed:[80]

> Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court.

As regards interplay between sub-sections (4) and (5) of section 100, the court observed:[81]

> Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section (4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of the respondent and, therefore, sub-section (5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognises the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the

79 (2018) 4 SCC 562.

80 *Id*., para 20.

81 *Id*., para 21.

> reasons for framing such additional question of law at the time of hearing of the appeal.

In *Vijay Arjun Bhagat* v. *Nana Laxman Tapkire*,[82] the high court had allowed the second appeal without answering the six substantial questions of law it had framed at the time of admission of second appeal but on two additional questions of law, which were neither framed at the time of admission or at the time of hearing of the case. These additional questions of law were framed in the judgment itself. While setting aside the order and remanding the case back to the high court, the apex court elucidated the limits on the power of the second appellate court under proviso to sub-section (5) of section 100, CPC. According to the apex court, the high court, while deciding the second appeal, can formulate additional substantive questions of law only if the three conditions are fulfilled - "first 'such questions should arise in the appeal', second, 'assign the reasons for framing the additional questions' and third, 'frame the questions at the time of hearing the appeal".

In *Narayana Gramani* v. *Mariammal*,[83] the apex court, while explaining the entire scheme of section 100, CPC, has emphasized that the jurisdiction of the high court to decide the second appeal is confined only to the questions framed either under clause (4) or proviso to clause (5) of section 100. The high court has no jurisdiction to examine the issue, which it has not formulated as a substantial question of law either at the time of admission of the second appeal or at the time of hearing of the appeal.

As the second appeal is allowed only if the case involves 'substantive question of law', the question as to what question can be termed as 'substantive question law' often arise for determination. In *Ramji Singh Patel* v. *Gyan Chandra Jaiswal*,[84] it was held that the high court, in a second appeal, shall not entertain a question relating to limitation, which is a mixed question of law and fact if the same was not raised before the trial court or the first appellate court. However, if the issue of limitation was raised as a pure question of law, then there is no bar for the high court to entertain such question in a second appeal.

In *Uma Pandey* v. *Munna Pandey*,[85] where the high court had dismissed the second appeal on the ground that it did not involve substantive question of law, the apex court disagreed with it. Noting that both the trial court as well as the first appellate court had relied upon a particular document for deciding the *lis* involved, apex court observed:[86]

> It is a settled principle of law that interpretation of any document including its contents or its admissibility in evidence or its effect on the rights of the parties to the lis constitutes a substantial question(s) of law within the meaning of Section 100 of the Code.

82 (2018) 6 SCC 727.

83 (2018) 18 SCC 645. Also see, *Shrikant* v. *Narayan Singh* (2018) 18 SCC 232.

84 (2018) 14 SCC 120.

85 (2018) 5 SCC 376.

86 *Id*., para 12.

In the instant case, the apex court itself has framed five questions which it termed 'substantive question of law' within the meaning of section 100, CPC[87] and referred the case back to the high court to decide the case on merits on the said questions. *Per contra*, in *Kalyan Singh* v. *Ravinder Kaur*,[88] where the high court had allowed the second appeal, the apex court was of the view that the high court was wrong in doing so because the case did not involve any question of law much less the substantial question of law. Without even mentioning the question framed by the high court while admitting the second appeal, the apex court opined that, "the substantial question of law framed by the High Court is not a substantial question of law but purely a question of fact in dispute between the parties."[89] It is not tenable to only record the conclusion that the question framed by the high court is not a substantial question of law without even mentioning it much less explaining why it is not. Particularly, when the decision of the second appellate court was reversed, the apex court should adequately analyze the decision and accord proper reasons for reversing the same.

Maintainability of letters patent appeal against the order passed in exercise of supervisory jurisdiction under article 227

An interesting question as to the maintainability of letters patent appeal arose for consideration before the apex court in *LIC* v. *Nandini J. Shah*.[90] In this case, an order passed by the estate officer under sections 5 and 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 was challenged before the appellate officer under section 9 of the said Act. As per section 9, it is pertinent to note, the 'appellate officer' shall be the district judge of the district, where the public premises in question is situated or such other judicial officer in that district with not less than ten years' experience designated by the district judge for the purpose. The appellate officer upheld the order passed by the estate officer. The orders passed by the eviction officer and the appellate officer both came to be challenged before the single judge of the High Court of Bombay in a writ petition filed under articles 226 and 227 of the Constitution of India. The said writ petition got dismissed. The said order of dismissal was challenged in a letters patent appeal filed before the division bench. The LIC raised the preliminary objections on maintainability of letters patent appeal. The division bench rejected the said preliminary objection and also allowed the appeal on merit. The decision of the division bench came be assailed before the apex court on both counts. As regards the maintainability of letters patent appeal against the order of the single judge, it was contended thatsection 9, when read with sections 3, 8 and 10 of the Act, makes it amply clear that jurisdiction exercised by the appellate officer

87 The five substantive question of law formulated by the apex court were: (i) Whether findings recorded by the first appellate court on Ext. A for allowing the defendants' first appeal and, in consequence, reversing the judgment-decree of the trial court is legally and factually sustainable? (ii) What is the true nature of Ext. A? Can it be termed as "partition deed" or a document recognising a factum of partition already effected between the parties in relation to the suit land? (iii) Whether Ext. A binds the plaintiffs and, if so, how and to what extent? (iv) Whether Ext. A requires registration and, if so, its effect? (v) Since Ext. A was exhibited in evidence without any objection, whether any objection about its admissibility or legality can now be raised by the appellants in second appeal and, if so, its effect?

(the designated judicial officer) under section 9 of the Act was in his capacity as a civil court and not as *persona designata*. Thus, the petition under article 227 is the only provision under which such orders can be challenged. Even though, the petition filed before single judge was labeled as one under both articles 226 and 227, looking at the nature of it, it is clear that such a petition could have been filed and entertained only under article 227 of the Constitution. The appellant has referred to plethora of judgments to substantiate its contentions.[91]Based on the same, it was submitted that the letters patent appeal was not maintainable against the order passed by the single judge in exercise of supervisory jurisdiction under article 227. The division bench committed manifest error in entertaining it.

The respondents on the other hand contended that the district judge or his designate exercises power under section 9 only as *persona designata* and not as a civil court and, thus, the division bench has not committed any error in entertaining the letters patent appeal. They too had cited several decisions to buttress their point of view. The apex court rejected the contention of the respondents and held, relying on principles laid down in earlier cases,[92] thatthe appellate officer referred to in section 9 of the Act acts in his capacity as a pre-existing judicial authority. S/he, thus, acts as a court and not as a *persona designata.* The order passed under section 9 of the Actis an order of the subordinate court, which can be challenged by invoking the supervisory jurisdiction of the high court under article 227 of the Constitution. The apex court also reiterated that order passed by the single judge in exercise of supervisory jurisdiction under article 227 of the Constitution cannot be assailed in a letters patent appeal.

Appeal in arbitration matters under the Commercial Courts Act, 2015

In *Kandla Export Corpn*. v. *OCI Corpn*.,[93] the apex court dealt with the question whether an appeal not contemplated under section 50 of the Arbitration and Conciliation Act, 1996 is maintainable under section 13 (1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015?

The court answered the said question in the negative. It was held that the Arbitration and Conciliation Act, 1996 is a self – contained code and, thus, section 50 contained therein is exhaustive as regards appealable orders. Section 50 is the only provision that provides for appeal on specified grounds in arbitration proceedings seeking enforcement of foreign awards. The appeals, which are not explicitly provided for therein, are not permissible. Section 13 (1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 is a general

88 (2018) 18 SCC 528.

89 *Id*., para 6.

90 (2018) 15 SCC 356.

91 See *Id*., para 17.

92 *Thakur Das* v. *State of Madhya Pradesh* (1978) 1 SCC 27; *Asnew Drums (P) Ltd.* v. *Maharashtra State Finance Corpn.*, (1971) 3 SCC 602; *Maharashtra State Financial Corpn.* v. *Jaycee Drugs & Pharmaceuticals (P) Ltd.*, (1991) 2 SCC 637; *Ram Chandra Aggarwal* v. *State of Uttar Pradesh*, 1966 Supp SCR 393 and *MukriGopalan* v. *Cheppilat Puthanpurayil Aboobacker* (1995) 5 SCC 5.

93 (2018) 14 SCC 715.

provision, thus, it cannot override provision contained in the Arbitration and Conciliation Act, 1996, which is a special law relating to arbitration. The said section 13 (1) gets attracted only if the appeal is permitted under section 50 of the Arbitration and Conciliation Act, 1996 in the first place and not otherwise.

Appeal under section 173 of the Motor Vehicles Act, 1988

The high court is under a legal obligation, while hearing an appeal under section 173 of the Motor Vehicles Act, 1988, to decide all issues arising in a case both on law as well as facts after appreciating the entire evidence. The appeal under the aforesaid provision is essentially in the nature of first appeal under section 96, CPC, therefore, the high court shall dispose of the said appeal as required under order 20 rule 4 (2) read with order 41 rule 31, CPC. The judgment passed, while disposing of such appeal, shall contain a "concise statement of the case, points for determination, decision thereon and the reasons."[94]

Appeal under section 30 of the Employee's Compensation Act, 1923

In *North East Karnataka Road Transport Corpn.*v. *Sujatha*,[95] the apex court considered the scope of appellate jurisdiction of the high court under section 30 of the Employee's Compensation Act, 1923 (which was earlier known as Workmen's Compensation Act, 1923). The aforesaid section 30 provides for appeal from the order of the commissioner to the high court. The apex court clarified that the appeal under section 30 "is not like a regular first appeal akin to Section 96 of the Code of Civil Procedure, 1908 which can be heard both on facts and law. The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial questions of law arising in the case."[96]

Admission of additional evidence by appellate court

Order 41 rule 27, CPC confers discretionary power on the appellate court to admit additional evidence or allow additional witnesses to be examined after recording reasons for the same. In *Y.P. Sudhanva Reddy* v. *Karnataka Milk Federation*,[97] it was held that he appellate court can admit additional documents if such documents are required to decide the case and the court is satisfied with the explanation given as to why the documents could not be filed in the trial court.

Order 41 rule 27, CPC, which explicitly permits additional evidence to be admitted is, however, silent as to the procedure to be followed by the appellate court after admission of additional evidence. In the absence of explicit provision, is it necessary for the appellate court, after admission of additional evidence, to grant reasonable opportunity to the other party to lead evidence in rebuttal or to explain their position was the question that arose for the consideration of the apex court in *Akhilesh Singh* v. *Lal Babu Singh*.[98] The court answered the question in the affirmative by invoking rule 2 of order 41. It observed:[99]

94 *Sudarsan Puhan* v. *Jayanta Mohanty* (2018) 10 SCC 552.
95 (2019) 11 SCC 514.
96 *Id*., para 12.
97 (2018) 6 SCC 574.
98 (2018) 4 SCC 659.
99 *Id*., para 14.

> Order 41 Rule 2 provides that the appellant shall not, except by leave of the court, be allowed to urge any ground in the appeal, which is not set forth in the memorandum of appeal. The proviso to Order 41 Rule 2 engrafts a rule, which obliged the Court to grant a sufficient opportunity to the contesting party, if any new ground is allowed to be urged by another party, which may affect the contesting party. The provision engrafts rule of natural justice and fair play that contesting party should be given opportunity to meet any new ground sought to be urged. When the appellate court admits the additional evidence under Order 41 Rule 27, we fail to see any reason for not following the same course of granting an opportunity to the contesting party, which may be affected by acceptance of additional evidence.

The court had relied on principles laid down in *LAO*[100] and *Shalimar Chemical Works Ltd*.,[101] cases in support of its ruling in the instant case.

The procedure to be followed after admission of additional evidence was once again reiterated by the apex court in *Corpn. of Madras* v. *M. Parthasarathy*.[102] In this case, the first appellate court entertained an application filed under order 41 rule 27 and allowed the additional evidence to be produced. Relying on the additional evidence so produced, without providing an opportunity to the other side to file any rebuttal, it allowed the first appeal. The apex court has pointed out two jurisdictional errors in the approach adopted by the first appellate court, which were not pointed out even by the high court in second appeal. Two jurisdiction errors it pointed out were:

(i) Taking into consideration the additional evidence in deciding the appeal without providing an opportunity to the other side, despite prejudice being caused to them, to file rebuttal or contest the same.

(ii) After allowing the application filed under order 41 rule 27, the first appellate court had only two options. It could have either, *first*, set aside, by taking recourse to order 41 rule 23-A, the entire judgment or decree of the trial court and remanded the case back for retrial to enable the parties to prove additional evidence in accordance with law, or second, by invoking the power under order 41 rule 25, retained the appeal to itself and referred specific issues arising in the case on account of production of additional evidence to the trial court for limited trial. After receiving the findings of the trial court on such issues, it could have proceeded to decide the first appeal.

Since the first appellate court did neither of these and admitted the additional evidence without providing an opportunity to rebut, the apex court set aside order of the first appellate court and, by taking recourse to order 41 rule 23 –A, it remanded the case back to the trial court for retrial of the whole case after taking into account the additional evidence.

100 *LAO* v. *H. Narayanaiah* (1976) 4 SCC 9.

101 *Shalimar Chemical Works Ltd.* v. *Surendra Oil and Dal Mills* (2010) 8 SC*C 423*.

102 (2018) 9 SCC 445.

In *Uttaradi Mutt* v. *Raghavendra Swamy Mutt*,[103] three applications were filed under order 41 rule 27 before the first appellate court for production of certain additional evidence. The first appellate court dismissed those applications and, in the second appeal, the high court allowed all the three applications and remanded the matter to the trial court for fresh trial after examining the additional evidence as required under law. The said order of the high court was impugned before the apex court. While setting aside the same, the apex court delineated on the power of the appellate court to remand and proper course to be adopted in such cases. The court stated:

(i) Rule 23 of order 41 allows the appellate court to remand the case to the court from whose decree an appeal was preferred only if such court had disposed of the case on preliminary issues, which was reversed by the appellate court.

(ii) Rule 23 – A of order 41 confers residuary power on the appellate court to remand the case in other category of cases, where it reverses the decision of the court from whose decree an appeal was preferred even though such court had disposed of the case otherwise than on a preliminary issue.

(iii) While exercising discretion under rule 23-A, the appellate court is bound to keep in mindrules 25 and 26 of order 41. Accordingly, the appellate court may frame the issues and remand them to the court, from whose decree an appeal was preferred, for adjudication.

(iv) In cases where appellate court allows application under order 41 rule 27, it has an option, as per rule 28 and 29 of order 41, to do either of the two things: First, it may record the evidence itself by allowing the parties to produce evidence before it or, second, direct the court, from whose decree an appeal was preferred, to do so.

Scope of article 136: Re-appreciation of evidence

The article 136 of the Constitution of India confers on the Supreme Court an extraordinary appellate jurisdiction. While hearing appeals under the said provision, the court does not ordinarily re-appreciate the evidence and interfere with the findings of facts. In certain cases, however, it does so. In *Kerala SEB* v. *Kurien E. Kalathil*,[104]the apex court said, relying on *Mahesh Dattatray Thirthkar*,[105] that, "where the findings of the High Court are perverse or the findings are likely to result in excessive hardship, the Supreme Court would not decline to interfere merely on the ground that findings in question are findings of fact."[106] Again in *Lakshmi Sreenivasa Cooperative Building Society Ltd.* v. *Puvvada Rama*,[107] the apex court, relying on *Indira Kaur*,[108] reiterated that "merely because two courts have taken a particular view on the material issues, that by itself would not operate as a fetter on this Court to exercise jurisdiction under

103 (2018) 10 SCC 484.

104 (2018) 4 SCC 793.

105 *Mahesh Dattatray Thirthkar* v. *State of Maharashtra* (2009) 11 SCC 141.

106 *Id*., para 46.

107 (2018) 9 SCC 251.

108 *Indira Kaur* v. *Sheo Lal Kapoor* (1988) 2 SCC 488.

Article 136 of the Constitution."[109] Applying the said principle, the court undertook to examine the evidence on record to see whether the concurrent findings recorded by the courts below are manifestly unreasonable or unjust. The apex court, however, after the detailed examination of the evidence, has upheld the findings of the courts below stating that they are not manifestly unreasonable or unjust.

Right to withdraw appeal

In *Anurag Mittal* v. *Shaily Mishra Mittal*,[110] the apex court considered the question as to whether the dismissal of an appeal, an account of the withdrawal application filed by the appellant, would take effect from the date of filing of the application for withdrawal or only from the date of dismissal by the court.

The court held that dismissal takes effect, in such cases, from the date of filing of withdrawal application. It was of the opinion that the order 23 rule 1 (1), CPC, which gives an absolute right to the plaintiff to withdraw the suit, applies to the appeal as well. The appellant has an unconditional right to withdraw. If an application is filed for withdrawal, the court has to grant it. Whenever the court passes an order granting withdrawal, the appeal is deemed to have been withdrawn from the date on which the application for withdrawal was filed.

Readjudication of issue(s) not challenged before the appellate court

It the trial court has decided a particular issue in favour of the appellant, it cannot be readjudicated by the appellant court in the absence of cross-appeal filed by the respondent. Readjudicating the issues, in the absence of challenge to the findings thereon, amounts to jurisdictional error.[111]

VII REVIEW AND REVISION

Distinction between appeal and review

In *Sivakami* v. *State of T.N.*,[112] the apex court briefly outlined the distinction between appellate powers and review powers of the court. It observed:[113]

> The scope of the appellate powers and the review powers is well defined. The power of review under Order 47 Rule 1 of the Code of Civil Procedure, 1908 is very limited and it may be exercised only if there is a mistake or an error apparent on the face of the record. The power of review is not to be confused with the appellate power. The review petition/application cannot be decided like a regular intra-court appeal. On the other hand, the scope of appeal is much wider wherein all the issues raised by the parties are open for examination by the appellate court.

In *Goel Ganga Developers India (P) Ltd.* v. *Union of India*,[114] the apex court further emphasized that, "[T]he power of review is not like appellate power. It is to be

109 *Supra* note 106, para 13.

110 (2018) 9 SCC 691.

111 *Biswajit Sukul* v. *Deo Chand Sarda* (2018) 10 SCC 584.

112 (2018) 4 SCC 587.

113 *Id*., para 18.

114 (2018) 18 SCC 257.

exercised only when there is an error apparent on the face of the record."[115] Further, relying on order 47 rule 5, CPC and the law laid down *Malthesh Gudda Pooja*,[116] the apex court observed that "judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra-court appeal to another Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency." It stated the reasons very succinctly as follows:

(i) The Judges who heard the matter originally have applied their mind and would know best the facts and legal position;[117]

(ii) They will be in the best position to appreciate the matter in issue when a review is filed;[118]

(iii) If the matter goes before another Bench that Bench will have to virtually hear the matter afresh;[119]

(iv) Most importantly, when the matter goes to a new Bench the members of the new Bench may go by their own perspective and philosophy which may be totally different to that of the Bench which originally heard the matter.[120]

Revision

In exercise of the revisionary jurisdiction, under section 115, CPC, which is limited, the high court cannot interfere with the concurrent findings of fact by the courts below, when the view taken by them was plausible and not perverse.[121]

In *Hiya Associates* v. *Nakshatra Properties (P) Ltd*.,[122] while examining whether the revisional court was justified in remanding the case to the executing court for fresh consideration in the facts and circumstances of the case, the apex court succinctly stated when the superior court is justified in remanding the case back for reconsideration. It observed:[123]

> In our opinion, the remand of a case to the subordinate court is considered necessary when the superior court while exercising its appellate or revisionary jurisdiction finds that the subordinate court has failed to decide some material issues arising in the case or there is some procedural lacuna noticed in the trial, which has adversely affected the rights of the parties while prosecuting the suit/proceedings or when some additional evidence is considered necessary to decide the rights of the parties which was not before the trial court, etc.

115 *Id*., para 41.

116 *Malthesh Gudda Pooja* v. *State of Karnataka* (2011) 15 SCC 330.

117 *Supra* note 113, para 43.1.

118 *Id*., para 43.2.

119 *Id*., para 43.3.

120 *Id*., para 43.4.

121 *Surinder* v. *Nand Lal* (2018) 2 SCC 717.

122 (2018) 18 SCC 358.

123 *Id*., para 17.

Challenge to a compromise decree in review petition

In *Ved Pal* v. *Prem Devi*,[124] the second appeal was disposed of by the high court in terms of the compromise said to have been arrived at between the parties. Aggrieved by the decision, the appellants filed a review petition, which was dismissed by the high court with an observation that they are free to take recourse to any other legal remedies available to them.

The apex court, keeping in view the bar contained in order 23 rule 3-A and section 96 (3), CPC, has stated that the legislative intent is very clear that the parties cannot take recourse to filing of fresh suit or appeal to challenge the decree passed in terms of compromise arrived at between the parties. The challenge on the ground of 'fraud' committed by the parties in obtaining judicial orders is the only exception, where a suit may lie against such decree.

In the instant case, having regard to the fact that the high court did not examine the plea keeping in view the facts alleged in the review petition, the apex court set aside the order passed in the review and restored the same on the file of the high court to hear it. It also gave parties the liberty to amend the review petition. Explaining why the high court itself is a proper forum and relegating the parties to take recourse to any other legal remedies is not appropriate in the facts and circumstances of the case, the apex court observed:[125]

> Since the second appeal was disposed of affecting the rights of the parties in the light of compromise, the proper forum to re-examine the issue, in our opinion, is the High Court, which disposed of the second appeal rather than any other forum to examine the issue at this stage. It is more so when we find that the High Court did not go into the details in the proceedings filed by the appellants in its correct perspective.

Maintainability of review petition filed by a third party

The apex court, in *Union of India* v. *Nareshkumar Badrikumar Jagad,*[126] has unequivocally stated that "even a third party to the proceedings, if he considers himself an aggrieved person, may take recourse to the remedy of review petition."[127]In this case, the Union of India, which was not a party to the original proceedings before the Supreme Court, had filed a review petition under article 137 of the Constitution read with order 47 of the Supreme Court Rules, 2013. While examining the issue relating to the maintainability of the said review petition, the court also took note of, in addition to article 137 of the Constitution and order 47 of the Supreme Court Rules, section 114 and order 47, CPC which allow any aggrieved person to file a review petition. It observed that, "[N]otably, neither Order 47 CPC nor Order 47 (of) the Supreme Court Rules limits the remedy of review only to the parties to the judgment under review."[128] In its opinion the quintessence of these provisions is that "the person should be

124 (2018) 9 SCC 496.

125 *Id*., para 9.

126 2018 SCC OnLine SC 2573.

127 *Id*., para 18.

128 *Ibid*.

aggrieved by the judgment and order passed by this Court in some respect."[129]It was, thus, held that the aggrieved person has a *locus* to file review petition even though the said person was not a party to the earlier proceedings.

VIII JUDGMENT, DECREE AND ORDERS

The apex court had time and again castigated the practice of passing cryptic or unreasoned orders. In *G. Saraswathi* v. *Rathinammal*,[130] it set aside the impugned order, which was very cryptic, passed by the high court of judicature at Madras while disposing of the letters patent appeal. It observed:[131]

> …[i]n the absence of any application of judicial mind to the factual and legal controversy involved in the appeal and further without even mentioning the factual narration of the case set up by the parties, the findings of the two courts as to how they dealt with the issues arising in the case in their respective jurisdiction and without there being any discussion, appreciation, reasoning and categorical findings on the issues and why the findings of two courts below deserve to be upheld or reversed, while dealing with the arguments of the parties in the light of legal principles applicable to the case, it is difficult for this Court to sustain such order of the Division Bench.

In the opinion of the apex court, the disposal of the letters patent appeal by an order which does not contain the aforesaid ingredients cannot be said to be in conformity with the requirements of order 41 rule 31, CPC.It was also pointed out by the court that cryptic and unreasoned orders "undoubtedly caused prejudice to the parties because it deprived them to know the reasons as to why one party has won and the other has lost."[132]

Similarly, in *Jalendra Padhiary* v. *Pragati Chhotray*,[133] where both the family court and the high court have passed cryptic orders in an alimony case, the apex court set them aside and referred the case back to the family court to decide the suit afresh and pass reasoned order. In this case too, the apex court emphasized on the need to pass reasoned order in every case. It observed that the order must contain:[134]

(i) The narration of the bare facts of the case,
(ii) The issues arising in the case,
(iii) The submissions urged by the parties to the *lis*,
(iv) The legal principles applicable, and
(v) The reasons in support of the findings recorded based on appreciation of evidence on all the material issues arising in the case.

IX EXECUTION

The question as to whether the petition seeking execution of arbitral award can be straightway filed in the court having jurisdiction over the place where the assets

129 *Ibid.*
130 (2018) 3 SCC 340.
131 *Id*.,para 9.
132 *Id*. Para 10.
133 (2018) 16 SCC 773.
134 *Id*., para 16.

are located or is there a requirement of first filing such a petition in the court having jurisdiction over the arbitration proceedings and then obtain the transfer of the decree to the court where assets are located arose for consideration in *Sundaram Finance Ltd*. v. *Abdul Samad*.[135] This is a question on which divergent views were expressed by different high courts in India. The High Courts of Madhya Pradesh[136] and Himachal Pradesh[137] have taken the view that it is required to first file such a petition in the court having jurisdiction over the arbitration proceedings and then obtain the transfer of the decree to the court where assets are located whereas the High Courts of Delhi,[138] Kerala,[139] Madras,[140] Rajasthan,[141] Allahabad,[142] Punjab and Haryana[143] and Karnataka[144] have taken the contrary position.

The apex court, after detailed analysis of the relevant provisions of law, had taken the position that, "the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings."[145] It accordingly overruled the decisions of the High Courts of Madhya Pradesh and Himachal Pradesh and upheld the views taken by other high courts.

In *BCCI* v. *Kochi Cricket (P) Ltd*.,[146]the apex court incidentally considered a question as to whether the execution proceedings give rise to vested substantive rights. The said question was answered in the negative. The court held that since the execution of a decree pertains to the realm of procedure, the judgment – debtor has no substantive vested right to resist execution.

Participation of decree holder in action sale

Order 21 rule 72, CPC, prohibits the decree-holder to participate, without the express permission of the court, in an action sale to buy the property put to auction. The decree holder can bid to buy the property only if the court grants him or her permission. The bid amount, which has to be mandatorily deposited, as per order 21 rule 85, CPC, can be set off, as per the proviso to the aforesaid rule 85, if the decree – holder himself or herself is the purchaser of the property.[147]

Setting aside sale of immovable property in execution of a decree

Under order 21 rule 90, an action sale of immovable property conducted for execution of a decree can be challenged by the affected individuals "on the ground of

135 (2018) 3 SCC 622.
136 *Computer Sciences Corpn. India (P) Ltd.* v. *Harishchandra Lodwal*, AIR 2006 MP 34.
137 *Jasvinder Kaur* v. *Tata Motors Finance Ltd.*, 2013 SCC OnLine HP 3904.
138 *Daelim Industrial Co. Ltd.* v. *Numaligarh Refinery Ltd.*(2009) 159 DLT 579.
139 *Maharashtra Apex Corpn.Ltd.* v. *Balaji G.*(2011) 4 KLJ 408.
140 *Kotak Mahindra Bank Ltd.* v. *SivakamaSundari*, 2011 SCC OnLine Mad 1290.
141 *Kotak Mahindra Bank Ltd.* v. *Ram SharanGurjar*, 2011 SCC OnLine Raj 2748.
142 *GE Money Financial Services Ltd.* v. *Mohd.Azaz*, 2013 SCC OnLine All 13365.
143 *IndusInd Bank Ltd.* v. *Bhullar Transport Co.*, 2012 SCC OnLine P&H 21674.
144 *Chandrashekhar* v. *Tata Motor Finance Ltd.*, 2014 SCC OnLineKar 12146.
145 *Supra* note 133, para 20.
146 (2018) 6 SCC 287.
147 *Bee Gee Corpn. (P) Ltd*. v. *Punjab Financial Corpn*. (2019) 13 SCC 592.

a material irregularity or fraud in publishing or conducting it." Clause (2) of the aforesaid rule 90 states that the court shall not set aside the sale unless it is satisfied that "the applicant has sustained substantial injury by reason of such irregularity or fraud." Further, as per clause (3), the court is precluded from entertaining an application to set aside the sale on "any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up." Explanation to rule 90 adds that the court shall not set aside a sale on the ground of mere defect or absence of attachment of property.

Clause (1) rule 92 of order 21 obligates the court to pass an order confirming the sale both in cases, *firstly*, where no application is made under rules 89, 90 or 91 of order 21 and *secondly*, where such application is made under any of those rules and disallowed by the court. Upon such confirmation, the sale shall become absolute and, by virtue of clause (3) of rule 92, the person against whom such an order confirming the sale is made is precluded from filing any suit to set aside the sale.

In *Siddagangaiah* v. *N.K. Giriraja Shetty*,[148] where the aggrieved person had filed a fresh suit, by hiding the fact that his application under order 21 rule 90 read with section 47, CPC was disallowed in an earlier suit, the apex court held that filing of fresh suit to set aside the sale on the same ground is impermissible. Keeping in view the facts and circumstances of the case and relying on precedents, the court also reiterated the following propositions:

(i) In order to successfully invoke order 21 rule 90, it is necessary to prove that the applicant has suffered substantial injury by reason of fraud or material irregularity in publishing or conducting the sale. Mere inadequacy of price cannot be a ground for setting aside sale.

(ii) Dismissal of the application filed under order 21 rule 90 for 'default in appearance' is sufficient to proceed under clause (1) of rule 92 to confirm the sale.Even dismissal for default counts as refusal to set aside the sale.

(iii) The court can restore the application under order 21 rule 90 dismissed for default. Further, an order of refusal to set aside the sale is appealable.

(iv) When the sale is confirmed under rule 92(1) of order 21, after disallowing the application under rule 90, the objector is barred by virtue clause (3) of rule 92 of Order 21 from filing a fresh suit to set aside the sale on the same grounds.

(v) When the application to set aside the sale is made on the ground not specified under rule 90 and if it has not been made under rule 89, then such application would fall under section 47, CPC.

(vi) Under section 47, an application can be filed by the legal representatives of the deceased judgment – debtor seeking declaration that the sale is a nullity on the ground that the decree was passed after the death of the judgment – debtor or on the ground that the sale is not binding on them as the suit land was ancestral property.

148 (2018) 7 SCC 278.

(vii) It is permissible to join claim to set aside a sale on any of the grounds mentioned in order 21 rule 90 with any other ground under section 47, CPC.

Limits on the powers of the executing court

The apex court, in *Meenakshi Saxena* v. *ECGC Ltd*.,[149] elucidated the limits on the powers of the executing court while executing a decree. It observed:[150]

> The whole purpose of execution proceedings is to enforce the verdict of the court. Executing court while executing the decree is only concerned with the execution part of it but nothing else. The court has to take the judgment in its face value. It is settled law that executing court cannot go beyond the decree. But the difficulty arises when there is ambiguity in the decree with regard to the material aspects. Then it becomes the bounden duty of the court to interpret the decree in the process of giving a true effect to the decree. At that juncture the executing court has to be very cautious in supplementing its interpretation and conscious of the fact that it cannot draw a new decree. The executing court shall strike a fine balance between the two while exercising this jurisdiction in the process of giving effect to the decree.

X LIMITATION

Determination and condonation of delay

For the purpose of determining whether the suit is filed within the limitation period or not, the court has to mainly look at the allegations made in the plaint and how the plaintiff has pleaded the accrual of cause of action.[151]

The apex court in *Ummer* v. *Pottengal Subida*,[152]observed that the "earlier view of this Court that the appellant was required to explain the delay of each day till the date of filing the appeal has since been diluted by the later decisions of this Court and is, therefore, held as no longer good law."[153]

Delay in filing election petition: Inapplicability of the provisions of Limitation Act

In *Suman Devi* v. *Manisha Devi*,[154] an election petition was filed by the respondent in the first instance, which was withdrawn after the objection to its maintainability was raised in an application filed under order 7 rule 11, CPC. The liberty to file a fresh petition was granted at the time of withdrawal. The fresh petition was filed after the expiry of thirty days limitation period prescribed under section 176 of the Haryana Panchayati Raj Act, 1994. Again an application was filed by the appellant under order 7 rule 11 for rejection of the petition on the ground that the same was barred by limitation. The trial court allowed the application and rejected the petition. The decision

149 (2018) 7 SCC 479.

150 *Id*., para 17.

151 *Ghewarchand* v. *Mahendra Singh* (2018) 10 SCC 588.

152 (2018) 15 SCC 127.

153 *Id*., para 14.

154 (2018) 9 SCC 808.

was reversed by the first appellate court and the order of reversal was confirmed by the high court.

While allowing the appeal, the apex court, held that the Haryana Panchayati Raj Act, 1994 is a complete code in itself for the presentation of the election petition. The thirty days limitation period fixed under section 176 thereof is mandatory and the same cannot be extended by relying on section 14 of the Limitation Act, 1963.

Proceedings under Insolvency and Bankruptcy Code: Applicability of limitation of Act

In *B.K. Educational Services (P) Ltd.* v. *Parag Gupta and Associates*,[155]the apex court held that the provisions of the Limitation Act, 1963 are applicable to the proceedings under sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016. Having regard to the facts of the case, the court ruled that filing of the application under sections 7 and 9, CPC after the expiry of three years since the occurrence of default i.e., when the right to sue accrues, is barred by article 137 of the Limitation Act.

Period of limitation for seeking an execution of a decree

In *Shanthi* v. *T.D. Vishwanathan*,[156] the land lord seeking possession of the suit property and the arrears of rent from his tenant has got concurrent orders from all the three courts below – thetrial court, the first appellate court and the high court – in his favour. When he initiated execution proceedings, it was resisted by the tenant on the ground that the same is barred by limitation as it was not filed within twelve years from the date of the judgment by the trial court. It was not in dispute that it was filed within twelve years from the date of the judgment of the high court. Relying on the law laid down by a three judge bench in *Chandi Prasad*,[157] the apex court held that the execution proceeding initiated by the land lord is not barred by limitation. It reiterated that:[158]

> …[i]n terms of Article 136, Limitation Act, 1963, a decree can be executed when it becomes enforceable. A decree is defined in Section 2(2) CPC, 1908 to mean the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. A decree within the meaning of Section 2(2) CPC would be enforceable irrespective of whether it is passed by the trial court, the first appellate court or the second appellate court. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intents and purposes, the suit continues. When a higher forum entertains an appeal and passes an order on merit, the doctrine of merger would apply. The doctrine of merger is based on the principles of the propriety in the hierarchy of the justice delivery system. The doctrine of merger does

155 (2019) 11 SCC 633.

156 (2019) 11 SCC 419.

157 *Chandi Prasad* v. *Jagdish Prasad* (2004) 8 SCC 724.

158 *Supra* note 155, para 7.

> not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

The court, thus, held that in view of the doctrine of merger the decree passed by the high court becomes enforceable.

XI MISCELLANEOUS

Issue and service of summons

The apex court, in *Auto Cars* v. *Trimurti Cargo Movers (P) Ltd*.,[159]succinctly outlined the threefold objectives the issuance of summons essentially serves. It observed:[160]

> …[f]irst, it is to apprise the defendant about the filing of a case by the plaintiff against him; second, to serve the defendant with the copy of the plaint filed against him; and third, to inform the defendant about actual day, date, year, time and the particular court so that he is able to appear in the court on the date fixed for his/her appearance in the said case and answer the suit either personally or through his lawyer.

The court, having regard to the fact of the case, held that summons published in a newspaper in terms of order 5 rule 20 requiring the defendant to appear in court within 15 days, without mentioning any specific day, date, time and year for appearance, suffers from material infirmity and, thus, cannot be considered as duly served. The court held that it is mandatory to mention the specific day, date and time and year in the summons as prescribed under section 27 read with order 5 rule 20 (3) and process no. 1-A (as applicable to Calcutta) of appendix – B, CPC.

In *Jayaprakash* v. *T.S. David*,[161] the apex court dealt with the question: If the court of appeal sets aside the *ex parte* order passed by the trial court and restores the suit at the instance of some of the defendants, is it obligatory on the part of the trial court to issue fresh notice of the suit to the rest of the defendants despite their non-appearance in the first round of trial? Having regard to the local amendment made by the State of Kerala in the first proviso to order 9 rule 13, the apex court answered the question in the affirmative. It said that such defendants are entitled to notice under the amended order 9 rule 13.

In *Neerja Realtors (P) Ltd.* v. *Janglu*,[162] the court elaborated on the procedure to be followed before resorting to substituted service of summonsby way of publication in a newspaper. The court said that the substituted service contemplated under order 5 rule 20, CPC is an exception to the normal mode of service. It was of the opinion that when the normal mode of service fails either because the defendant or his agent refuses to accept the summons and sign the acknowledgement or s/he cannot be found, it is mandatory for the serving officer (bailiff), to follow the procedure laid down in

159 (2018) 15 SCC 166.
160 *Id*., para 26.
161 (2018) 2 SCC 294.
162 (2018) 2 SCC 649.

order 5 rule 17. It requires the bailiff to "affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain"[163] and then to return the original to the court concerned with a report stating that "he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."[164]

If the report of the bailiff does not indicate that s/he has duly followed the procedure, then the substituted service cannot be ordered. Order 5 rule 20 require the court to satisfy itself, before ordering substituted service, that:

(i) There is reason to believe that the defendant is deliberately avoiding the service of summons, or

(ii) For any other reason, the summons cannot be served in the ordinary way. After being satisfied with either of the above, the court may order the substituted service in either of the following ways:

(i) By affixing a copy of the summons in some conspicuous place in the court house as well as in the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or

(ii) In such other manner as the court deems fit including publication in a newspaper.

It may be noted that both rule 17 and rule 20 contemplate affixing a copy of the summons in some conspicuous part of the house of the defendant, but the difference is it is a mandatory requirement under rule 17, whereas it is envisioned under rule 20 as one of the two alternative ways of substituted service. In the latter case, when it is used as one of the alternative ways of substituted service, it is also required to affix a copy of the summons in some conspicuous place in the court house in addition to affixing it upon the house of the defendant. No doubt, both rule 17 and rule 20 contain overlapping provisions as regards the requirement of affixing a copy of the summons in some conspicuous part in the house of the defendant but, since, it is mandatory to be complied with by the bailiff in the circumstances envisaged under rule 17, it cannot be argued that it is not necessary, under rule 20, to affix the copy of the summons at the house of the defendant once the court orders service by publication in the newspaper. In view of rule 17, it is a pre-requisite to be fulfilled before moving an application for substituted service under rule 20.

Remedies available against *ex parte* decree

The apex court, in *Neerja Realtors (P) Ltd*.,[165] elucidated the remedies available to a defendant aggrieved by an *ex parte* decree. It observed:[166]

> A defendant against whom an ex parte decree is passed has two options: the first is to file an appeal. The second is to file an application under Order 9 Rule 13. The defendant can take recourse to both the

163 CPC, 1908, Order 5 rule 17,

164 *Ibid*.

165 *Supra* note 161.

166 *Id*., para 17.

> proceedings simultaneously. The right of appeal is not taken away by filing an application under Order 9 Rule 13. But if the appeal is dismissed as a result of which the ex parte decree merges with the order of the appellate court, a petition under Order 9 Rule 13 would not be maintainable. When an application under Order 9 Rule 13 is dismissed, the remedy of the defendant is under Order 43 Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96.

Election petition: Adherence to technicalities

In *Abdulrasakh* v. *K.P. Mohammed*,[167] the apex court, having regard to the sanctity of democratic process, has reiterated that the noncompliance with the technical requirements prescribed under the Representation of Peoples Act, 1951 while filing an election petition would be fatal to the election petition at the threshold itself. It, however, held, relying on *Mithilesh Kumar Pandey*,[168] that election petition shall not be dismissed if it contains only clerical or typographical mistakes which are of no consequences.

Payment of interest

By virtue of sub-section (2) of section 34, CPC, the decree holder is not entitled to claim subsequent interest on the sum adjudged in the absence of any direction to pay such interest in the decree.[169]

Reference of dispute to arbitration: Section 89, CPC

In *Kerala SEB* v. *Kurien E. Kalathil*,[170] the apex court examined the correctness of reference of dispute by the court below to arbitration in the absence of arbitration agreement. The court, noting that the reference of parties to arbitration has serious procedural and substantive consequences, held that in the absence of arbitration agreement between the parties, the dispute shall not be referred, under section 89, CPC, to arbitrationunless parties file a joint memo or a joint application. In its opinion, "oral consent given by the counsel without a written memo of instructions does not fulfil the requirement under Section 89 CPC."[171]

Direction for temple administration

While dealing with issues concerning administration and management of the Shri Jagannath Temple, Puri, in *Mrinalini Padhi* v. *Union of India*,[172] a writ petition filed under article 32 of the Constitution –a two judge bench of the apex court, in its interim order dated July 5, 2018, expressed its opinion that:[173]

> The issue of difficulties faced by the visitors, exploitative practices, deficiencies in the management, maintenance of hygiene, proper utilization of offerings and protection of assets may require

167 (2018) 5 SCC 598.

168 *Mithilesh Kumar Pandey* v. *Baidyanath Yadav* (1984) 2 SCC 1.

169 *Kerala SEB* v. *Kurien E. Kalathil, supra* note 103.

170 *Ibid*.

171 *Id*., para 36.

172 2018 SCC OnLine SC 667.

173 *Id*., para 10.

> consideration with regard to all Shrines throughout the India, irrespective of religion practiced in such shrines. It cannot be disputed that this aspect is covered by List III Item 28 of the Seventh Schedule to the Constitution of India and there is need to look into this aspect by the Central Government, apart from State Governments.

Further, the court, referring to section 92, CPC, opined that the jurisdictional district judge has the power under the said provision to issue directions for making a scheme or arrangement of management or administration of the charitable or religious institution. It accordingly issued a direction to all the district judges in the country that if any devotee moves the court with any grievance on the above stated aspects, the concerned district judge shall examine such grievances or assign the matter to any other court under his or her jurisdiction for examination and send the report, if necessary to the concerned high court. The apex court expected that the high courts could consider such matters in public interest and issue necessary judicial directions having regard to the facts and circumstances of the case.

Granting and moulding of relief at interlocutory stage

In *Samir Narain Bhojwani* v. *Aurora Properties and Investments*,[174]the apex court reiterated the law relating to granting of interim mandatory injunction and cleared the ambiguities on the question as to whether the court can mould the relief at interlocutory stage. It categorically stated that, as per the well-established law, an interim mandatory injunction cannot be granted easily. It can be granted only under special circumstances, when *prima facie* case is made out clearly showing that one of the parties to the litigation has altered the *status quo*. In such cases, *status quo ante* can be restored by issuing an interim mandatory injunction in the interest of justice.

Further, the apex court also made it clear that the principles of moulding of relief cannot invoked to mould the relief at the time of granting of mandatory injunction at an interlocutory stage. Relief can be moulded only at the time of finally disposing of the proceedings and not at the interlocutory stage. In its opinion, "[T]here is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the status quo and not to establish a new set of things differing from the state which existed at the date when the suit was instituted."[175]

Scientific investigation to ascertain the truth

In *Rama Avatar Soni* v. *Laxmidhar Das*,[176] there was a dispute regarding genuineness of the will. Allowing the application filed by the plaintiff under order 22 rule 10 – A, CPC, the trial court sent the will to the handwriting expert to ascertain the genuineness of the signature on the will. The high court set aside the order of the trial court stating that it is the genuineness of the will that was disputed and the signature of the testator in particular. The apex court set aside the decision of the high court holding that, "[T]o challenge the genuineness of the will inter alia indicates challenge

174 (2018) 17 SCC 203.

175 *Id*., para 24.

176 (2019) 11 SCC 415 .

to the genuineness of the signature…"[177] While restoring the order of the trial court, the apex court opined that, "[I]f the scientific investigation of the document in question facilitates the ascertaining of truth, in the interest of justice, naturally it has to be ordered."[178] The court has the power under section 75 read with order 22 rule 10 – A, CPC to order scientific investigations in such cases.

Taking into account the events taken place subsequent to filing of suit

The general rule is that the rights of the parties to the suit stand crystallized on the date of its institution. This rule, however, has certain exceptions. In appropriate cases, the court can take into account subsequent events. While reiterating the law, the apex court in *Hukum Chandra* v. *Nemi Chand Jain*,[179]quoted with approval the observations made in *Om Prakash Gupta,*[180] where conditions that needs to be satisfied for allowing the parties to introduce additional evidence by way of amendments are stipulated. It is only on the satisfaction of those conditions that the court can take into account the additional evidence.

Counter claim: Order VIII, rule 6-A

In the survey year, a two judge bench of the apex court, in *Ashok Kumar Kalra* v. *Wing Cdr Surendra Agnihotri*,[181] has referred an issue relating to the interpretation of order VIII, rule 6-A, CPC to a larger bench to examine whether language of the said provision is mandatory in nature or not. A three judge bench was constituted for the purpose, which rendered its decision later in the year in *Ashok Kumar Kalra* v. *Wing Cdr Surendra Agnihotri*.[182] The bench though examined the precise question – "Whether Order VIII Rule 6A of the CPC mandates an embargo on filing the counter-claim after filing the written statement?" – could not, however, deliver a unanimous verdict. The majority, after noting the purpose of introducing rule 6-A, had answered the question in the negative. It observed:[183]

> …[t]hat Order VIII Rule 6A of the CPC does not put an embargo on filing the counter-claim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counter-claim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counter-claim, which is pegged till the issues are framed.

Further, noting that the court concerned, in such cases, have the discretion to entertain counter-claim, the majority stated – illustratively and not exhaustively – the inclusive factors that shall be taken into account, while exercising the discretion. They are:[184]

177 *Id*., para 8.
178 *Id*., para 7.
179 (2019) 13 SCC 363.
180 *Om Prakash Gupta* v. *Ranbir B. Goyal* (2002) 2 SCC 256.
181 2018 SCC OnLine SC 3497.
182 2019 SCC OnLine SC 1493.
183 *Id*., para 22.
184 *Ibid*.

i. Period of delay.
ii. Prescribed limitation period for the cause of action pleaded.
iii. Reason for the delay.
iv. Defendant's assertion of his right.
v. Similarity of cause of action between the main suit and the counter-claim.
vi. Cost of fresh litigation.
vii. Injustice and abuse of process.
viii. Prejudice to the opposite party.
ix. Facts and circumstances of each case.

The majority categorically stated that in any case the counter – claim shall not be allowed after framing of the issues. The minority took a different stand on this very aspect. According to the minority, in exceptional circumstances, filing of counter – claim may be permitted even after framing of the issues "till the stage of commencement of recording of the evidence on behalf of the plaintiff."[185]

XII CONCLUSION

It is evident from the above that, as the apex court itself stated, "[Q]uestions about procedural justice are remarkably persistent and usual in the life of Common Law Courts."[186] In many a cases such questions arose in the survey year. The apex court, while dealing with such questions, has reinforced the provisions of civil procedural law by emphasizing on the necessity to adhere to them in the process of adjudication of disputes. In several cases, decisions of the courts below have been set aside and remanded back precisely on the ground of non-compliance with the procedure prescribed. As in the previous years, the court's decisions have brought greater clarity. Even when the court has reiterated the existing positions in large number of cases, it did so very lucidly and succinctly so that the litigants and courts can have clearer understanding and follow them in future. There were ambiguities with regard to certain aspects such as courts' power to grant and mould relief at interlocutory stage; exceptions to the doctrine of *res judicata*; the jurisdiction of the court where execution petition can be filed for enforcement of arbitral awards; stage at which objections to the pecuniary jurisdiction of the court can be taken, and thestage up to which filing of the counter claim may be allowed *etc.*, the decisions rendered by the court in the survey year have cleared those ambiguities.

185 *Supra* note 182, para 24.
186 *Id*., para 1.