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CIVIL PROCEDURE

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I INTRODUCTION

IN THE survey year, humankind all over the world has experienced a worst ever crisis in the living memory. The life threatening COVID-19 pandemic has brought the human lives almost to a standstill. Various institutions including the courts at all levels could not carry on their normal functioning after the announcement of the nation-wide lockdown to prevent the spread of the virus. People were prevented from accessing courts within the statutorily stipulated periods of limitation; litigants have had several difficulties in serving summons, notices and in exchanging pleadings *etc*., which are all essential in almost every legal proceeding before any court or other adjudicative body; and courts could not conduct regular proceedings in an offline mode. Most of them were literally shut for certain period of time for most purposes. In the wake of these insurmountable difficulties, the judiciary rose to occasion and resumed proceedings in an online mode to begin with. The apex court, in particular, took the *suo motu* cognizance of the difficulties created by the pandemic and passed certain orders to overcome some of the difficulties.

Gradually many other regular caseshave also been taken up for adjudication. Some of these cases involved significant questions of procedural law. Few of these questions were answered by larger benches whereas the remaining questions were answered by division benches consisting of two judges. This survey briefly elucidates the rulings and reasoning of the apex court on those questions.

II JURISDICTION

In the survey year, several issues concerning jurisdiction of the superior courts, civil courts, and special forums such as family courts, consumer forums *etc.*, came-up for consideration before the apex court in a number of cases.

Bar of civil courts jurisdiction

In *Nagar Parishad, Ratnagiri* v. *Gangaram Narayan Ambekar*,[1] the apex court considered a question regarding bar of jurisdiction of civil courts to adjudicate disputes

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1 (2020) 7 SCC 275.

or questions in respect of any matter over which the National Green Tribunal has jurisdiction. In this case the suit was filed in 2005 before the coming into force of the National Green Tribunal Act, 2010. The suit involved "substantial question relating to environment including enforcement of legal right relating to environment."After coming into force of the Act, the trial court without noting the bar of jurisdiction contained in section 29 of the Act proceeded with the suit and decided it in 2011. Thereafter, even the first and the second appellate courts have also decided the respective appeals without adverting to the effects of section 29 of the Act. The apex court opined that by virtue of section 29 of the Act,the court was not justified in continuing with the suit. In its view, after coming into force of the Act, the civil court, at best, could have relegated the parties to the tribunal instead of proceeding with the suit. Further, while noting that the appeals are continuation of the suit, it particularly took exception to the approaches of the first and the second appellate courts, which have had the benefit of the decision rendered by the apex court in *Bhopal Gas Peedith Mahila Udyog Sangathan,*[2] wherein the law on the question was clearly expounded.The apex court accordingly held that "the findings and conclusions rendered in favour of the plaintiffs, in particular by the first appellate court and the High Court, will be of no avail and in law stand effaced being without jurisdiction and nullity."[3]

Territorial jurisdiction of high courts

In *Shanti Devi* v. *Union of India*,[4] a writ petition challenging stoppage of pension filed by a retired employee before the High Court of Patna was dismissed on the ground that it did not have territorial jurisdiction as the petitioner served in the State of West Bengal and the authorities and organizations under which he served are located either in the States of West Bengal or Jharkhand. The apex court, while hearing the appeal, too note of the fact that, when asked by the employer to indicate the place for receiving pension, the petitioner opted for receiving pension in the bank in his native place in Bihar and he has been drawing pension from there regularly for the last eight years. Based on the aforestated facts, the court held that "stoppage of pension gave a cause of action, which arose at the place where the petitioner was continuously receiving the pension."[5]The High Court of Patna, thus, had the territorial jurisdiction. Further, it also rejected the respondent's plea based on the principle of *forum non conveniens* and observed:[6]

> A retired employee, who is receiving pension, cannot be asked to go to another Court to file the writ petition, when he has a cause of action for filing a writ petition in the Patna High Court. For a retired employee convenience is to prosecute his case at the place where he belonged to and was getting pension.

2 *Bhopal Gas Peedith Mahila Udyog Sangathan* v. *Union of India* (2012) 8 SCC 326.

3 *Supra* note, para 15.

4 (2020) 10 SCC 766.

5 *Id*., para 28.

6 *Id*., para 32.

Jurisdiction of superior courts: General principle

In *Kantaru Rajeevaru (Right to Religion, In re-9 J.) (2)* v. *Indian Young Lawyers Assn*.,[7]while addressing the question as to whether a bench can refer questions of law to a larger bench in review petitions, the apex court reiterated the general principle of law relating to jurisdictions of the superior courts. Relying on *Halsbury's Laws of England*,[8] the court observed:[9]

> No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to be so, under the provisions of the Constitution. In the absence of any express provision in the Constitution, this Court being a superior court of record has jurisdiction in every matter and if there is any doubt, the Court has power to determine its jurisdiction.

Jurisdiction of family courts

In *Rana Nahid* v. *Sahidul Haq Chisti*,[10] a division bench of the Supreme Court dealt with the question as to whether a family court established under the Family Courts Act, 1984 has jurisdiction to hear applications filed under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. In this case, the family court, while noting that the application filed by a Muslim divorced woman for maintenance under section 125 of the Code of Criminal Procedure is not maintainable, has treated the said application as the one filed under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and awarded maintenance. The high court, in a revision petition, set aside the order of the family court on the ground that family court did not have the jurisdiction to convert the application under section 125 of the Code into an application under aforesaid Act. It is in this factual background, the aforestated question arose before a two judge bench of the apex court consisting of R. Banumathi and Indira Banerjee, JJ.

Two judges wrote separate judgments disagreeing with each other. R. Banumathi, J answered the question as to whether a family court has jurisdiction to entertain applications under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 in the negative. She relied upon the full bench decision of the High Court of Bombay[11] to hold that the jurisdiction to entertain application under the said section 3 is conferred only on a Magistrate of the First Class. The family courts do not have jurisdiction to entertain such applications.

Indira Banerjee, J., on the other hand, had answered the question in the affirmative. She observed that:[12]

7 *Infra* note 89.

8 10 *Halsbury's Laws of England* (Fourth Edition), para 713: "Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court."

9 *Supra* note 7, para 27.

10 (2020) 7 SCC 657.

11 *Karim Abdul Rehman Shaikh* v. *Shehnaz Karim Shaikh*, 2000 SCC OnLine Bom 446.

12 *Supra* note 10, para 36.

> On a reading of Section 7(1) along with Explanation (f) to Section 7(1) of the Family Courts Act, it is patently clear that the Family Court, established under Section 3 of the Family Courts Act, is clothed with the jurisdiction and powers exercisable by a District Court or any subordinate civil court, under any law for the time being in force, to entertain and decide any suit or proceeding for maintenance, which would include an application under Section 3 of the 1986 Act for Muslim Women.

In the opinion of Indira Banerjee, J., the family courts, as per explanation (f) of section 7 (1) of the Family Courts Act, 1984, are not only vested with the jurisdiction and powers of the district courts or subordinate civil courts, they are also empowered to exercise jurisdiction of a First Class Magistrate under Chapter IX of the Code of Criminal Procedure.

In view of the differences of opinions on the question, the matter was directed to be placed before the Chief Justice of India for reference to a larger bench.

Jurisdiction of consumer forums

In*Imperia Structures Ltd.* v. *Anil Patni*,[13] one of the questions that arose for consideration before the apex court was whether section 79 of the Real Estate (Regulation and Development) Act, 2016 bars commission or forums under the Consumer Protection Act, 1986 to entertain any complaint regarding the subject-matters covered under the former Act.

The court, after considering the overall scheme of both the legislations, had answered the question in the negative. The court, most particularly, held that section 79 of the RERA Act, 2016 bars only the jurisdiction of 'civil courts' and the commission and forums under CP Act, 1986 are not civil courts.

As a result of the decision, it is now clarified that the aggrieved persons have an option to initiate proceedings in the forums created by either of the legislations. Initiating proceedings under the RERA Act is not the only option.

Return of plaint to be presented before appropriate court

There were conflicting opinions expressed by different division benches of the apex court on the question as to when a plaint is returned by a court, under order 7 rule 10 read with 10-A of the Code of Civil Procedure (CPC), to be presented before a court having jurisdiction, should the latter court start the trial *de novo* or from the stage at which the plaint was ordered to be returned?[14]

In the previous survey year *i.e.*, 2019, a two judge bench of the apex court, while noting such contradictions, referred the question to be decided by a larger bench.[15] In the current survey year, a three judge bench of the apex court, in *EXL Careers* v.

13 (2020) 10 SCC 783.

14 For details, see P. Puneeth, "Civil Procedure" LV *Annual Survey of Indian Law – 2019,* 25 – 79 at 30 (ILI, 2021).

15 *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.*, 2019 SCC OnLine SC 1294.

Frankfinn Aviation Services (P) Ltd.,[16] after examining the scheme of order 7 rule 10 read with 10-A and the precedents, answered the question authoritatively. It opined that when a returned plaint is presented before the appropriate court, it has no option under the statutory scheme but to start the trial *de nono*. The bench made a clear distinction between 'transfer of proceedings' and 'return of plaint'. It observed:[17]

> In cases dealing with transfer of proceedings from a court having jurisdiction to another court, the discretion vested in the court by Sections 24(2) and 25(3) either to retry the proceedings or proceed from the point at which such proceeding was transferred or withdrawn, is in marked contrast to the scheme under Order 7 Rule 10 read with Rule 10-A where no such discretion is given and the proceeding has to commence de novo.

The bench also ruled that the direction given in *Joginder Tuli*[18] has no precedential value as it was made in the light of the peculiar facts of the case and in exercise of the discretionary jurisdiction under article 136 of the Constitution.[19] Further, the bench also expressly overruled *Oriental Insurance Co. Ltd*.,[20] stating that the same does not lay down the correct law.

III RES JUDICATA

Test to be applied for invoking the doctrine

The doctrine of *res judicata* contained in section 11, CPC prevents a party from raising an issue which was "directly and substantially" in issue between the same parties in an earlier case. If the matter was only "collaterally or incidentally" in issue in a previous case, it does not operate as *res judicata* in a subsequent case. To decide whether a matter was "directly or substantially" in issue or only "collaterally or incidentally" in issue in an earlier case, the material test to be applied, as per the settled law, is "whether the court considers the adjudication of the issue *material* and *essential* for its decision."While reiterating the test, the apex court, in *Nand Ram* v. *Jagdish Prasad*,[21]observed "if the issue was *'necessary'* to be decided for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and substantially' in issue *and* if it is clear that the judgment was in fact *based* upon that decision, then it would be *res judicata* in a latter case."[22]

The apex court also held that "[W]hich matters are directly in issue and which are only collaterally or incidentally in issue, must be determined *on the facts of each case*."[23] It reiterated that, in deciding such a question, the court has to examine the

16 (2020) 12 SCC 667.

17 *Id*., para 20.

18 *Joginder Tuli* v. *S.L. Bhatia* (1997) 1 SCC 502. In this case, keeping in view the facts and circumstances, a direction was given to proceed from the stage at which the plaint was returned.

19 *Supra* note 16, para 14.

20 *Oriental Insurance Co. Ltd.* v. *Tejparas Associates & Exports (P) Ltd.*, (2019) 9 SCC 435.

21 (2020) 9 SCC 393.

22 *Id*., para 20.

23 *Ibid*.

plaint and the written statements filed by the parties in an earlier case, issues framed and the judgment rendered by the court in the case. All these documents need to be produced for invoking the doctrine of *res judicata* in a subsequent case.

In the case, the court also reiterated another important settled position of law that "what operates as *res judicata* is the decision and not the reasons given by the court in support of the decision."[24]

Bar under order 2 rule 2

Order 2 rule 2 bars institution of fresh suits in respect of portion of the claim omitted or deliberately relinquished in an earlier suit. In *B. Santoshamma* v. *D. Sarala*,[25] the apex court held that for seeking rejection of a fresh suit filed in respect of such omitted or relinquished claim, the defendant must specifically plead and satisfactorily establish it before the court. The plea of bar of suit is a technical plea. Unless such a plea is taken, the court cannot *suo motu* invoke the provision and reject the suit. Further, such a plea cannot be taken before the apex court for the first time if the same had not been raised before the high court.

Another important aspect that was clarified in the survey year was the distinction between the two sub-clauses of order 2 rule 2. In V. *Kalyanaswamy(D) By Lrs.* v. *L. Bakthavatsalam(D) By Lrs.*,[26] the apex court elucidated the distinction between sub-clauses (2) and (3). Firstly, it is important to know the prescription under sub-clause (1) to understand the distinctions between the sub-clauses (2) and (3).

Sub-clause (1) requires the plaintiff to include whole of the claim that he is entitled to in the suit. It, however, leaves with the plaintiff an option to relinquish "any portion of his claim in order to bring the suit within the jurisdiction of any court." Clause (2) specifies the consequences of intentional relinquishment of or omission to sue in respect of any portion of the claim. It clearly specifies that such portion of the claim he either intentionally relinquished or omitted shall not be a subject matter of a fresh suit. He loses his right to sue in respect of such portion of his *claim*.

Clause (3), on other hand, deals with the *reliefs* to be claimed. It provides an option to the person entitled for more than one relief in respect of the same cause of action to sue for all or any of such reliefs. The provision contemplates two different scenarios: (i) where the plaintiff omits to sue for all such reliefs without the leave of the court, and (ii) where he omits certain reliefs with the leave of the court. In the first scenario, he cannot initiate fresh proceedings seeking reliefs that he had omitted earlier and, whereas, in the second scenario, he can do so.

Unlike under sub-clause (3), the plaintiff cannot obtain the leave of the court to initiate a fresh suit in respect of any portion of the *claim* he has either relinquished or omitted.[27]

24 *Id*., para 25.
25 2020 SCC OnLine SC 756.
26 2020 SCC OnLine SC 584.
27 See, *Id*., para 60.

An issue relating to applicability of order 2 rule 2, CPC to writ proceedings arose in *Brahma Singh* v. *Union of India*,[28] where the apex court entertained a writ petition under article 32 to adjudicate upon the service disputes concerning quantification of qualifying service for fixation of pensions and other retirement benefits.

In this case, certain serving and retired employees of the Supreme Court Legal Services Committee approached the apex court under article 32 claiming that the services rendered by them prior to the promulgation of the Supreme Court Legal Services Committee Rules, 2000 should also be counted for calculating their qualifying service. They had earlier also approached apex court claiming for the fixation of their pay and allowances as per rule 6 of the aforesaid Rules and the court had granted the relief in 2011. Opposing the current writ petition, the respondent Union of India contented, *inter alia*, that "this plea could have been taken in the earlier writ petition and, in fact, such a plea was raised but finally the Court did not grant this relief and, therefore, they cannot file the second petition." The argument was based on order 2 rule 2, CPC. The apex court did not countenance the argument. The court cited *Devendra Pratap Narain Rai Sharma*,[29] and *Gulabchand Chhotalal Parikh*,[30] to indicate that the provisions contained in order 2 rule 2 do not apply to high prerogative writ proceedings under article 32. However, the most important question as to whether the writ petition, under article 32, can be maintained, without there being any issue relating to violation of any of the fundamental rights, was neither raised nor addressed in the case.

Writ and other remedies have been designed under article 32 only for enforcement of fundamental rights and for no other purpose. In the recent days, unfortunately there is too much of judicial *ad hocism* and arbitrariness in exercising jurisdiction under article 32. Whereas in cases involving infringement of fundamental rights, the apex court often ask the petitioners to exhaust alternative remedies, it readily entertains writ petitions in certain cases even though they do not involve issues relating to enforcement of any of the fundamental rights. It is hard to find and understand the rationale in the approach of the apex court in entertaining writ petitions under article 32 of the Constitution of India.

IV PLEADINGS

Amendment of Pleadings

Under order 6 rule 17, CPC the court has the power to allow amendment of pleadings of the either party at any stage of the proceedings. However, the proviso to rule 17 restricts the power of the court to allow amendment after the commencement of the trial unless the court is satisfied that "in spite of due diligence, the party could not have raised the matter before the commencement of trial."

28 (2020) 12 SCC 762.

29 *Devendra Pratap Narain Rai Sharma* v. *State of U.P.*, AIR 1962 SC 1334.

30 *Gulabchand Chhotalal Parikh* v. *State of Gujarat*, AIR 1965 SC 1153.

In *Pandit Malhari Mahale* v. *Monika Pandit Mahale*,[31] an amendment application filed by a party after the commencement of evidence was allowed by the trial judge without recording any finding to the effect that the party, in spite of his due diligence, could not have raised the matter earlier.The apex court held that in the absence of such a finding, the order allowing the amendment is unsustainable. When the provision confers discretionary power to be exercised only on satisfaction of certain conditions, the court must necessarily record its findings on the question regarding satisfaction of such conditions.

Production of documents by defendant

Order 8 rule 1-A, CPC requires the defendant to produce the documents, upon which he bases his defence, at the time of presenting written statement. If such documents are not produced at the time of filing written statements, the court has the discretionary power under sub-rule (3) to grant leave to produce them later. In *Sugandhi* v. *P. Rajkumar*,[32] the apex court held that "[T]he discretion conferred upon the court to grant such leave is to be exercised judiciously. While there is no straitjacket formula, this leave can be granted by the court on a good cause being shown by the defendant."[33] In this case, the court also elaborated on the importance of doing substantial justice even when it requires deviating from the procedural norms. The court observed:[34]

> It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way of the court while doing substantial justice. If the procedural violation does not seriously cause prejudice to the adversary party, courts must lean towards doing substantial justice rather than relying upon procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the court is required to take appropriate steps to thrash out the underlying truth in every dispute.

The apex court, therefore, opined that the court should take a lenient view while considering applications made under sub-rule (3) seeking leave to produce documents, which could not have been produced at the time of filing written statement.

Rejection of plaint: Order 7 rule 11

Order 7 rule 11, CPC provides for rejection of plaints at the threshold or at any later stage in certain cases. It is a special remedy, which permits the court to dismiss the suit summarily. The court can exercise power under this provision in cases where the plaint does not disclose a 'cause of action' or where the suit is barred by any law. The power can also be exercised in cases where the relief claimed is undervalued or the paper insufficiently stamped or even on the ground of plaintiff(s) not furnishing sufficient number of copies as required.

31 (2020) 11 SCC 549.

32 (2020) 10 SCC 706.

33 *Id*., para 8.

34 *Id*., para 9.

The court can use the power under this provision to put an end to the sham litigation and to save the precious judicial time.

In *Dahiben* v. *Arvindbhai Kalyanji Bhanusali*,[35] the apex court reiterated that the power conferred under the provision is a drastic one and, thus, the conditions laid down therein should be strictly adhered to while exercising it. The court also highlighted the mandatory nature of the provision stating that "if any of the grounds specified in clauses (a) to (e) are made out… the court has no option but to reject the plaint."[36]

It was further held that the power to reject the plaint can be exercised "at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial."[37] While dealing, in particular, with the application for rejection of plaints filed either under order 7 rule 11 (a) or (d), the court observed that:[38]

> The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed.

While deciding the said question, only the plaint and the documents filed along with it under order 7 rule 14 should be taken into consideration. Such documents, which form the basis of the plaint, shall be treated as part of it.[39] The pleas taken by the defendant either in the application seeking rejection of the plaint or in the written statement are not relevant to be considered in deciding such questions. It is only the plaint and the documents filed along with it that needs to be considered. But the court must consider the plaint as a whole and not only a part or a passage in it. This was again reiterated in *Shakti Bhog Food Industries Ltd.* v. *Central Bank of India*.[40] In this case, the apex court was considering a question relating to rejection of plaint on the ground that the suit was barred by limitation. The apex court held that in order to decide whether a suit is barred by limitation, the plaint as a whole needs to be examined and it is not sufficient to consider only selected averments made in the plaint. It also underscored the point that "the factum of suit being barred by limitation, ordinarily, would be a mixed question of fact and law."[41] No decision can be reached on such questions without examining the plaint entirely.

In *Canara Bank* v. *P. Selathal*,[42] the apex court held that the suits filed basically challenging the decree passed by the debt recovery tribunal without availing the remedy of appeal provided under the Recovery of Debts Due to Banks and Financial Institutions

35 (2020) 7 SCC 366.
36 *Id*., para 23.15.
37 *Id*., para 23.14.
38 *Id*., para 23.11.
39 *Id*., para 23.8.
40 2020 SCC OnLine SC 482.
41 *Id*., para 21.
42 (2020) 13 SCC 143.

Act, 1993 is liable to be dismissed in exercise of the power under order 7 rule 11, CPC.

In *Tej Bahadur* v. *Narendra Modi*,[43] an election petition was filed by the petitioner-appellant, whose nomination was rejected by the returning officer, seeking declaration of the election of the respondent as void. The petition was dismissed under order 7 rule 11, CPC by the election tribunal. The apex court upheld the dismissal of the petition. It was of the opinion that by virtue of section 81 of the Representation of People Act, 1951, an election petition can be filed only by an 'elector' or a 'candidate' at such an election. The appellant was neither an 'elector' in the constituency nor a 'candidate' within the meaning of section 79 (b) of the Act. In the opinion of the court, a person, whose nomination paper does not conform to the provisions of section 33 (3) of the Act, cannot "claim to have been duly nominated as a candidate". It was, thus, held that the appellant had no *locus standi* to file the election petition. The court also observed:[44]

> It is settled that where a person has no interest at all, or no sufficient interest to support a legal claim or action he will have no locus standi to sue. The entitlement to sue or locus standi is an integral part of cause of action.

Scope of the suit

Scope of the suit is determined by the pleadings. It is a settled law that in a civil suit neither the parties nor the court can travel beyond the pleadings. It is, however, well within the power of the court to adjudicate, while disposing of the suit, even the connected dispute raised by the defendant in his written statement. In *Sajan Sethi* v. *Rajan Sethi*,[45] though the suit was filed for partition of the second floor and rights over the terrace of the building, the appellant-defendant, in his written statement, had raised certain disputes even in respect of common areas in the ground floor. He, however, had not filed any counter claim in the suit. The court in the final decree had negatived the claim of the appellant-defendant over the common areas. In the appeal, the high court had partly modified the judgment. The appellant-defendant challenged the decision of the high court before the apex court, where it was mainly contended that both the trial court and the first appellate court have exceeded, in deciding the rights of parties in respect of the common areas in the ground floor, the scope of the suit, which was confined to the partition of second floor and terrace. While rejecting the contention, the apex court observed "[H]aving invited findings by raising a dispute of the common areas, the appellant-defendant cannot plead that the trial court as well as the appellate court have exceeded scope of the suit, in issuing directions for the common areas."[46]

43 2020 SCC OnLine SC 951.

44 *Id*., para 26.

45 (2020) 4 SCC 589.

46 *Id*., para 12.

Attempts to produce evidence in the absence of necessary pleading

It is axiomatic that the parties are allowed to produce evidence to prove the specific pleas raised in the pleadings. In the absence of a specific plea, it serves no purpose to produce evidence to prove any point. In *Biraji* v. *Surya Pratap*,[47] a suit was filed seeking, *inter alia*, cancellation of registered adoption deed. The date of adoption ceremony was mentioned in the deed itself and the plaintiffs were aware of it at the time of filing of the suit. Despite having the knowledge of the date of adoption, plaintiffs did not take the plea that the second defendant was on duty on the date of adoption. But, at a later stage *i.e.*, after closing of evidence, they filed an application to summon the leave record of the second defendant to prove that he was on duty on the said date, thus, could not have attended the alleged adoption ceremony. The application was dismissed by the trial court and the dismissal was confirmed by the revisional court and the high court. The apex court also upheld the decisions of the courts below while reiterating that "[I]t is fairly well settled that in absence of pleading, any amount of evidence will not help the party."[48]

V PARTIES

Determination of legal representatives and effect thereof

With regard to the question as to determination of legal representatives to be impleaded in a suit and the effects thereof, the apex court, in *Varadarajan* v. *Kanakavalli*,[49] has reiterated the following legal positions:

(i) The determination of the legal representatives of the deceased plaintiff or defendant under order 22 rule 5, CPC is only for a limited purpose of impleading the person to represent the estate/interest of the deceased. Such determination does not confer on the person recognized as legal representative any right to the suit scheduled property*vis-à-vis* other rival claimants to the estate of the deceased.

(ii) Proceedings under order 22, rule 5 CPC are summary in nature. The high court, in exercise of its revision jurisdiction under section 115, CPC cannot interfere with the findings recorded in such proceedings unless the tests laid down for exercising the revision jurisdiction are satisfied.

Joint complaint by consumers having 'same interest'

Section 12 (1) (c) of the Consumer Protection Act, 1986 permits one or more consumers to file a complaint, with the permission of the district forum, on behalf of or for the benefit of all the consumers having "same interest." In *Vikrant Singh Malik* v. *Supertech Ltd.*,[50] the apex court held that, where such joint or composite complaints are filed, by virtue of section 13 (6) of the Act, procedure prescribed under order 1 rule 8, CPC stand attracted. The test that need to be adopted for granting permission under section 12 (1) (c) is "sameness of interest". In order to establish that the

47 (2020) 10 SCC 729.
48 *Id.*, para 8.
49 (2020) 11 SCC 598.
50 (2020) 9 SCC 145.

consumers have "same interest", it is not necessary that they should have the same 'cause of action'.

Proper party: Discretion to implead

In *Satish Chander Ahuja* v. *Sneha Ahuja*,[51] the apex court considered a question as to whether the husband of the defendant, in a suit filed against her by her father-in-law seeking mandatory and permanent injunction in relation to suit property, is a necessary party to be impleaded. In this case, the plaintiff had not impleaded his son, the respondent was the sole defendant in the original proceedings. The trial court decreed the suit. The high court, while setting aside the decree of the trial court, remanded the case back for retrial with a direction to implead the defendant's husband in exercise of the *suo motu* power under order 1 rule 10, CPC.

In an appeal, the apex court was of the opinion that though he was not a 'necessary party' as no relief was claimed against him, he should be impleaded as a 'proper party' in view of the fact that the defendant had pleaded her right of residence under sections 17 and 19 of the Protection of Women Against Domestic Violence Act, 2005. Noting that one of the reliefs that can be granted under section is provisioning for alternative accommodation and it is the husband's responsibility to make such provision, the court held that he may be a proper party to be impleaded for considering the claims under the aforesaid sections 17 and 19. The apex court, however, did not countenance the wide and peremptory nature of the direction given by the high court, which implied that in all such cases, the husband shall be mandatorily impleaded. It observed:[52]

> The… direction is a little wide and preemptory (*sic*). In event, the High Court was satisfied that impleadment of husband of defendant was necessary, the High Court itself could have invoked the power under Order 1 Rule 10 and directed for such impleadment. When the matter is remanded back to the trial court, the trial court's discretion ought not to have been fettered by issuing such a general direction… (which) is capable of being misinterpreted. Whether the husband of an aggrieved person in a particular case needs to be added as plaintiff or defendant in the suit is a matter, which needs to be considered by the Court taking into consideration all aspects of the matter. We are, thus, of the view that direction in para 56(i) be not treated as a general direction to the courts to implead in all cases the husband of an aggrieved person and it is the trial court which is to exercise the jurisdiction under Order 1 Rule 10.

In this context, it is pertinent to point out that the functional independence of the subordinate courts is as much important as that of the higher courts. In order to ensure and maintain functional independence of the subordinate courts, higher courts must eschew temptation to issue directions that fetters the discretionary powers of the

51 *Infra* note 153.

52 *Id*., para 129.

subordinate courts in a manner so as to constrain them to reach a particular result. This judgment should serve as a reminder to the higher courts to remain mindful of the independence of the subordinate courts.

VI APPEALS

Appeal is a judicial examination of the decision of a lower court by a higher court to rectify errors, if any, in the decision under appeal. The law provides for appeals "because of the recognition that those manning judicial tiers too commit errors."[53] Ordinarily, "the right of appeal carries with it a right of rehearing on law as well as on fact, unless the statute conferring a right of appeal limits the rehearing in some way."[54] Since the right of appeal is a statutory right, where the statute grants only a limited right of appeal, the court cannot expand the scope of appeal.[55]

First appeal

The first appeal is a valuable right of the appellant. It is considered to be continuation of the proceedings of the court of first instance. The first appellate court has the jurisdiction to rehear both questions of law as well as facts raised by the aggrieved party. As per section 96 read with order 41 rule 31, CPC, the first appellate court must examine and record its findings with reasons on all issues and contentions. Its judgment must clearly show conscious application of mind.

First appeal is entirely different from the second appeal, which is, under section 100, CPC, limited to cases involving substantial questions of law only.

In *Malluru Mallappa* v. *Kuruvathappa*,[56] a suit for specific performance was dismissed by a trial court on two counts: (i) that it was barred by limitation and (ii) plaintiff did not show readiness and willingness to perform his part of the contract. The decree was confirmed by the high court in the first appeal filed under section 96, CPC. The apex court set aside the decision of the first appellate court for non-compliance with the requirements of order 41 rule 31, CPC. It observed:[57]

> [t]he judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons. Even when the first appellate court affirms the judgment of the trial court, it is required to comply with the requirement of Order 41 Rule 31 and non-observance of this requirement leads to infirmity in the judgment of the first appellate court.

Second appeal

It is a settled law that the second appeal under section 100, CPC is admissible only if the case involves substantial question(s) of law. What is 'substantial question of law' and when can such a question is said to have been 'involved' in an appeal are the important questions that often arise for consideration before the high courts and

53 *Malluru Mallappa* v. *Kuruvathappa* (2020) 4 SCC 313, para 10.

54 *Id*., para 11.

55 *Nazir Mohamed* v. *J. Kamala*, 2020 SCC OnLine SC 676.

56 *Supra* note 53.

57 *Id*., para 18.

the apex court. In *Nazir Mohamed* v. *J. Kamala*,[58] the apex court succinctly articulated its views as follows:[59]

> To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.
>
> To be a question of law "involved in the case", there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case.

The court also made it clear, relying on *Panchagopal Barua*,[60] that if such a question was not raised before the trial court or the first appellate court, the high court cannot entertain the second appeal.

Further relying on several judicial precedents, the apex court summarized the legal principles governing second appeal under section 100, CPC:[61]

(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iv) The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences

58 *Supra* note 55.

59 *Id*., paras 32 and 33.

60 *Panchagopal Barua* v. *Vinesh Chandra Goswami*, AIR 1997 SC 1047.

61 *Supra* note 55, para 37.

> from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

This lucid summary of legal principles, in fact, provide greater clarity on: (i) distinctions between 'question of fact' and 'question of law' and also between 'question of law' and 'substantial question of law', and (ii) when can the high court, in a second appeal, justified in interfering with the concurrent findings of facts by the courts below.

Further, having regard to limited appellate jurisdiction of the high court, it is incumbent upon the high court, at the time of admission of the second appeal, to explicitly frame substantial question(s) of law involved in the case. Such questions need to be specifically answered while disposing of the appeal.

In *Gajaraba Bhikhubha Vadher* v. *Sumara Umar Amad*,[62] the high court, at the time of admission of the second appeal, had framed as many as six substantial questions of law but it failed to consider and answer them while disposing of the appeal. The apex court, while remitting the matter back to the high court for reconsideration, had observed:[63]

> [w]hen the substantial questions of law were formulated on admission, those were required to be answered one way or the other by providing the High Court's reasonings and to arrive at a conclusion on that basis. On the other hand, if the Court was of the opinion that any of the substantial questions of law framed was to be modified, altered or deleted, a hearing was required to be provided on the same and thereafter, appropriate substantial questions of law could have been framed and answered. Without resorting to any such procedure, on taking note of the substantial questions of law as it existed, a brief reference is made thereto and the same is disposed of without answering the same, which would not be justified.

In *Kirpa Ram (Deceased) Through LRs* v. *Surendra Deo Gaur*,[64] the apex court pointed out an exception to the rule that high court must mandatorily frame substantial question of law in the second appeal. It was of the view that if no substantial question of law arises in the second appeal, then the high court is not obliged to frame any questions. If the high court finds no error in the judgment of the first appellate court, it can uphold the same without framing any substantial question of law. But the court made it abundantly clear that under no circumstances, the high court, in second appeal,can interfere or reverse the decisions of the courts below without framing substantial question of law.

62 (2020) 11 SCC 114.

63 *Id*., para 11.

64 2020 SCC OnLine SC 935.

Further, it is also a settled law that the high court in second appeal shall not interfere with the concurrent findings of facts by the court of first instance and the first appellate court unless such findings are found to be contrary to law or perverse. In *C. Doddanarayana Reddy* v. *C. Jayarama Reddy*,[65] the apex court reiterated the position. It opined that when "two courts have returned a finding which is not based upon any misreading of material documents, nor is recorded against any provision of law, and neither can it be said that any Judge acting judicially and reasonably could not have reached such a finding",[66] then the high court is not justified in interfering with such findings. Similar opinion was expressed in *Mangayakarasi* v. *M. Yuvaraj*[67] as well. In this case, the court observed:[68]

> [i]n a proceeding of the present nature where the trial court has referred to the evidence and the first appellate court being the last court for reappreciation of the evidence has undertaken the said exercise and had arrived at a concurrent decision on the matter, the position of law is well settled that neither the High Court in the limited scope available to it in a second appeal under Section 100 of the Civil Procedure Code is entitled to reappreciate the evidence nor this Court in the instant appeals is required to do so.

It may, however, be noted that in the State of Punjab, by virtue of section 41 of the Punjab Courts Act, 1918, there is no requirement of framing substantial question of law for admitting the second appeal. Unlike section 100, CPC, section 41 of the aforesaid Act allows the second appeal on wider grounds. The apex court in *Pankajakshi*[69] and *Randhir Kaur*[70] delineated the scope of interference in the second appeal under section 41. While reiterating the position, the apex court, in *Dhanpat* v. *Sheo Ram*,[71] stated that though the substantial questions of law need not be framed in entertaining the second appeal under section 41 of the Act, the court has no jurisdiction, even under the said provision, to interfere with the finding of facts recorded by the courts below. It quoted with approval the observation made in *Randhir Kaur*,[72] where it was held that "the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be."[73]

Locus to file appeal

When can a person, who was not a party to the suit, file an appeal against the decree passed in such suit arose for consideration in *V.N. Krishna Murthy* v.

65 (2020) 4 SCC 659.
66 *Id*., para 29.
67 (2020) 3 SCC 786.
68 *Id*., para 11.
69 *Pankajakshi* v. *Chandrika* (2016) 6 SCC 157.
70 *Randhir Kaur* v. *Prithvi Pal Singh* (2019) 17 SCC 71.
71 (2020) 16 SCC 209.
72 *Supra* note 70.
73 *Id*., para 15.

Ravikumar.[74] The apex court reiterated that "[I]t is only where a judgment and decree prejudicially affects a person who is not party to the proceedings, he can prefer an appeal with the leave of the appellate court."[75] The appellate court cannot grant leave to appeal to any stranger. Such leave can be granted to a person only if (s)he falls into the category of "aggrieved persons." The court categorically stated that "[T]he expression 'person aggrieved' does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised."[76] The court also endorsed and applied the test laid down in *K. Ponnalagu Ammani*[77] for determining whether appellant in the instant case falls into the category of aggrieved person. According to the test "ordinarily the leave to appeal should be granted to persons who, though not parties to the proceedings, would be bound by the decree or judgment in that proceeding and who would be precluded from attacking its correctness in other proceedings." Applying the test, the court held that the appellant, who was seeking the leave to appeal in the instant case, does not fall into the category of "aggrieved persons."

Cross-objections in appeals

In *Urmila Devi* v. *National Insurance Co. Ltd*.,[78] an insurance company, which was held liable to pay the compensation by the Motor Accidents Claims Tribunal, filed an appeal before the high court challenging the award on the ground that it is not liable to pay the compensation as there was a breach of terms and conditions by the driver/owner of the vehicle. In the said appeal, a cross-objection was filed by the respondent under order 41 rule 22, CPC. The appeal was dismissed for the "want of office objection" and the counsel for the appellant informed the court that the appellant is not interested in reviving the appeal. Thereafter, the high court dismissed even the cross-objection as not maintainable. The reason it accorded was quiet strange. The high court held that "when the Insurance Company has not challenged the quantum of compensation but only challenges its liability to pay compensation on the ground that there is a breach of terms and condition by the driver and/or the owner of the vehicle, the cross-objection would not be tenable at the instance of the claimants."

The apex court, after careful consideration of the provisions of section 173 of the Motor Vehicles Act, 1908, Rule 249 of the Bihar Motor Vehicles Rules, 1992, order 41 rule 22, CPC and the case law on the question, had set aside the decision of the high court. While remitting the matter back to the high court for deciding the cross-objection, the apex court observed:[79]

> [t]he right to prefer cross-objection partakes of the right to prefer an appeal… taking any cross-objection to the decree or order impugned

74 (2020) 9 SCC 501.

75 *Id*., para 15.

76 *Id*., para 19.

77 *K. Ponnalagu Ammani* v. *State of Madras*, 1952 SCC OnLine Mad 300.

78 (2020) 11 SCC 316.

79 *Id*., para 16.

> is the exercise of right of appeal though such right is exercised in the form of taking cross-objection…the substantive right is the right of appeal and the form of cross-objection is a matter of procedure.

Further, the apex court also took into account the specific provision contained in sub-rule (4) of rule 22 of order 41, CPC, which mandates that the cross-objection should be heard and determined even if the original appeal is withdrawn or dismissed for default. It, accordingly, held that even if the appeal filed by the insurance company was dismissed for default, "the high court was required to decide the cross-objection… on merits and in accordance with law."[80]

Exercise of power of remand by the appellate court

The question as to when the appellate court is required to exercise the power of remand arose for consideration in *Shivakumar* v. *Sharanabasappa*.[81]Prior to the Code of Civil Procedure (Amendment) Act, 1976, it was only rule 23 of order 41, CPC that dealt with remand of a case by appellate court. It allowed the appellate court to remand the case back to the trial court only if it had reversed a decree passed by the trial court disposing of the suit on a preliminary point. Notwithstanding such a specific provision, it was generally accepted even before the amendment, that the appellate court, in exercise of its inherent power, could remand the case if it was considered necessary in the interest of justice. The aforesaid amendment made explicit provision to that effect by inserting rule 23-A.

The apex court, after examining the provisions, had opined that in order to completely comprehend the scheme of the provisions for remand, it is necessary to read rules 23 and 23-A of order 41 in the light of rule 24 of the said order, which enables the appellate court to determine the case finally where evidence on record is sufficient. It observed thus:[82]

> A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which

80 *Id*., para 25.

81 2020 SCC OnLine SC 385.

82 *Id*., para 83.

> may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

Further, the court also added that the remand order should not be made only to provide an opportunity to a party to fill –up the lacuna in its case. It should be made "only when the factual findings of Trial Court are reversed and a re-trial is considered necessary by the Appellate Court."[83]

VII REVIEW AND REVISION

Scope of review jurisdiction under section 114, CPC

In *Ram Sahu (Dead) Through LRs* v. *Vinod Kumar Rawat*,[84] the apex court elucidated the scope and ambit of the power of a court to review its decree or orders under section 114 read with order 47 rule 1, CPC. The court held that even though section 114, which is a substantive provision for review, has not laid down any condition precedent nor does it impose any prohibition on exercise of the power to review, a decree or order can be reviewed only the grounds enumerated in order 47 rule 1, CPC. Further, comparing the power of review with the appellate jurisdiction, it observed:[85]

> An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review.

Review jurisdiction of the Supreme Court

In *Kantaru Rajeevaru (Right to Religion, In re-9 J.) (2)* v. *Indian Young Lawyers Assn*.,[86] the nine judge bench of the apex court, which was hearing a reference made by a five judge bench, was asked to consider, at the threshold, the question as to whether a bench hearing a review petition can refer questions of law to a larger bench. In addition to the general contention that a reference cannot be made in review, those who were objecting to the reference have also argued that the reference was bad as the review petition itself was not maintainable under order 47 rule 1 of the Supreme Court Rules, 2013. Their point of view was that, by virtue of the aforesaid provision in the Rules, the review petition was maintainable only on grounds mentioned in order 47 rule 1, CPC. Alternatively, they have also contended that "a reference to a larger bench can be made only after the grant of review and not in a pending review petition."[87]

While addressing the first contention, the apex court referred to order 47 rule 1 of the Supreme Court Rules, 2013, which reads: "The Court may review its judgment

83 *Id*., para 84.
84 2020 SCC OnLine SC 896.
85 *Id*., para 34.
86 (2020) 9 SCC 121.
87 *Id*., para 23.

or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record."

Nine judge bench of the apex court, emphasizing on the punctuation mark used in the provision, rejected the argument that the review petition against the judgment passed in writ proceedings is maintainable only on the grounds mentioned in order 47 rule 1, CPC. The bench observed:[88]

> Construction of Order XLVII Rule 1 of the Supreme Court Rules should be made by giving due weight to the punctuation mark "comma" after the words "the Court may review its judgment or order". The intention of the rule-making authority is clear that the abovementioned part is disjunctive from the rest of the rule. Moreover, the words "but no application for review will be entertained in a civil proceeding except on ground mentioned in Order 47 Rule 1 of the Code and in a criminal proceeding except on the ground of an error apparent on the face of record" are exceptions to the opening words of Order XLVII Rule 1, namely, "the Court may review its judgment or order". Therefore, there is no limitation for the exercise of power by this Court in review petitions filed against judgments and orders in proceedings other than civil proceeding or criminal proceedings.

Further, the bench, in its unanimous single judgment, had categorically held that a bench hearing a review petition can refer questions of law to a larger bench. It also rejected the alternative argument that a reference to a larger bench can be made only after the petition is admitted for review and not when it was pending for consideration. The bench referred to order 6 rule 2 of the Supreme Court Rules, 2013, which reads: "Where in the course of the hearing of any cause, appeal or other proceedings, the Bench considers that the matter should be dealt with by a larger Bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a Bench for the hearing of it." The bench, while holding that "[T]here cannot be any doubt that the pending review petition falls within the purview of the expression 'other proceeding'",[89]wholly rejected the alternative contention as well. In order to further substantiate its conclusion, the bench also adverted to article 142 of the Constitution, which allows the apex court to pass any "order as is necessary for doing complete justice in any cause or matter pending before it."

Revisional jurisdiction

In *Mohd. Inam* v. *Sanjay Kumar Singhal*,[90] the apex court reiterated the scope of revisional jurisdiction of the high court. It observed that:[91]

> [i]n examining the legality and the propriety of the order under challenge in revision, what is required to be seen by the High Court, is whether it

88 *Id*., para 21.

89 *Id*., para 25.

90 (2020) 7 SCC 327.

91 *Id*., para 27.

> is in violation of any statutory provision or a binding precedent or suffers from misreading of the evidence or omission to consider relevant clinching evidence or where the inference drawn from the facts proved is such that no reasonable person could arrive at or the like…if such a finding is allowed to stand, it would be gross miscarriage of justice and is open to correction because it is not to be treated as a finding according to law.

The court, more particularly observed that the aforestated principlesguiding the exercise of revisional jurisdiction by the high courts aptly apply to the district courts exercising revisional jurisdiction under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

In *Addissery Raghavan* v. *Cheruvalath Krishnadasan*,[92]the apex court, while admitting the argument that a revisional court "cannot act as if it is a second court of first appeal", held that high court, in exercise of its revisional jurisdiction under section 20 of the Kerala Buildings (Lease and Rent Control) Act, 1965, is not justified in interfering with the findings of fact when findings recorded by the appellate authority do not suffer from perversity or misappreciation of evidence.

VIII EXECUTION

Execution of consent decree

The apex court, in *Pawan Kumar Arya* v. *Ravi Kumar Arya*,[93]has categorically held that the consent terms/decree cannot be executed partially. When parties enter into a settlement in relation to subject-matters of the suit and other properties in order to bring about complete quietus to the disputes between them, the entire consent decree needs to be implemented by both the parties. No party can claim partial execution of consent decree in execution proceedings. In the opinion of the court "[B]oth the parties to the consent terms/consent decree are required to fully comply with the terms of settlement... One party cannot be permitted to say that that portion of the settlement which is in their favour be executed... not the other terms of the settlement".[94] It further noted that partial execution would defeat the very object and purpose of the consent decree which was to resolve all the disputes between the parties amicably.[95]

'Executable' award/decree

The question as to whether an execution court direct the execution of an arbitration award, which only determined and fixed the price of the land in question, as a decree in a suit for specific performance of agreement arose before the apex court in *Rajasthan Udyog* v. *Hindustan Engg. and Industries* Ltd.[96] It is evident from the facts that the reference to the arbitrator, as per the agreement, was confined to fixation

92 (2020) 6 SCC 275.
93 (2020) 15 SCC 190.
94 *Id*., para 9.
95 *Id*., para 13.
96 (2020) 6 SCC 660.

of price of the land. The respondent was given an option either to accept the price fixed by the arbitrator and execute the sale deed or to refuse to execute it if the price is not acceptable. While noting the facts, the apex court held that "[T]he award was only declaratory of the price of the land", thus, it is not capable of being executed independently. The court observed that the "execution of an award can be only to the extent what has been awarded/decreed and not beyond the same."[97] What was not awarded in the decree/award cannot be granted by the executing court purportedly to do complete justice.[98]

IX LIMITATION

Extension of limitation during COVID – 19

The COVID – 19 pandemic had thrown-up multifarious challenges to the humankind. Spread of COVID – 19 and the measures taken to combat it drastically affected the lives and livelihood of many. People were also prevented from accessing courts for adjudication of their disputes. Law of limitation prescribes periods of limitation within which the aggrieved persons can approach the courts for adjudication of their claims. Owing to nationwide lockdown announced to combat COVID – 19 and/or other COVID – 19 induced reasons, it became difficult, in some cases even impossible, to approach the courts of law before the expiry of such periods of limitation. The apex court took *suo motu* cognizance of the issue in *In Re: Cognizance for Extension of Limitation*. In the first order dated March 23, 2020,[99] the apex court, taking note of the challenges faced by the country on account of COVID-19 and the resultant difficulties faced by litigants in filing their suits, applications, appeals, petitions, etc., before the courts within the period of limitation prescribed under the union or state laws, passed the following order:[100]

> To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/ Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

This is an extraordinary order. The apex court made it clear that it passed such an order in exercise of its power under article 142 read with article 141 of the Constitution of India. It also explicitly declared that "this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities."[101]

97 *Id*., para 37.
98 *Id*., para 44.
99 2020 SCC OnLine SC 343.
100 *Id*., para 2.
101 *Id*., para 3.

By a subsequent order dated May 6, 2020,[102] the apex court similarly extended the period of limitations prescribed under the Arbitration and Conciliation Act, 1996 and under section 138 of the Negotiable Instruments Act, 1881.

These orders are not as unremarkable and innocuous as they appear. Through these orders, the apex court overrode the statutory provisions prescribing limitation. There is no doubt that the extension of periods of limitation was absolutely warranted in view of the situation created by the nationwide lockdown and other COVID induced difficulties that prevented litigants from approaching the courts, tribunals or other adjudicative bodies within time. The pertinent question, however, is whether the apex court has the power, under article 142 of the Constitution of India, to override the statutory period of limitation?

Article 142 of the Constitution of India provides that "[T]he Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it". The extent of power the Supreme Court has under this provision has not been clearly and convincingly elucidated so far. Multiple questions need to be answered to clearly understand the scope of the power under the provision. One of the most important questions that need to be answered is whether the Supreme Court under this provision has power, purportedly for doing complete justice, to pass orders that are inconsistent with or override other constitutional or statutory provisions?

It may be noted that article 142, though broadly worded, does not contain a non-obstante clause to the effect that *notwithstanding anything contained in this Constitution or in any other law for the time being in force,* the Supreme Court has the power to do complete justice. If the framers of the Constitution had intended to confer such a power, they would have explicitly provided for it. The power of such magnitude should be conferred and not to be inferred.In the absence of such a non-obstante clause, passing orders that are inconsistent with or override other constitutional or statutory provisions is not justifiable. Investing the court with such a power to pass any order, purportedly to do complete justice, notwithstanding the provisions contained in any other law in force is a clear threat to rule of law, which is considered to be an inviolable essential feature of the Constitution of India.

Extraordinary situations may call for extraordinary actions. Framers of the Constitution have made explicit provisions to deal with such extraordinary situations. Power to promulgate ordinances is one such extraordinary provision envisaged under the Constitution to deal with such exigencies. An ordinance could have been legitimately promulgated to extend the periods of limitations prescribed under the general or special laws. It is surprising that even though the Solicitor General had appeared in the *suo motu* proceedings initiated by the apex court, such a proposal to promulgate an ordinance was not even floated for consideration. The Solicitor General, who represents the government, seems to have agreed with passing of such extraordinary orders invoking power under article 142 of the Constitution of India.

102 2020 SCC OnLine SC 434.

Article 142 of the Constitution does not allow the Supreme Court to do anything and everything purportedly to do 'complete justice'. Its contours need to be defined keeping in view other inviolable features of the Constitution of India such as separation of powers and rule of law.

Condonation of delay in filing written statements

Order 8 rule 1, CPC requires the defendant to file the written statement within thirty days from the date of service of summons. The court is, however, empowered by the proviso to the said provision to extend the time for a further period of ninety days. The apex court in catena of cases had held that the maximum period of one hundred and twenty days prescribed under the provision is not mandatory. The provision does not take away the inherent discretion of the courts to condone delays beyond 120 days. While reiterating the position, the apex court, in *New India Assurance Co. Ltd.* v. *Hilli Multipurpose Cold Storage (P) Ltd.*,[103] observed that a harmonious construction of the aforesaid rule 1 with rule 10 of Order 8 is clearly indicative that the court has discretion to extend time beyond the maximum of 120 days in exceptional cases. The apex court has, however, categorically distinguished section 13 (2) (b) (ii) of the Consumer Protection Act, 1986 from the order 8 rule 1, CPC. It held that the time stipulated under the Consumer Protection Act, 1986 is mandatory since the Act provides for the consequences of failure to submit the written statement within the maximum time stipulated thereunder. The Act requires that in such cases complaint should be proceeded *ex parte*.

Similar is the position with regard to the commercial suits as well. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015mandates that in cases of commercial suits, the time shall not be extended beyond 120 days from the date of service of summons for filing of written statements under any circumstances. It is provided in categorical terms that on the expiry of one hundred and twenty days, "the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record."

The apex court in *Desh Raj* v. *Balkishan*,[104] noted that with the passing of the aforesaid Act, "there are two regimes of civil procedure. Whereas commercial disputes [as defined under Section 2(c)…] are governed by CPC as amended by Section 16 of the said Act; all other non-commercial disputes fall within the ambit of the unamended (or original) provisions of CPC."[105]

The apex court held that the mandatory nature of the timeline prescribed under the aforesaid Act is applicable only to commercial disputes. The courts dealing with commercial disputes have no discretion to grant time beyond one hundred and twenty days for filing written statements. As regards non – commercial disputes are concerned, they are governed by the unamended provision of order 8 rule 1 and the timeline

103 (2020) 5 SCC 757.
104 (2020) 2 SCC 708.
105 *Id*, para 11.

prescribed thereunder is only directory and not mandatory. The court was, however, quick to add that though the timeline under unamended order 8 rule 1 is directory, "[i]t cannot be interpreted to bestow a free hand to on any litigant or lawyer to file written statement at their own sweet will and/or to prolong the lis."[106] It observed:[107]

> The legislative objective behind prescription of timelines under CPC must be given due weightage so that the disputes are resolved in a time-bound manner. Inherent discretion of courts, like the ability to condone delays under Order 8 Rule 1 is a fairly defined concept and its contours have been shaped through judicial decisions over the ages. Illustratively, extreme hardship or delays occurring due to factors beyond control of parties despite proactive diligence, may be just and equitable instances for condonation of delay.

DRT: Condonation of delay in filing review petition

In *Standard Chartered Bank* v. *MSTC Ltd*.,[108] the apex court held that the delay in filing the review petition before the Debt Recovery Tribunal under section 22 (2) (e) of the Recovery of Debts and Bankruptcy Act, 1993 read with rule 5-A of the Debts Recovery Tribunal (Procedure) Rules, 1993 cannot be condoned relying on section 24 of the Act.

Section 24 of the Act provides that the provisions of the Limitation Act, 1963 shall apply to an application made to a tribunal. In view of the definition of 'application' under section 2 (b) of the Act, the court held that word 'application' in section 24 refers only to original applications filed under section 19 and the review petitions are not covered under it as they owe their origin to section 22 (2) (e) of the Act read with rule 5-A of the aforesaid Rules. Thus, the provision for condonation of delay contained in the Limitation Act, 1963 cannot be made applicable to review petitions. As per rule 5-A, review petition shall be filed within thirty days from the date of order. The peremptory language of the provision leaves no scope for extension beyond the aforesaid period.

Limitation for execution of a foreign decree/award

Section 44A, CPC provides for execution of decrees passed by courts in reciprocating countries. In *Bank of Baroda* v. *Kotak Mahindra Bank Ltd*.,[109] certain questions relating to limitation for filing an application for execution of such decrees arose for consideration before the apex court *viz*.,

(i) Does section 44A, apart from prescribing the manner of execution of foreign decrees, also indicate the period of limitation for initiating proceedings for execution?

(ii) What is the period of limitation for executing a foreign decree in India?

(iii) From which date the period of limitation shall start running?

106 *Id*., para 15.

107 *Ibid*.

108 (2020) 13 SCC 618.

109 2020 SCC OnLine SC 324.

The apex court answered the first question in the negative. It opined that section 44A is only an enabling provision and it has nothing to do with limitation. It only enables the district court to execute the foreign decree as if the same had been passed by it.

As regards the second question, after considering several authorities and global trends, the court was of the opinion that if the law of the *forum country* (the country in which the decree is sought to be executed) is silent with regard to limitation for initiating proceedings for execution of a foreign decree, then the limitation prescribed in the *cause country* (the country in which the decree was passed) would apply. In the present case, the *cause country* was England where the limitation for executing a decree is six years. In India, article 136 of the Limitation Act, 1963 prescribes 12 years limitation for initiating proceedings for execution of decrees. In the opinion of the court"where the remedy stands extinguished in the *cause country* it virtually extinguishes the right of the decree-holder to execute the decree and creates a corresponding right in the judgment debtor to challenge the execution of the decree"[110] and"[I]t would be a travesty of justice if the person having lost his rights to execute the decree in the *cause country* is permitted to execute the decree in a *forum country*."[111] The court also clarified that the corresponding rights created in the judgment debtor after the expiry of the period of limitation are "substantive rights and cannot be termed to be procedural".[112] In this context, it had categorically stated that the law of limitation cannot be considered entirely procedural.

Further, the court also held that article 136 of the Limitation Act, 1963 deals only with decrees passed by Indian courts and not by foreign courts as the provision does not specifically refer to foreign decrees.[113]

As regards the third question relating to the time from which limitation period begins to run, the court contemplated two situations. First, where the decree holder does not initiate any proceedings in the *cause country* for execution of the decree, in such cases, the period of limitation would start running from the date on which the decree was passed in the *cause country* and it had to be filed within the period of limitation prescribed in the said country. The limitation period prescribed in the *forum country* would not be applicable. Second, where the decree holder initiates the execution proceedings in the *cause country* that leads to satisfaction of the decree partly but not fully, in such cases, the court observed:[114]

> [t]he right to apply under Section 44A will accrue only after the execution proceedings in the *cause country* are finalised and the application under Section 44A of the CPC can be filed within 3 years of the finalisation of the execution proceedings in the cause country as prescribed by Article 137 of the Act. The decree holder must approach

110 *Id*., para 37.

111 *Id*., para 44.

112 *Ibid*.

113 See *Id*., paras 40 and 41.

114 *Id*., para 45.

the Indian court along with the certified copy of the decree and the requisite certificate within this period of 3 years.

In *Union of India* v. *Vedanta Ltd*.,[115] the apex court was asked to determine the period of limitation for filing a petition for enforcement of foreign arbitral award. The apex court, relying on article 3 of the New York Convention on the Recognition and Enforcement of Foreign Awards, 1956, clarified, at the outset, that the "issue of limitation for enforcement of foreign awards being procedural in nature, is subject to the *lex fori* i.e. the law of the forum (State) where the foreign award is sought to be enforced."[116]

In India, by virtue of section 43 of the Arbitration and Conciliation Act, 1996, provisions of the Limitation Act, 1963 apply to arbitration proceedings as they apply to court proceedings. The court after examining the provisions of the Limitation Act held that the period of limitation for filing a petition for enforcement of foreign arbitration award is governed by article 137 and not by article 136 of the Limitation Act, 1963. Article 136 applies only to a decree of a civil court in India. The legal fiction created by section 49 of the Arbitration and Conciliation Act, 1966, whereby a foreign award is deemed to be a decree of the court, is applicable only for a limited purpose. Foreign awards cannot be considered to be decree for the purpose of bringing them within the purview of article 136 of the Limitation Act. Thus, petition seeking enforcement of foreign award falls within the purview of residuary provision i.e., article 137 of the Act. The principle of *ejusdem generis* is not applicable for interpreting the phrase "any other application" in article 137. Any other application includes 'petitions' as well.

Thus, the petition filed under sections 47 and 48 of the Arbitration and Conciliation Act, 1996 for the enforcement of foreign award is governed by article 137 of the Limitation Act, 1963, which prescribes the period of three years limitation for filing such petitions. The apex court also clarified that the delay, if any, in filing the application under the aforesaid sections 47 and 48 may be condoned under section 5 of the Limitation Act, 1963.

Condonation of delay in filing application to set aside sale in execution of a decree

Order 21 rule 90, CPC permits any interested party to file an application to set aside sale of any immovable property in execution of a decree on the ground of "material irregularity or fraud in publishing or conducting it". Article 127 of the Limitation Act, 1963 prescribes sixty days limitation period for filing such an application. In *Aarifaben Yunusbhai Patel* v. *Mukul Thakorebhai Amin*,[117] a question as to whether the application filed under the said provision after the expiry of the limitation period can be entertained by the court either by relying on section 5 or section 14 of the Limitation Act arose for consideration. Section 5 permits the court to extend prescribed period in certain cases and section 14 provides for exclusion of

115 (2020) 10 SCC 1.
116 *Id*., para 63.
117 (2020) 5 SCC 449.

the time during which the party has been prosecuting another civil proceeding with *due diligence* and in *good faith*.

The apex court ruled that section 5 of the Limitation Act, 1963 does not apply to applications filed under order 21 rule 90, CPC. The provision explicitly excludes all applications filed under any provisions of order 21 from its purview. Further, with regard to application of section 14, the court reiterated that "[A]ny person claiming benefit of Section 14 of the Act can only claim exclusion of time of that period for which it had been prosecuting another remedy with *due diligence* and in *good faith*."[118] In the instant case, the party had, instead of filing an application under order 21 rule 90, filed a writ petition before the high court of setting aside the sale. While considering the overall circumstances of the case, the apex court held that the party was not prosecuting the writ proceedings with *due diligence* and in *good faith*.

X MISCELLANEOUS

Service of notices, summons during COVID –19

The COVID – 19 pandemic had thrown multiple challenges to the functioning various institutions and their processes including that of courts. Owing to the nationwide lockdown announced to combat COVID – 19, it became impossible even to serve notices and summons and to exchange pleadings which are essential almost in every legal proceeding. In the *suo motu* proceedings initiated by the apex court to deal with the issue of expiring limitation, the apex court tried to find solution to resolve the issues relating to service of summons and notices. In *Cognizance for Extension of Limitation, In re*,[119]the apex court, taking note of the difficulties, passed the following order:[120]

> We, therefore, consider it appropriate to direct that such services of all the above may be effected by email, fax, commonly used instant messaging services, such as WhatsApp, Telegram, Signal, etc. However, if a party intends to effect service by means of said instant messaging services, we direct that in addition thereto, the party must also effect service of the same document(s) by email, simultaneously on the same date.

It is evident from the order that even though the apex court allowed the instant messaging services also to be sued to serve notices, summons etc., it made it clear that that alone would not be sufficient to comply with the requirements. Additionally such documents should be served through emails as well.

Temporary Injunction

In *Ambalal Sarabhai Enterprise Ltd*. v. *KS Infraspace LLP Ltd*.,[121] the apex court reiterated the principles governing the grant of temporary injunction in a suit for specific performance. While noting that "[T]he grant of relief in a suit for specific

118 *Id*., para 12.
119 (2020) 9 SCC 468
120 *Id*., para 8.
121 (2020) 5 SCC 410.

performance is itself a discretionary remedy", the apex court categorically stated, relying on *Dalpat Kumar*,[122] that the plaintiff seeking a temporary injunction in such a suit will have to establish "a strong prima facie case on basis of undisputed facts". The court granting the temporary injunction must exercise the discretion judiciously taking into account, *inter alia*, the conduct of the plaintiff.

Concurrent civil and criminal proceedings

It is a well settled law that where same set of facts give rise to remedies both in civil and criminal laws, a person aggrieved is entitled to avail both the remedies. Availing civil remedies or its possibility does not preclude the person from initiating criminal proceedings on the self-same set of facts.[123]

Leave to institute suit against public trust:Section 92, CPC

In *Ashok Kumar Gupta* v. *Sitalaxmi Sahuwala Medical Trust*,[124] the apex court reiterated the three conditions that are required to be satisfied for seeking leave under section 92, CPC for instituting a suit against a public trust. They are:[125]

(i) The Trust in question is created for public purposes of a charitable or religious nature;

(ii) There is a breach of trust or a direction of court is necessary in the administration of such a Trust; and

(iii) The relief claimed is one or other of the reliefs as enumerated in the said section.

All the three conditions need to be satisfied. If any of them is not satisfied, then the matter would be outside the scope of section 92.

In the instant case, there was a dispute as to the satisfaction of the third condition as the plaintiff has, *inter alia*, sought the court to include himself also as one of the trustees. The question was whether seeking such a relief would take the matter outside the scope of section 92, CPC? Relying on *Sugra Bibi*,[126] and considering the entire plaint and the overall reliefs sought, the apex court answered the question in the negative. The court observed:[127]

> [t]he principal relief prays for framing of a proper scheme of administration and for appointing trustees from medical profession and from the public for proper and effective administration of the Trust. The expression "including the first plaintiff" has to be understood in the context that the first plaintiff, as a qualified medical professional, was associated with the Trust right since the inception but now stands removed. The relief prayed for cannot be said to be in the nature of

122 *Dalpat Kumar* v. *Prahlad Singh* (1992) 1 SCC 719.

123 *K. Jagadish* v. *Udaya Kumar G.S.* (2020) 14 SCC 552.

124 (2020) 4 SCC 321.

125 *Id*., para 12.

126 *Sugra Bibi* v. *Hazi Kummu Mia* (1969) 3 SCR 83.

127 *Id*., para 18.

> vindicating personal rights of the first plaintiff. What was prayed was for framing of a proper scheme of administration so that the Trust which was founded with the object of making available medical and related services to the general public could attain and achieve all its objectives through trustees who are themselves well qualified to undertake such responsibility.

Further, in *Ghat Talab Kaulan Wala* v. *Gopal Dass*,[128] the apex court categorically held that the procedure prescribed under section 92, CPC would be applicable only when a suit is filed *against* the trust created for public purposes of a charitable or religious nature and not when the suit is filed *by* such a trust.

Writ petition: Complex questions of facts

Whether the high court can entertain a writ petition involving "questions of fact of complex nature" arose for consideration in *Punjab National Bank* v. *Atmanand Singh*.[129]The apex court, relying on catena of cases, has restated the position that if the case involves questions of fact of complex nature, the determination of which require "oral and documentary evidence to be produced and proved by the party concerned… the High Court should be loath in entertaining such writ petition and instead must relegate the parties to remedy of a civil suit."[130] If the material facts are not in dispute, then the high court may be justified in entertaining the writ petition to examine the claim of the petitioner "on its own merits and in accordance with law".[131]

The apex court, however, added, relying on *Gunwant Kaur*,[132] that the petition involving complex questions of fact may be entertained if the high court, on consideration of the nature of the controversy, thinks it is appropriate to do so "on sound judicial principles."

Registration of compromise decree

Section 17 (2) (vi) of the Registration Act, 1908 exempts any decree or order of a court from the requirement of compulsory registration. This exemption clause, however, has one exception *i.e.*, "a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding." By virtue of the provision, compromise decree comprising immovable property, which was not the subject-matter of the suit, is required to be registered compulsorily and not all compromise decrees. Compromise decrees comprising immovable property need not be registered if the property was the subject-matter of the suit.[133]

128 (2020) 13 SCC 50.

129 (2020) 6 SCC 256.

130 *Id., para 22.*

131 *Ibid*.

132 *Gunwant Kaur* v. *Municipal Committee, Bhatinda* (1969) 3 SCC 769.

133 *Mohd. Yusuf* v. *Rajkumar* (2020) 10 SCC 264. Also see, *Gurcharan Singh* v. *Angrez Kaur* (2020) 10 SCC 250.

Deficiency in court fee: Section 149, CPC

In *Atma Ram* v. *Charanjit Singh*,[134] a suit for mandatory injunction was filed against the respondent-defendant, who had failed to perform the contract in terms of agreement to sell immovable property. Since it was filed for mandatory injunction, the suit was valued only at 250 and a fixed court fee of 25 was paid. The respondent raised an objection to the maintainability of the suit in the current form and filed an application for dismissal of the same. The trial court passed an order whereinit allowed the petitioner-plaintiff to pay the deficit court fee by treating the relief claimed as one for specific performance. It seems it was not permissible for the trial court to do so. The only way of converting the existing suit for mandatory injunction into a suit for specific performance was by way of seeking an amendment to theplaint under order 6 rule 17, CPC. Such an application for amendment would have been subject to limitations etc., Therefore, the petitioner-plaintiff found a short-cut to retain the plaint in the same form and only sought permission to pay deficit court fee and the trial court allowed the same by adopting a "convoluted logic". The said order remained unchallenged. Later, the trial court decreed the suit for specific performance. The decision of the trial court was reversed by the first appellate court, which was confirmed by the high court in the second appeal. The high court held that the suit was time barred.

Challenging the decision of the high court, it was contended before the apex court that the trial court permitted the petitioner-plaintiff to pay the deficit court fee by treating the suit as one for specific performance and the petitioner-plaintiff had complied with the same. By virtue of section 149, CPC "such payment would have same force and effect as if such fee had been paid in the first instance itself."[135] The apex court, even while agreeing with the submissions as regards the effect of section 149, had observed:[136]

> It may be true that the approach of the High Court in non-suiting the petitioner-plaintiff on the ground of limitation, despite the original defect having been cured and the same having attained finality, may be faulty. But we would not allow the petitioner to take advantage of the same by taking shelter under Section 149 CPC, especially when he filed the suit (after more than three years of the date fixed under the agreement of sale) only as one for mandatory injunction, valued the same as such and paid court fee accordingly, but chose to pay proper court fee after being confronted with an application for the dismissal of the suit. Clever ploys cannot always pay dividends.

Further, while dismissing the appeal, the court also remarked that "[S]uch a dubious approach should not be allowed especially in a suit for specific performance, as the relief of specific performance is discretionary under Section 20 of the Specific Relief Act, 1963."[137]

134 (2020) 3 SCC 311.
135 *Id*., para 4.
136 *Id*., para 8.
137 *Id*., para 7.

Consent order: Withdrawal of consent

Whether party can unilaterally seek to withdraw a consent given in an earlier proceedings based on which the consent order was passed was one of the issues arose in a matrimonial dispute in *Soumitra Kumar Nahar* v. *Parul Nahar*.[138] The apex court answered the question in the negative. Taking into account the facts and circumstances of the case, it observed:[139]

> [i]t was a trilateral consent which was recorded by the High Court in its order dated 1-3-2013 which one party cannot be permitted unilaterally to seek withdrawal of his/her consent and in our considered view, the consented order… will remain operative until the parties to the consent order jointly move an application for withdrawal of their consent as being recorded in its order dated 1-3-2013 or until the court of competent jurisdiction is pleased to set it aside on permissible grounds and/or absolves the respondent wife therefrom.

Inherent power to order restitution

Section 144, CPC empowers the court to pass an order of restitution, in cases where an earlier decree or order is varied or reversed, in order to place the parties in the position which they would have occupied but for such decree or order. The provision is based on the ideal of doing complete justice to the parties at the end of litigation. It prevents a litigant from taking advantage of the litigation. A question as to whether restitutions can be ordered in situations not covered under section 144 arose for consideration before a five judge bench of the apex court in *Indore Development Authority (LAPSE-5 J.)* v. *Manoharlal*.[140] While answering the question in the affirmative, the bench observed:[141]

> Section 144 of the Code of Civil Procedure is not the fountain source of restitution. It is rather a statutory recognition of the rule of justice, equity and fair play. The court has inherent jurisdiction to order restitution so as to do complete justice… In exercise of such power, the courts have applied the principle of restitution to myriad situations not falling within the terms of Section 144 CPC.

The bench also afforded justifications for applying the concept of restitution to interim orders as well. It was of the opinion that:[142]

> Litigation cannot be permitted to be a productive industry. Litigation cannot be reduced to gaming where there is an element of chance in every case. If the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order.

138 (2020) 7 SCC 599.
139 *Id*., para 38.
140 (2020) 8 SCC 129.
141 *Id*., para 335.
142 *Ibid*.

> Further, the bench has succinctly articulated the test to be applied in considering application seeking restitution.[143]
>
> What attracts applicability of restitution is not the act of the court being wrongful or mistake or an error committed by the court; the test is whether, on account of an act of the party persuading the court to pass an order held at the end as not sustainable, resulting in one party gaining an advantage which it would not have otherwise earned, or the other party having suffered an impoverishment, restitution has to be made.

Direction to deposit passport to ensure appearance in the court

In *Shyam Sahni* v. *Arjun Prakash*,[144] the apex court considered the question as to whether the single judge of the high court is justified, in exercise of the power under order 39 rule 2-A read with section 151, CPC and sections 10 and 12 of the Contempt of Courts Act, 1971, to order the defendant to deposit his passport in the court. In this case, the defendant had violated the injunction order passed by the single judge and was not appearing in the court proceedings and failed to comply with the repeated undertakings given to it.

The apex court, while noting that the purpose of ordering the passport to be deposited was only to ensure the presence of the defendant and further progress of the trial, answered the question in the affirmative. It also opined that order to deposit the passport in the court does not amount impounding of the passport.

The apex court, in the judgment, had not gone into the legal intricacies to clarify under which provision such an order to deposit the passport in the court can be passed.

It may be noted that neither order 31 rule 2-A, CPC nor sections 10 and 12 of the Contempt of Courts Act, 1971 empower the court to pass such an order. Order 31 rule 2-A, which deals with "consequence of disobedience or breach of injunction" only allows the court to attach the property of the person guilty of such disobedience or to detain such a person in the civil prison for a term not exceeding three months. Even the Contempt of Court Act, 1971 does not empower the court to pass such an order. The court may, however, justifiably pass such an order to deposit the passport in exercise of its power under section 151, CPC, which saves the "inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Non-compliance with order 21 rule 89

In *Paul* v. *T. Mohan*,[145] on failure of the borrower to repay the money, a chits company filed a petition before the Deputy Registrar of Chits, who passed an *ex parte* order directing the guarantor, who had executed a collateral security of certain immovable property, to pay the due amount. After obtaining the *ex parte* order, the company filed an execution petition. When the notice of the execution proceedings is served, the guarantor started repaying the due amount in installments. In the meantime,

143 *Ibid*.
144 (2020) 16 SCC 788.
145 (2020) 5 SCC 138.

the property was auctioned. After learning about the auction, the guarantor approached the chits company and repaid the entire amount. Thereafter, he filed an application under order 21 rule 89 read with section 151, CPC for setting aside the auction. During the pendency of the application, the chits company also issued no-due certificate. Though, this fact was brought to the notice of the executing court, the court after nearly four years delay dismissed the application on the ground of non-compliance with requirements stipulated in order 21 rule 89 and issued the sale certificate to the auction-purchaser. The said provision requires the applicant to deposit the amount specified in the sale proclamation along with five per cent of the purchase money.The guarantor filed a civil revision before the high court challenging the dismissal of his application. Keeping in view the facts and circumstances of the case, the high court was of the opinion that there was no necessity of depositing the amounts as required under the said provision. It, accordingly, allowed the civil revision and set aside the auction. The apex court, while dismissing the appeal, observed that the view taken by the high court would not call for interference under article 136 of the Constitution of India. The court was, however, very cautious to add that it is not "laying down any law with regard to the issue relating to application or non-compliance with Order 21 Rule 89".[146] It had kept the question of law open to be decided in an appropriate case.

Challenge to a compromise decree

In *Triloki Nath Singh* v. *Anirudh Singh*,[147] the apex court, relying on *Pushpa Devi Bhagt*,[148] has reiterated that no compromise decree can be challenged either in an appeal or in an independent suit. Section 96 (3) bars filing of appeal against a compromise decree and order 23 rule 3-A bars filing of independent suit for having a compromise decree set aside. The court also held that as result of deletion of order 43 rule 1 (m), even the order of the court recording or refusing to record a compromise cannot be appealed against. While noting that the whole purpose of providing for recording a compromise between the parties and passing a decree accordingly is to avoid multiplicity of litigation and allow the parties to settle the dispute amicably and in a manner that is lawful, the court held that no further litigation should be created on the basis of compromise between the parties.

The court categorically stated that a compromise decree can be challenged only by way of filing an application under order 23 rule 3 before the court, which passed such a decree.

Transfer of suits

In *Shamita Singha* v. *Rashmi Ahluwalia*,[149] a petition was filed under section 25, CPC seeking transfer of the partition suit filed in the Delhi High Court to Bombay High Court, which was hearing the petition seeking grant of letters of administration to the estate of the deceased on the basis of the willexecuted by him. Though the suit for partition was instituted in the High Court of Delhi before the probate proceedings were instituted in Bombay, the apex court following the guidelines laid down in

146 *Id*., para 11.

147 (2020) 6 SCC 629.

148 *Pushpa Devi Bhagat* v. *Rajinder Singh* (2006) 5 SCC 566.

149 (2020) 7 SCC 152.

Chitivalasa Jute Mills,[150] ordered the transfer of the partition suit to High Court of Bombay. The apex court categorically held that the petition for transfer of suit must be decided "on consideration of the ends of justice" and the principle "first past the post" has no application in deciding such petitions.

Effect of clubbing suits for hearing

In *B. Santoshamma* v. *D. Sarala*,[151] the apex court highlighted the effect of clubbing of suits for hearing them together and passing of a common judgment thereafter. The apex court, while holding that the suits are clubbed for practical reasons or convenience such as "to save time, costs, repetition of procedures and to avoid conflicting judgments" has reiterated that such clubbing "do not convert the suits into one action…the suits retain their separate identity."[152]

Judgment on admissions

Order 12 rule 6, CPC confers discretionary power on the court to pass any order or judgment on the basis of admission of facts made either in the pleading or otherwise. In *Satish Chander Ahuja* v. *Sneha Ahuja*,[153] the plaintiff filed a suit for mandatory and permanent injunction against his daughter-in-law, who was occupying a portion of the suit property and had also initiated proceedings under the Protection of Women from Domestic Violence Act, 2005 (DV Act) to prevent the plaintiff from alienating the property or dispossessing her. In the suit, the plaintiff filed an application under order 12 rule 6 read with section 151, CPC for passing the decree on the basis of admission made by her in the proceedings under the DV Act, 2005. The trial court entertained the application and passed the decree accordingly. The high court set aside the decree on the ground that exercise of discretion under order 12 rule 6 is not justified in the facts and circumstances of the case. The case was remanded back to the trial court. The decision of the high court was challenged before the apex court.

The apex court, relying on *Himani Alloys Ltd.*[154] and *S.M. Asif*,[155] had refused to interfere with the decision of the high court. In the aforesaid cases, the apex court had clearly elucidated the scope and ambit of the discretionary power of the courts under order 12 rule 6. In the opinion of the court, if the admission of facts is not clear, unambiguous and unconditional, the discretion shall not be exercised. The court also added that "[T]he power under Order 12 Rule 6 is discretionary and cannot be claimed as a matter of right."[156]

Standard of proof in civil cases

In *Rattan Singh* v. *Nirmal Gill*,[157] the apex court reiterated the settled law that the standard of proof required to prove any disputes facts in civil cases is

150 *Chitivalasa Jute Mills* v. *Jaypee Rewa Cement* (2004) 3 SCC 85.

151 *Supra* note 25.

152 *Id*., para 93.

153 (2021) 1 SCC 414.

154 *Himani Alloys Ltd.* v. *Tata Steel Ltd.* (2011) 15 SCC 273.

155 *S.M. Asif* v. *Virender Kumar Bajaj* (2015) 9 SCC 287.

156 *Supra* note 153, para 106.

157 2020 SCC OnLine SC 936.

"preponderance of probabilities" and not proof "beyond reasonable doubt". The latter is the standard of proof required in criminal cases only. Unlike in criminal cases, higher standard of proof is not required in civil cases.

Judicial review of administrative actions: Accrual of 'cause of action'

In *Rusoday Securities Ltd.* v. *National Stock Exchange of India Ltd*.,[158] the decision to withhold securities were taken somewhere in 1997 but the order supplying reasons and justifications in support of the said decision was passed by the defaulter's committee much later in 2014. It was contended that the cause of action to challenge the decision arose only in 2014 when the second order was passed. Rejecting the argument, the apex court held that "[T]he cause of action, if at all any, had arisen to the appellant from the moment their securities were withheld in 1997. Merely because a subsequent order is passed to justify a prior action, it cannot be a case of accrual of fresh cause of action to the aggrieved."[159]

XI CONCLUSION

In the year 2020, the COVID – 19 pandemic had hit the humankind in an unprecedented way. As stated at the outset, it affected, *inter alia*, even the normal functioning of the courts at all levels. Most of them were literally shut for certain period of time for most purposes.The apex court in these difficult times rose to the occasion and resumed proceedings in an online mode and also passed certain orders to overcome hurdles in process serving and also passed an extraordinary order for stopping the clock of statutory limitation by exercising the power it claims to have under article 142 read with article 141 of the Constitution of India. Having regard to the extraordinary situation, though stopping the clock of statutory limitation was the need of the hour, doing so through a judicial order, under article 142, does not appear to be a constitutionally appropriate method. As pointed out, issuing an 'ordinance' for the purpose would have been most appropriate.

In the survey year, as in the previous years, the apex court has also dealt with several other questions relating to procedural provisions while adjudicating wide variety of civil disputes. Some important questions have been answered by the larger benches.

A nine judge bench of the apex court had answered in the affirmative a question as to whether a bench hearing a review petition, under article 137 of the Constitution, can refer a question of law to a larger bench even before the grant of review. The bench also clarified that the courts power to review judgments passed in writ proceedings is not confined only to grounds mentioned in order 47 rule 1, CPC. Unlike the power to review judgments passed in civil or criminal proceedings, there are no limitations, under the Supreme Court Rules, 2013, on the power to review judgments passed in writ proceedings. This authoritative pronouncement by a larger bench has clarified the legal positions.[160]

158 (2021) 3 SCC 401.
159 *Id*., para 87.
160 *Supra* note 86.
161 *Supra* note 140.

In another case,[161] a five judge bench of the apex court categorically held that section 144, CPC "is not the fountain source of restitution". It was clarified that the courts have inherent power, in order to do complete justice, to order restitution even in situations not covered under section 144. Another important question of procedural law was answered by a three judge bench. In *EXL Careers*,[162] a question as to when a plaint is returned by a court to be presented before an appropriate court having jurisdiction to try, should the latter court start the trial *de novo* was answered in the affirmative. The said question was referred to a three judge bench in the previous year because of the conflicting judicial precedents. With the pronouncement by a three judge bench, the position now stands clarified.

Similarly, many two judge benches have settled several other questions of procedural law. However, one question concerning the jurisdiction of family courts was referred to a larger bench because of the disagreement between the judges in a two judge bench before which the question arose.[163] Further, a question of law regarding the effect of non-compliance with the requirements stipulated in order 21 rule 89 was kept open by another bench to be decided in a more appropriate case in the future.[164]

In most of the other cases decided during the survey year, the apex court, as in the past, reiterated and reinforced principles and rules of civil procedural law. These reiterations have provided greater clarity. Particularly, a very lucid and succinct summary of legal principles governing second appeal under section 100, CPC provides much needed clarity on the scope of the provision. Distinctions between 'question of fact' and 'question of law' and between 'question of law' and 'substantial question of law' have been pointed out more clearly. The summary can serve as a ready reference for litigating lawyers and judges.[165] Overall, the contribution of the apex court in the survey year deserves to be lauded.

162 *Supra* note 16.
163 *Supra* note 10.
164 *Supra* note 145.
165 *Supra* note 61.