ACKNOWLEDGEMENT

Recently introduced amendments in the Code of Civil Procedure have brought about far reaching changes in the procedural law. Understanding these changes in their right perspective and context is a must for every judicial officer, especially those who have just entered the judicial service. Realizing this paramount need of newly appointed Judicial Officers, Hon'ble (Dr.) Justice B.S. Chauhan has very kindly penned down authoritative comments on the provisions of the Code of Civil Procedure with reference to the Amendment Acts, 1999 & 2002, explaining the changes in a very lucid and simple manner and in their right perspective. This is a unique work that combines analysis of the provisions of law with judicial pronouncements for the fine textural exposition of the subject. The result is a revelation. The treatment of the subject makes it an essential reading for new entrants to the Judicial Service and there can be no better way to convey the essence of changes in the Code of Civil Procedure than by reading these comments by His Lordship.

I take pride in writing this note of acknowledgement for the kindness that has been showered upon us by His Lordship in the form of the words of wisdom in these pages for judicial officers who are at the threshold of their career. Earlier, when His Lordship came here to deliver a talk on the subject, "Recent changes in the Code of Civil Procedure", His Lordship had been kind enough to bring with him a write-up on the subject. This write-up was published by the Institute in the form of a small book, which was received very well by the officers, and there is a great demand for the book from the Judicial Officers. His Lordship has been kind enough to provide us thoroughly revised and updated text, which we are publishing with great pleasure for the benefit of judges of the subordinate judiciary.

We bow down to His Lordship's authoritative treatment of the subject that is par excellence and acknowledge an enormous debt of gratitude for the superb job.

ALLAH RAHAM

DIRECTOR

Comments on
CODE OF CIVIL PROCEDURE-WITH REFERENCE TO AMENDMENT ACTS-1999 & 2002

Dr. Justice B.S. Chauhan

As it is evident from its name, it mainly lays down the procedure to be adopted in civil courts, and its principles may be applicable in other courts, like writ courts, and Tribunals to the extent the enactments establishing the Tribunals provide for it. It provides for a fair procedure for redressal of disputes. The other party may know what is the dispute about, what defence it can take, and how both the parties may proceed to prove their respective cases. Some of its provisions are substantive in nature and not procedural at all, like Sections 96, 100, 114 and 115 providing for a right of appeal, review and revision. The other provisions are generally procedural in nature. The purpose of the Code is to provide a litigant a fair trial in accordance with the accepted principles of natural justice. The Code is mainly divided into two parts, namely, Sections and Orders. While the main principles are contained in the Sections, the detailed procedures with regard to the matters dealt with by the Sections have been specified in the Orders. Section 122 of the Code empowers the High Court to amend the Rules, i.e., the procedure laid down in the Orders and every High Court had amended the procedure from time to time making the amendments in the said Orders.

The Civil Procedure Code, 1908 (hereinafter referred to as Code) is a codification of the principles of natural justice. Natural justice means 'justice to be done naturally' which is adopted naturally by the habits of every individual. It does not mean godly-justice or justice of nature. It simply means an inbuilt-habit of a person to do justice. For example, if a child of 1,1/2 years breaks the saucer, the mother of the child may slap him being furious, but at the time of slapping, she would repeatedly ask him why he has broken the saucer, though she knows that the child has not started speaking. As these principles are inbuilt-habit of everyone to ask others for furnishing the explanation of anything done by them, the same are known as 'principles of natural justice'. In Eden Garden God did not punish Adam

without giving him opportunity to show cause. The first reported case of principles of natural justice in Dr. Bentely's case, i.e., R Vs. University of Cambridge, (1723) 1 STR 757, wherein reference of the incident of Eden Garden was made.

The two words are repeated everyday in the courts- 'justice' and 'law'. Justice is a illusion as the meaning and definition of 'justice' varies from person to person and party to party. Party feels having got justice only and only if it succeeds before the court, though it may not have a justifiable claim. (Vide Delhi Administration Vs. Gurudeep Singh Uban, AIR 2000 SC 3737).

Law is a very wide term and has been defined in Article 13 (3) (a) of the Constitution of India by an inclusive definition, i.e., it includes any ordinance, order, bye-laws, rule, regulation, notification, customs or usage having the force of law in the territory of India.

Law is a scheme of social control as distinct from self control. The sovereign State considers and determines how much personal liberty is best and how much social control is best in the interest of the State for the protection of its social interest. Therefore, law is an expression of the will of the sovereign State which has to be enforced by the executive as well as the courts of law. Law in fact is an instrument enacted by the Parliament or State Legislature in exercise of power under Articles 245 and 246 of the Constitution of India and also includes the subordinate legislature like rules and regulations. Customs and usages etc. are also law if not violative of the fundamental rights conferred by Part III of the Constitution of India. Law does not include the principles of natural justice though it may be mandatory to follow the same. Law determines the legal rights of the individuals and it contains provisions either to be enforced, applied or restraining from doing certain acts. Law is accompanied by the sanction of the State that it has to be enforced/obeyed. Thus, law generally means State made law. (Vide A.K. Gopalan Vs. State of Madras, AIR 1950 SC 27; Provincial Transport Services Vs. State Industrial Court, Nagpur & Ors., AIR 1963 SC 114; Raj Kumar Narsing Pratap Singh Deo Vs. State of Orissa & Anr., AIR 1964 SC 1793; and The Chairman, Board of Mining Examination and Chief Inspector of Miners & Anr. Vs. Ramjee, AIR 1977 SC 965. Justice is administered in courts, keeping in mind the law applicable in the facts and circumstances of the case. It is not persuaded by

concept of equity. (Vide Madamanchi Ramappa & Anr. Vs. Muthaluru Bojjappa, AIR 1963 SC 1633).

Court has a right to decide a case, that includes the right to decide it wrongly also, otherwise there could have been no provision for appeal, review or revision. Case requires to be decided at the earliest according to conscious and best ability of the Judge and assistance rendered by the bar.

For paucity of time it would not be possible for us to deal with every provision in the Code. Thus, we will discuss the scope and application of the provisions which we have to deal with every day in the Court.

Section 9- provides for bar of jurisdiction of civil court if the Statute provides for an alternative forum. For example, a Suit for permanent injunction is barred for a licensee by virtue of the provisions of Sections 14 and 42 of the Specific Reliefs Act. Motor Vehicles Act, 1988 and Land Acquisition Act, 1894 are complete Code providing for a forum of redressal of any grievance. Therefore, the jurisdiction of the civil court may be barred.

In Firm Seth Radha Kishan Vs. Administrator, Municipal Committee, Ludhiana, AIR 1963 SC 1547, the Hon'ble Apex Court held that in a case where jurisdiction of civil court has expressly been barred, a Suit should not be entertained even if it is impliedly barred under Section 9 of the Code, but a Suit in the civil court "will always lie to question the order of a Tribunal created by a Statute, even if its order is, expressly or by necessary implication, made final if the said Tribunal abused its power or does not act under the Act but in violation of its provisions.

A Constitution Bench of the Hon'ble Supreme Court in Firm of Illury Subbayya Chetty & Sons Vs. State of Andhra Pradesh, AIR 1964 SC 322, placing reliance upon the judgments of the Privy Council in Secretary of State Vs. Mask & Co., AIR 1940 PC 105; and Raleigh Investment Co. Ltd. Vs. The Governor General in Council, AIR 1947 PC 78, held as under:-

> "..... there is a general presumption that there must be a remedy in the ordinary civil court to a citizen claiming that an amount had been recovered from him illegally and that such a remedy can be held to be barred only

on very clear and unmistakable indication to the contrary. The exclusion of the jurisdiction of a civil court to entertain civil cause will not be assumed unless the relevant Statute contains an express provision to that effect or leads to a necessary and inevitable implication of that nature....."

The Court further held that if the jurisdiction has been conferred upon a particular Authority/Tribunal, entertaining a civil Suit would make the proceedings before the appropriate authority illegal and without jurisdiction. The Court further held that as the provisions of Section 18-A of the Sales Tax Act expressly excludes the jurisdiction of the civil court, hence the court had no jurisdiction to entertain such a Suit.

Another Constitution Bench of the Hon'ble Supreme Court in Ram Swarup & Ors. Vs. Shikar Chand & Anr., AIR 1966 SC 893, held that the jurisdiction of civil courts to deal with civil causes can be excluded by the legislature by Special Act which may deal with special subject matters, but the statutory provision must expressly provide for such exclusion or must necessarily and impliedly lead to that inference. However, the said bar would not be relevant if the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity. While deciding the said case, the Court placed reliance upon large number of judgments including the judgment in The Secretary of State for India in Council Vs. Roy Jatindra Nath Chowdhury & Anr., AIR 1924 PC 175.

Yet another Constitution Bench of the Hon'ble Supreme Court in Dhulabhai & Anr. Vs. State of Madhya Pradesh & Anr., AIR 1969 SC 78, held that exclusion of jurisdiction of the civil court by express provision may not be a complete bar to entertain a Suit if party satisfies the civil court that the Statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. More so, the Statutory Tribunal must be competent to provide all the remedies normally associated with the actions in civil courts, which are prescribed by the said Statute or not. More so, the exclusion of jurisdiction of the civil court is not readily to be inferred unless the aforesaid conditions are fulfilled.

In Sardara Singh Vs. Sardara Singh, (1990) 4 SCC 90, the Hon'ble Supreme Court held that civil court's jurisdiction is available wherever the act or action of a statutory authority is found to be without jurisdiction in spite of the fact that statute includes the jurisdiction of the civil court and the suit is maintainable.

In D.R. Chawla & Ors. Vs. Municipal Corporation of Delhi, (1993) 3 SCC 162, the Supreme Court held that where statutory enactments only create rights or liabilities without providing forums for remedies, any person having a grievance that he had been wronged or his right is being affected, can approach the ordinary civil court, but in case a Special Forum is provided for enforcement of such right or for protection or enforcement of a liability without any authority in law, the ouster of the civil court's jurisdiction can be upheld on the finding that the rights and liabilities in question have been created by the Act without touching the existing Common Law rights and the remedy provided therein is adequate and complete. But where adequate redressal machinery is not provided under the Statutory Forum, the civil court can still examine the correctness of the order passed under the Statute.

In Pavitter Singh & Ors. Vs. Niranjan Lal Malhotra, JT 2001 (8) SC 641, the Apex Court held that Section 46 of the Administration of Evacuee Property Act, 1950 bars the jurisdiction of civil court in certain cases. The Court held that in such an eventuality, civil court cannot entertain and try a Suit as its jurisdiction has expressly been barred and the only remedy in such cases, if any person is aggrieved by the order passed under the Act in respect of those evicted, is to resort to writ jurisdiction of the Writ Court.

Similar view has been reiterated by the Hon'ble Supreme Court while dealing with the provisions of the Motor Vehicles Act, 1939 in Shri Chand Vs. Government of U.P. & Ors., AIR 1986 SC 242; and Anwar Vs. First Addl. District Judge, Bulandshahar & Ors., AIR 1986 SC 1785, observing that in most of the matters pertaining to the Motor Vehicles Act, the jurisdiction of the civil court is impliedly barred as the matter can be adjudicated upon by the State Transport Appellate Tribunal only.

In Sankarnarayanan Potti Vs. K. Sreedevi & Ors., (1998) 3 SCC 751, the Hon'ble Supreme Court observed as under:-

> "It is obvious that in all types of civil disputes, civil courts have inherent

jurisdiction as per Section 9 of the Code of Civil Procedure unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication, by any statutory provision and conferred on any other Tribunal or authority."

Similar view has been reiterated in Shri Panch Nagar Parakh, Mandsaur Vs. Purushottam Das, AIR 1999 SC 3071.

Exclusion of jurisdiction of the civil court is not to be readily inferred. Onus lies on the party seeking ouster of civil court's jurisdiction, and the issue is to be determined primarily on the averments made in the plaint. (Vide Ramesh Chand Ardawatiya Vs. Anil Panjwani, AIR 2003 SC 2508; Sahebgouda Vs. Ogeppa, AIR 2003 SC 2743; and Union of India Vs. Karan Chandra Thapar & Bros. (Coal Sales) Ltd., (2004) 3 SCC 504).

Waiver, acquiescence or consent can neither confer on nor ouster the jurisdiction of the court. However, the court can refuse to entertain a suit if it is satisfied that the relief sought cannot be granted by the court. (Vide Vithalbhai (P) Ltd., Vs. Union Bank of India, (2005) 4 SCC 315).

In P.A. Ahammed Ibrahim Vs. Food Corporation of India, AIR 1999 SC 3033, the Hon'ble Supreme Court held that the applications under the provisions of various Statutes cannot be treated as Suits or claims unless such possibility is specifically provided for under those particular Statutes.

In Bhanu Construction Co. (P) Ltd. Vs. Andhra Bank, Hyderabad, AIR 2001 SC 477, the Hon'ble Supreme Court considered the provisions of Recovery of Debts (due to Banks and Financial Institutions) Act, 1953 and held that after the commencement of provisions of the said Act came into force, the Suit could not be instituted as conferring the jurisdiction upon the Tribunal under the Act would take away the jurisdiction of the civil court.

In Vannattankandy Ibrayi Vs. Kunhabduula Hajee, (2001) 1 SCC 564, the Hon'ble Supreme Court considered the provisions of the Kerala Building & Lease Control Act, 1965, which barred the jurisdiction of civil court for recovery of premises on various grounds by the landlord before

the Authority prescribed under the Act and the Suit was not maintainable. The Court held that where the building stood washed off because of natural calamity, possession of the remaining land may be recovered before the Civil Court. The Court held that under such circumstances, civil court may have jurisdiction, but had the building been there, its jurisdiction was barred by Section 9 of the Code because it ceased to be a building and remained land and in such a situation, only civil court was competent to entertain and try the Suit.

In Shri Ram & Anr. Vs. First Addl. District Judge & Ors., AIR 2001 SC 1250, the Apex Court held that in tenancy matters, generally revenue court has the jurisdiction, but in case a Suit is filed for cancellation of a void document, Section 9 of the Code does not impliedly bar such a Suit because the document has been obtained by fraud or impersonation as in such a case the mere declaration of title is required and the document, being void, is merely to be ignored for giving relief for declaration and possession.

In Ghulam Qadir Vs. Special Tribunal & Ors., (2002) 1 SCC 33, the Hon'ble Supreme Court held that in case the title is to be established, the remedy of civil court is available and in such case, Section 9 of the Code would not bar the civil Suit and would ask the authority only to avail the remedy under the provisions of J & K State Evacuees (Administration of Property) Act, 1949.

In M/s Pearlite Liners Pvt. Ltd. Vs. Manorma Sirsi, 2004 AIR SCW 273, the Apex Court held that as contract of service (Private) cannot be enforced in court, the Suit for declaration/permanent injunction that termination was bad, would not be entertained. (Order 7 Rule 11 C.P.C. was also considered).

A party is bound either by provisions of the Constitution, statutory provisions or any rule or under the terms of the contract which is not against the public policy. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of several forums available to them then the party can only file the suit in that Court alone to which they had agreed (Vide Shriram City Union Finance Corporation Ltd. Vs. Rama Mishra, AIR 2002 SC 2402).

In Mardia Chemicals Ltd. & Ors. Vs. Union of India & Ors., (2004) 4 SCC 311, the Hon'ble Apex Court examined the scope of Section 9 C.P.C.

in context of the cases under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and held that jurisdiction of the civil courts is undoubtedly barred in general, but it can be invoked to a very limited extent, precisely, to the extent permissible in cases of English mortgages, that is, for example where the action of the secured creditor is alleged to be fraudulent or his claim so absurd and untenable as to not require any probe whatsoever.

Section 10 provides that if a Suit is already pending between the same parties, substantially on the same issues and subsequent to it a Suit is filed, its trial may be stayed unless the earlier Suit is decided.

The test of applicability of Section 10 to a particular case remains as to whether on the final decision being reached in the previous Suit, such decision operates as res-judicata in subsequent Suit. (Vide M/s O.P. Steel Traders Vs. M/s Steel Strips Ltd., AIR 1992 P & H 217; R. Srinivasan Vs. Southern Petrochemical Industries Corporation Ltd., AIR 1992 Mad. 363; and Jugometal Trg. Republike Vs. Rungta and Sons (Private) Ltd., AIR 1966 Cal 382).

In Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527, nearly a Constitution Bench of the Supreme Court laid down the principles for application of provisions of Section 10 of the Code, that the question of issuing an order to a party restraining him from proceeding with any other Suit in a regularly constituted court of law, deserves care and consideration and such an order is not to be made unless absolutely essential for the ends of justice.

In M/s Maltex Malsters (P) Ltd. Vs. M/s Allied Engineers, AIR 1975 Del. 123, the Court, placing reliance upon a large number of judgments, rejected the application under Section 10, observing that the issue involved therein should be identical.

In Brijlal & Co. Vs. Madhya Pradesh Electricity Board, AIR 1975 Cal 69, it has been held that provisions of Section 10 are attracted only if the field of controversy and claim in the later Suit has been involved in the earlier case but second Suit cannot be restrained for proceedings if it is far more comprehensive and claiming different relief on different ground.

In Vijay Kumar & Ors. Vs. Manohar Lal & Ors. AIR 1979 Del 1, the Court placed great emphasis on the expression "matter in issue"

occurring in Section 10, meaning thereby that the matter in issue must be identical in the earlier Suit and in case the issues are common in two Suits, say claiming the recovery of rent for different periods, Section 10 would have no application though the same question may be involved in both the Suits.

In Piyush Kanti Guha Vs. West Bengal Pharmaceutical & Phytochemical Development Corporation Ltd. & Ors., AIR 1982 Cal. 94, the Court examined the case where a Suit had been filed on the ground of operation and framing of a scheme and appointment of Directors in a company petition which was distinctly different from the relief asked for in a civil Suit restraining some Directors nominated by the Government from functioning, and observed that staying the proceedings in the company petition would not arise under Section 10 of the Code as the issues involved in both the cases were entirely different. While deciding the said case, the Court placed reliance upon the judgment of the Hon'ble Supreme Court in Cosmosteels Private Ltd. & Ors. Vs. Jairam Das Gupta & Ors., AIR 1978 SC 375.

In Dr. Guru Prasad Mohanty & Ors. Vs. Bijoy Kumar Das, AIR 1984 Ori 209, the Orissa High Court held that if two Suits between the same parties, involving common questions, are pending, consolidation and analogous hearing of Suits is permissible but Section 10 may not be attracted.

In M/s Mehta Gandhi and Associates Vs. Shree Pipes Ltd., AIR 1990 Del 139, it was held by the Delhi High Court that provisions of Section 10 of the Code would apply provided the issues in both the Suits are identical and if all the issues in both the Suits are substantially identical, it will be in the interest of justice to stay the proceedings in a Suit filed subsequently till the disposal of the Suit pending in the Court.

In Shri Ram Tiwary & Anr. Vs. Bholi Devi & Anr., AIR 1994 Pat. 76, it was held by the Patna High Court that even if cause of action, relief prayed for or some of the issues in former and subsequent Suits may differ, that will not be a ground for non-application of Section 10 of the Code if the Court finds that the final decision in the former Suit would operate as res-judicata in the subsequent Suit. Similar view has been reiterated in M/s Wings Pharmaceuticals (P) Ltd. & Anr. Vs.

Swan Pharmaceuticals & Ors., AIR 1999 Pat. 96, observing that it may be necessary to apply the provisions of Section 10 to avoid the conflicting decisions in two different Suits having the identical issues.

In K.V. Subramaniam Vs. Pattabi Bhagavathar & Ors., AIR 1999 Mad. 99, the Court examined a case where the decree had been passed in favour of defendant in earlier Suit on the basis of settlement deed executed by plaintiff. Subsequent Suit had been filed alleging that the settlement deed was obtained by fraud and collusive decrees were passed. The Court held that in such an eventuality, Section 10 of the Code has no applicability for the reason that the relief sought in the second Suit is entirely different, i.e. for declaration that the defendant in bringing about the two decrees in the earlier Suit pertaining to the said property are collusive and fraudulent and hence the decrees made in those earlier Suits are liable to be set-aside. Two suits involved separate and distinct questions between the same parties. Matter appeared to be common regarding validity of documents. While in the first suit the question was only regarding the authority to create the settlement. The second suit questions the very legality of that settlement. The entitlement to create a document would be one thing while its legality in law would be quite another. Subsequent suit could not be stayed as it could not be said that the issues involved were directly and substantially the same.

It is evident from the language of the section that before the application thereof can be attracted to the particular case the following conditions must be satisfied:-

(a) the matter/matters in issue should be substantially the same in the two suits;

(b) the previously instituted suit should be pending in the same Court in which the subsequent suit is brought or in another Court in India having jurisdiction to grant the relief claimed; and

(c) the two suits should be between the same parties or their representatives and these parties should be litigating in the two suits under the same title (Vide C.L.Tandon Vs. Prem Pal Singh, AIR 1978 Del 221).

In view of the above, it is evident that the provisions of Section 10 of the Code are applicable only in case where there may not be complete identity of the subject matter, but it would be sufficient if the matter is directly or substantially in issue in an earlier Suit is directly or substantially in issue in the subsequent Suit.

The object of enacting Section 10 of the Code is to avoid duplication of evidence, saving of time and energy of the courts and parties, and further to avoid conflicting decrees. However, if a decree has been passed in contravention of the provisions of Section 10, that is to be enforced. (Vide Radha Devi Vs. Deep Narayan Mandal, (2003) 11 SCC 759; Gupte Cardiac Care Centre and Hospital Vs. Olympic Pharma Care (P) Ltd., AIR 2004 SC 2339; Pukhraj D. Jain Vs. G. Gopalakrishna, AIR 2004 SC 3504; and National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, (2005) 2 SCC 256).

Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence "interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "nemo debet bis vexari pro una et eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised. "Res judicata pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere " res judicata". (Vide Kunjan Nair Sivaraman Nair Vs. Narayanan Nair, (2004) 3 SCC 277).

If the issue has been already decided on merit between the same parties in earlier litigation, it cannot be decided again. Explanation (4) thereof, also provides for constructive res judicata which has to be read like the provisions of Order 2 Rule 2. It also applies to the proceedings in the Suit.

Even an erroneous decision on a question of law attracts the doctrine of res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. (Vide Shah Shivraj Gopalji Vs. ED-. Appakadh Ayiassa Bi & Ors., AIR 1949 PC 302; and Mohanlal Goenka Vs. Benoy

Kishna Mukherjee & Ors., AIR 1953 SC 65). In such an eventuality, re-agitation of an issue is barred by the principle of constructive res judicata. (Vide Mohanlal Goenka (supra); Ushadevi Balwant Vs. Devidas Shridhar, AIR 1955 Bom. 239; Benaras Ice Factory Ltd. Vs. Sukhlal Amarchand Vadnagra, AIR 1961 Cal. 422; Jasraj Multan Chand & Anr. Vs. Kamruddin & Ors., AIR 1971 MP 184; and Puthen Veettil Nolliiyodan Devoki Amma & Ors. Vs. Puthen Veettil Nolliyodan Kunhi Raman Nair & Ors., AIR 1980 Ker 230).

Undoubtedly, the doctrine of res judicata is applicable where earlier the Suit had been decided. Though the doctrine may not be attracted in different proceedings at different stages in the same Suit but the principle enshrined therein is, undoubtedly, applicable.

In Satyadhyan Ghosal & Ors. Vs. Smt. Deorajin Debi & Anr., AIR 1960 SC 941, the Supreme Court considered the applicability of the doctrine in the proceedings at different stages in the same Suit and held as under:-

> "The principle of res judicata is based on the need of giving a finality to judicial decision. What it says is that once a res is judicata, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation..... This principle of res judicata is embodied in relation to Suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation..... The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court, having, at an earlier stage, decided a matter in one way, will not allow the parties to re-agitate the matter again at the subsequent stage of the same proceedings."

This view has consistently been approved and followed by the Hon'ble Supreme Court in large number of cases. In Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993, the Hon'ble Apex Court observed as under:-

> "..... though Section 11 of the Code of Civil Procedure clearly contemplates the existence of two Suits and the findings in the first being res judicata in the later Suit, it is well established that the principle underlying it is equally applicable to the case of decision rendered at successive stages of the same Suit or proceeding. But where the principle of res judicata is involved in the case at the different stages of proceedings in the same Suit, the nature of the proceedings, the scope of the inquiry which the adjective law provides for decision being reached as well as the specific provisions made on matters touching decision are some of the material and relevant factors to be considered before the principle is held applicable."

Similar view has been reiterated by the Hon'ble Supreme Court in L.R. Ganapathi Thevar (dead) by his legal representatives Vs. Sri Navaneethaswaraswami Devasthanam, AIR 1969 SC 764.

The question whether the appellant's possession has become adverse since the death of the mother of the respondent and that the appellant could be said to have prescribed title as a Marusidar of the land in his possession on that basis could not have been raised in the earlier suit for partition by the appellant, the point cannot be said to be constructive res judicata by reason of the decision against appellant's title in the earlier suit. (Vide Nagta Singh Vs. Shiv Singh, AIR 1981 All 75).

It would be impermissible to permit any party to raise an issue inter se where such an issue under the very Act has been decided in an early proceeding. Even if res judicata in its strict sense may not apply but its principle would be applicable. Parties who are disputing, if they were

parties in an early proceeding under the very Act raising the same issue would be stopped from raising such an issue both on the principle of estoppel and constructive res judicata (Vide Vijayabai Vs. Shriram Tukaram AIR 1999 SC 451).

In Escorts Farms Ltd. Vs. Commissioner, Kumaon Division, Nainital, U.P. & Ors., (2004) 4 SCC 281, the Hon'ble Supreme Court examined the issue of res judicata observing that doctrine applied to give finality to "lis" in original or appellate proceedings. The issue once decided should not be allowed to be reopened and re-agitated twice over. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged a thing judicially acted upon or decided; a thing or matter settled by judgments".

The principle of res judicata would not apply if the decree has been obtained by practicing misrepresentation or fraud on the court, or where the proceedings had been taken all together under a special Statute. More so, every finding in the earlier judgment would not operate as res judicata. Only an issue "directly" and "substantially", decided in the earlier suit, would operate as res judicata. Where the decision has not been given on merit, it would not operate in, case against the judgment and decree of the court below the appeal is pending in the appellate court, the judgment of the court below cannot be held to be final, and the findings recorded **therein would not operate as res judicata**. (Vide Premier Cable Co. Ltd. Vs. Government of India, AIR 2002 SC 2418; Arm Group Enterprises Ltd. Vs. Waldorf Restaurant, (2003) 6 SCC 423; Mahila Bajrangi Vs. Badribhai, (2003) 2 SCC 464; Pondicherry Khadi & Village Industries Board Vs. P. Kulothangan, AIR 2003 SC 4701; Kiran Tandon Vs. Allahabad Development Authority, AIR 2004 SC 2006; T.P. Moideen Koya Vs. Govt. of Kerala, (2004) 8 SCC 106; State of Haryana Vs. State of Punjab, (2004) 12 SCC 673; Bhanu Kumar Jain Vs. Archana Kumar, (2005) 1 SCC 787; Sampat Co-operative Sugar Mills Ltd. Vs. Ajit Singh, (2005) 3 SCC 516; and Swami Atmananda & Ors. Vs. Sri. Ramkrishna Tapovanam & Ors. 2005 AIR SCW 2548).

Sections 15 to 20 deal with place of suing. Section 15 provides that every suit shall be instituted in the Court of lowest grade competent to try it. Section 16 provides for institution of the suit where subject matters situate. Section 17 provides that suit shall be instituted for immovable property

situate within jurisdiction of different Courts. Section 18 deals with the place of institution of suit where local limits of jurisdictions of Courts are uncertain. Section 19 provides for institution of suits for compensation for wrongs to person or movable.

Section 20 provides for institution of the suits not covered by earlier provisions where defendants reside or cause of action arises.

Conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the route of the jurisdiction. Such an issue can be raised even at a belated stage in execution. The finding of a court or Tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of party cannot confer jurisdiction upon a court and an erroneous interpretation equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. (Vide Smt. Nai Bahu Vs. Lala Ramnarayan & ors., AIR 1978 SC 22; Natraj Studios Pvt. Ltd. Vs. Navrang Studio & Anr., AIR 1981 SC 537; Sardar Hasan Siddiqui Vs. State Transport Appellate Tribunal, AIR 1986 All.132; A.R. Antuley Vs. R.S. Nayak, AIR 1988 SC 1531; Union of India Vs. Deoki Nandan Aggarwal, AIR 1992 SC 96; Karnal Improvement Trust Vs. Prakash Wanti & Anr., (1995) 5 SCC 159; U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd., AIR 1996 SC 1373; State of Gujarat Vs. Rajesh Kumar Chimanlal Barot & Anr., AIR 1996 SC 2664; Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar & ors., AIR 1999 SC 2213; and Collector of Central Excise, Kanpur Vs. Flock (India) (P) Ltd., Kanpur, AIR 2000 SC 2484).

In Subodh Kumar Gupta Vs. Shrikant Gupta & Ors., (1993) 4 SCC 1, the Hon'ble Supreme Court considered a case wherein a partnership firm was having the registered office at Bombay and factory at Mandsore. Two partners - defendants were residing at Mandsore while the third partner-plaintiff shifted to Chandigarh and an agreement had been drawn up between the partners at Bhilai for dissolution of the firm and distribution of assets. The suit was filed by the plaintiff in the Court at Chandigarh for dissolution of the firm and rendition of account on the

ground that the defendants at Mandsore misappropriated partnership's fund and the aforesaid agreement was void and liable to be ignored. The Court held that in view of the provisions of Section 20 of the Code, suit can be entertained in a place where cause of action had arisen fully or partly. The mere bald allegation by the plaintiff for the purpose of creating a jurisdiction would not be enough for conferring jurisdiction or an allegation that agreement was void was also not enough unless the agreement is set-aside by the competent court. The court must find out, examining the provisions carefully, as to whether the suit can be entertained by it. Generally, it should be at the place where the defendant resides, actually and voluntarily, or carries on business or personally works for gain or the cause of action arises wholly or in part.

In Oil & Naturla Gas Commission Vs. Utpal Kumar Basu & Ors., (1994) 4 SCC 711, the Hon'ble Supreme Court considered the provisions of Clause (2) of Article 226 of the Constitution of India, which provides for territorial jurisdiction of the High Courts. The Apex Court held that while deciding the territorial jurisdiction of the Court, within which the cause of action, wholly or partly, arises, must be decided on facts pleaded in the petition disregarding true or otherwise thereof, but the facts must form integral part of the cause of action. In the said case, facts involved had been that ONGC had decided to set-up a Kerosene Processing Unit at Hajaria (Gujarat). EIL was appointed by the ONGC as its consultant and in that capacity, EIL issued advertisement from New Delhi calling for tenders and this advertisement was printed and published in all leading news-papers in the country including The Times of India in circulation in West Bengal. In response thereto, tenders or the bids were forwarded to EIL at New Delhi, which were scrutinized and finalized by the ONGC at New Delhi. However, the writ petition had been filed in the Calcutta High Court challenging the acceptance of tenders of the other party. Before the Supreme Court, it was contended that the Calcutta High Court had no jurisdiction as no cause of action had arisen, even partly, in its territorial jurisdiction. Mere communication to any person at a particular place or publication or reading of the news or notice etc. does not confer jurisdiction. After examining the facts of that case, the Apex Court came to the conclusion that the Calcutta High Court lacked jurisdiction. While deciding the said case, the Hon'ble Supreme Court placed reliance upon

the judgment in Chand Koer Vs. Partab Singh, 15 Ind. Appeals 156, wherein it had been observed as under:-

> "The cause of action has no relation whatsoever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set-forth in the plaint as the cause of action; in other words, to the media upon which the plaintiff asked the court to arrive at a conclusion in his favour."

Therefore, in determining the objection of lack of territorial jurisdiction, the court must take all the facts pleaded in support of the cause of action into consideration albeit without embargo upon an inquiry as to the correctness or otherwise of the said facts.

In Aligarh Muslim University Vs. Vinay Engineering Enterprises Pvt. Ltd., (1994) 4 SCC 710, the Hon'ble Supreme Court examined a case wherein the contract between the parties was executed at Aligarh; the construction work was to be carried out at Aligarh; the contract provided that in the event of dispute, Aligarh Court alone would have the jurisdiction; the arbitrator was to be appointed at Aligarh and had to function at Aligarh. The Hon'ble Supreme Court held that the Court at Calcutta had no jurisdiction merely because the respondent company was a Calcutta-based firm.

In Board of Trustees for the Port of Calcutta Vs. Bombay Flour Mills Pvt. Ltd. & Anr., AIR 1995 SC 577, the Hon'ble Supreme Court considered a case wherein a civil court at Bharatpur (Rajasthan) entertained a civil suit in respect of assignment of imported goods unloaded at Calcutta dock and the plaintiff's representation to the Port Trust to waive the port charges had been refused. The Civil Court at Bharatpur entertained the suit and passed an ex parte ad-interim mandatory injunction directing the Port Trust to release the goods on payment of specified amount. The Rajasthan High Court dismissed the appeal of the Port Trust, but the Hon'ble Supreme Court held that as no cause of action, even partly, occurred at Bharatpur, the only appropriate court at Calcutta was competent to take cognizance of the action and held that the orders of the Civil Court at

Bharatpur, having no jurisdiction, were void and the order of the High Court, refusing to interfere with the orders, was illegal.

In Manju Bhatia & Anr. Vs. New Delhi Municipal Council & Anr., AIR 1998 SC 223, the Hon'ble Supreme Court considered a case for damages, under which a "cause of action" in a definite form may not be relevant except when necessary to comply with the laws relating to procedure and limitation etc. The Apex Court observed that "a cause of action in modern law is merely a factual situation., the existence of which enables the plaintiff to obtain a remedy from the Court and he is not required to head his statement of claim with a description of the breach of the law on which he relies....."

In State of Assam & Ors. Vs. Dr. Brojen Gogoi & Ors., AIR 1998 SC 143, the Hon'ble Supreme Court examined a case wherein the Bombay High Court had granted anticipatory bail to a person who was allegedly connected with the offence, for all practical purposes, in a place within the territorial jurisdiction of Gauhati High Court and all such activities had perpetuated therein. The Hon'ble Apex Court transferred the case from Bombay High Court to Gauhati High Court to be heard further.

In C.B.I., Anti-corruption Branch Vs. Narayan Diwakar, AIR 1999 SC 2362, the Hon'ble Apex Court considered a case where the respondent was the In charge/Collector in Daman within the territorial jurisdiction of Bombay High Court and an FIR had been lodged against him in Daman for hetching conspiracy. He stood transferred to Arunachal Pradesh within the territorial jurisdiction of Gauhati High Court. The CBI gave him a wireless message from Bombay advising him to appear before its officers, in respect of investigation of the said case, in Bombay. The respondent filed a writ petition under Article 226 of the Constitution before the Gauhati High Court. The Supreme Court did not decide the case on merit but observed as under:-

> "Suffice it to say that on the facts and circumstances of the case and the material on record, we have no hesitation to hold that the Gauhati High Court was clearly in error in deciding the question of jurisdiction in favour of the respondent. In our considered view, the

> writ petition filed by the respondent in the Gauhati High Court was not maintainable."

The entire argument in the case had been that the Gauhati High Court had no jurisdiction to entertain the writ petition as no cause of action had arisen, even partly, within its territorial jurisdiction and receiving the message in Arunachal Pradesh to appear before the CBI Authority at Bombay did not give rise to the cause of action, even partly.

In Navinchandra N. Majithia Vs. State of Maharashtra & ors., AIR 2000 SC 2966, the Hon'ble Supreme Court while considering the provisions of Clause (2) of Article 226 of the Constitution, observed as under:-

> "In legal parlance the expression 'cause of action' is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more basis for suing; a factual situation that entitles one person to obtain a remedy in court from another person.....'Cause of action' is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment.....the meaning attributed to the phrase 'cause of action' in common legal parlance is existence of those facts which give a party a right to judicial interference on his behalf."

The Apex Court held that while considering the same, the court must examine as to whether institution of a complaint/ plaint is a mala fide move on the part of a party to harass and pressurise the other party for one reason or the other or to achieve an ulterior goal. For that consideration, the relief clause may be a relevant criterion for consideration but cannot be the sole consideration in the matter.

In H.V. Jayaram Vs. Industrial Credit & Investment Corpn. of India Ltd., AIR 2000 SC 579, the Hon'ble Supreme Court examined the issue

of territorial jurisdiction of a court in respect of the offence under Section 113 (2) of the Indian Companies Act, 1956. Taking note of Sections 113 and 207 of the said Act, the Apex Court held that the cause of action for default of not sending the share certificates within the stipulated period would arise only at a place where the registered office of the company was situated as from that place the share certificates could be posted and are usually posted.

In Rajasthan High Court Advocates' Association Vs. Union of India & ors., AIR 2001 SC 416, the Hon'ble Supreme Court considered the question of territorial jurisdiction of the Principal Seat of this Court at Jodhpur and the Bench at Jaipur and explained the meaning of "cause of action" observing as under:-

> "The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense, 'cause of action' means the circumstance forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the rights, but the infraction coupled with the right itself. Compendiously the expression means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguishing from every piece of evidence which is necessary to prove each fact, comprises in a 'cause of action.' It has to be left to be determined in each individual case as to where the cause of action arose."

In Union of India & Ors. Vs. Adani Exports Ltd. & Anr., (2002) 1 SCC 567, the Hon'ble Supreme Court considered the scope of Section 20 of the Code and Clause (2) of Article 226 of the Constitution while examining as to whether in that case the Gujarat High Court was having

territorial jurisdiction. The Court held that the facts which may be relevant to give rise to the "cause of action", are only those which have "a nexus or relevance with the lis involved in the case and none else." In the said case, the respondent had filed an application before the Gujarat High Court claiming the benefit of Pass-book Scheme under the provisions of the Import Export Policy introduced w.e.f. 1-4-1995 in relation to certain credits to be given on export of srimps. However, none of the respondents in the civil application was stationed at Ahmedabad. Even the Pass-book, if to be issued, had to be issued by an Authority stationed at Chennai; the entries in the pass-book under the Scheme concerned were to be made by the Authority at Chennai and the export of prawns made by them and import of the inputs, benefit of which the respondents had sought in the application, were also to be made at Chennai. The Court held that the Gujarat High Court had no territorial jurisdiction, in spite of the fact that the respondents were carrying on their business of export and import from Ahmedabad, the orders of export and import were placed from and were executed at Ahmedabad, documents and payments of export and imports were sent/made at Ahmedabad, the credit of duty claimed in respect of export were handled from Ahmedabad, the respondents had executed a bank guarantee through their bankers as well as a bond at Ahmedabad, non-grant or denial of utilization of the credit in the pass-book might affect the company's business at Ahmedabad. The court held as under:-

> ".....In order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. ..... each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or

relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in para 16 of the petition, in our opinion, fall into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad. ..... the fact that the respondents are carrying on the business of export and import or that they are receiving the export and import orders at Ahmedabad or that their documents and payments for exports and imports are sent/ made at Ahmedabad, has no connection whatsoever with the dispute that is involved in the applications. Similarly, the fact that the credit of duty claimed in respect of exports that were made from Chennai were handled by the respondents from Ahmedabad have also no connection whatsoever with the actions of the appellants impugned in the application. The non-granting and denial of credit in the passbook having an ultimate effect, if any, on the business of the respondents at Ahmedabad would not also, in our opinion, give rise to any such cause of action to a court at Ahmedabad to adjudicate on the actions complained against the appellants."

In Muhammad Hafiz Vs. Muhammad Zakariya, AIR 1922 PC 23, the "cause of action" was explained as under:-

> "....the cause of action is the cause of action which gives occasion for and forms the foundation of the suit...."

Similarly, in Read Vs. Brown, (1889) 22 QBD 128, this was explained as under:-

> "Every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."

Same meaning has been reiterated by the Privy Council in Mohammed Khalil Khan & ors. Vs. Mehbul Ali Mian & ors., AIR 1949 PC 78, and by the Supreme Court in State of Madras Vs. C.P. Agencies, AIR 1960 SC 1309; and A.B.C. Laminart Pvt. Ltd. & Anr. Vs. A.P. Agencies, Salem, AIR 1989 SC 1239.

A "cause of action" is a bundle of facts which, taken with the law applicable, gives the plaintiff a right to relief against the defendant. However, it must include some act done by the defendant, since in the absence of an act, no cause of action can possibly occurred. (Vide Radhakrishnamurthy Vs. Chandrasekhara Rao, AIR 1966 AP 334; Ram Awalamb Vs. Jata Shankar, AIR 1969 All. 526 (FB); and Salik Ram Adya Prasad Vs. Ram Lakhan & Ors., AIR 1973 All. 107).

The "cause of action" in a suit of negotiable instrument arises wherever any one of the facts, the proof of which is essential to plaintiff's case, occurs where a promissory note was signed by the defendant at Seccundrabad and delivered to the plaintiff at Madras. It was held that the Madras High Court had jurisdiction as the delivery was necessary to complete the plaintiff's title. (Vide Winter Vs. Round, (1867) 1 MHC 202).

A similar view has been reiterated by the Hon'ble Supreme Court in Swami Atmananda & Ors. Vs. Sri Ramkrishna Tapovanam, & Ors, 2005 AIR SCW 2548, wherein the apex Court held that the "cause of action" means every fact, which, if traversed, would be necessary for the plaintiff to prove in order to support his right for a judgment of the Court. In other words, it is a bundle of fact which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include

some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right to sue, but include all the material facts on which it is found.

In the case of a cheque where it is drawn on a bank at place 'A' but the creditor hands it over to its banker at place 'B' for collection, the Court at place 'A' has jurisdiction as payment, which is part of cause of action, takes place at place 'A'. (Vide Firm M/s. Bodh Raj Mahesh Kumar Vs. M/s. Earl Chawla & Co. (P) Ltd., AIR 1974 P&H 2).

Therefore, for a "cause of action", it must be determined as what is the place where the right is created though infringement of the right might have taken place at some other place. (Vide Vijay Bank, Regional Office, Egmore, Madras Vs. Kiran & Co., AIR 1983 Mad. 357).

In Rameshwar Lal Ram Karan & Ors. Vs. Gulab Chand Puranmal, AIR 1960 Raj. 243, it was held that a suit can be filed in a court within whose jurisdiction a negotiable instrument was executed and the Court, in whose territorial jurisdiction an assignment was made, could not have jurisdiction as no cause of action, even in part, occurred therein, for the reason that such an assignment might have been made to defeat the statutory provisions contained in Section 20 (c) of the Code. While deciding the said case, the learned Single Judge of this Court considered two contrary judgments by the Division Bench of this Court on the same point, viz., Mishrimal Vs. Moda, 1951 R.L.W. 433 and Abdul Gafoor Vs. Sensmal & ors., AIR 1955 Raj. 53 and followed the former one, observing as under:-

> "..... If the assignment were to be treated as forming part of cause of action for the purpose of giving jurisdiction, the defendant could be compelled to defend the suit at the choice of the plaintiffs and this would cut at the basic principle underlying Section 20 CPC."

There are certain judgments wherein it has been held that assignment constitute the cause of action and is sufficient to give jurisdiction to the Court. (Vide Kalooram Agarwalla Vs. Jonistha Lal Chakrabarty & Anr., AIR 1936 Cal. 349; Gopal Shuriamal Vs. T.G. S.

Narayan & Anr., AIR 1953 Nag. 193; Union of India Vs. Adon Hajee, AIR 1954 Tra. & Cochin 362; Alliance Assurance Co. Vs. Union of India, AIR 1959 Cal. 563; Ramarao Vs. Union of India & ors., AIR 1961 AP 282; Radhakrishnamurthy (supra); and Barikara Narasayya & ors. Vs. R. Basavana Gowd & ors., (1985) 2 CCC 581). Another different view has also been taken to the extent that an assignment/ endorsement, which merely authorises the endorsee to take delivery of the goods, will not create the jurisdiction. (Vide Commissioner for the Port of Calcutta Vs. General Trading Corpn. Ltd., AIR 1964 Cal. 290).

In Kunjan Nair Sivaraman Nair Vs. Narayanan Nair, (2004) 3 SCC 277, the meaning of 'cause of action' has been explained by the Apex Court compendiously observing that the term has acquired a judicial settled meaning. In the restricted sense 'cause of action' means the 'circumstance forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit including not only the infraction of the right but the infraction coupled with the right itself. The expression means every fact which would be necessary for the plaintiff to prove, if traverse, in order to support his right to the judgment of the Court.

Where endorsement was made on back of promissory note in favour of plaintiff, endorsement was only to recover interest and not the whole amount. It was made unilaterally without the consent of the party. As it was not found to be bona fide and made to defeat provisions of Section 20 (c), therefore, it could not confer jurisdiction on Court within whose jurisdiction interest was directed to be paid. (Vide Mohna Ramakrishanan Vs. Yogam Bala Dev Raj, AIR 2003 Raj 88).

It is a well settled principle that by agreement the parties cannot confer jurisdiction, where none exist, on a Court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign Court. Indeed in such cases the English Courts do permit invoking their jurisdiction. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a foreign Court termed as a 'neutral Court' or 'Court of choice' creating exclusive on non-exclusive jurisdiction in it. (Vide Modi Entertainment Network Vs. W.S.G. Cricket Pte. Ltd., AIR 2003 SC 1177).

In view of the aforesaid judicial pronouncements, it may be summarised that the cause of action is a bundle of facts and to examine the issue of jurisdiction, it is necessary that one of the inter-linked facts must have occurred in a place where the suit has been instituted. The said fact must have a direct nexus to the lis between the parties and in case the facts taken in the plaint are denied, the plaintiff has to prove the same. The fact must have direct relevance in the lis involved. It is not that every fact be treated as a cause of action in part and may create a jurisdiction of the court, in whose territorial jurisdiction it has occurred. The condition precedent for creation of jurisdiction is that the facts occurred therein must form an integral part of the cause of action. A mere allegation by a plaintiff for the purpose of creating a jurisdiction should not be enforced for conferring jurisdiction. More so, a fact, which does not have any direct relevance with the lis but is made to occur only to defeat to statutory provisions of Section 20 (c) of the Code in order to deprive the court which must have territorial jurisdiction over the subject matter of the suit, should not be accepted for the reason that the act has knowingly or purposely been performed to harass the defendant and deprive the court which has territorial jurisdiction over the subject matter and to try the suit.

In New Moga Transport Co. Vs. United India Insurance Co. Ltd. & Ors., (2004) 4 SCC 677, the Supreme Court explained the scope of Section 20 C.P.C. observing that where the party enters into an agreement it is permissible to institute the suit in two or more Courts, but if by agreement parties restrict only to one place, that is, place of suing to only one of them, such an agreement is binding upon the parties not being contrary to public policy. However, the parties by consignment note cannot confer jurisdiction on a court which otherwise does not have jurisdiction to deal with the matter.

Similarly, in Kusum Ingots & Alloys Ltd. Vs. Union of India & Anr., (2004) 6 SCC 254 the Hon'ble Supreme Court explained the scope of clause (2) of Article 226 comparing it with Section 20 (c) of the Code of Civil Procedure and dealt with territorial jurisdiction of the writ court, observing that a court in whose territorial jurisdiction the cause of action has partly or fully arisen, would have the jurisdiction to deal with the case, though the original order might have been passed outside the territorial jurisdiction of the said court.

Section 24 provides for power for transfer of a case from one court to another.

Section 26 (2) has been amended providing that in every plaint, fact shall be verified by affidavit.

Section 27 Summonses have to be issued to the defendants to appear and answer the claim and he should file the written statement within thirty days from the date of institution of the Suit. The period for filing the written statement has been fixed by amendment.

Section 32 requires penalty for default of not appearing in the Court by the witness. Earlier, Court had a power to impose a fine not exceeding five hundred rupees. By amendment, amount had been enhanced to five thousand rupees.

Section 39 deals with transfer of decree for execution to the Court where property is situate. The power of the executing Court has been taken away against a person or property outside the local limits of its territorial jurisdiction by the amendment. Earlier, he could execute the decree throughout the territory of the province.

Section 58 deals with detention in execution of a Civil Court decree. The provision has been amended to the effect that detention is permissible for a period of three months if the amount involved is more than five thousand rupees, and if it is more than two thousand, but less than five thousand, the detention shall not exceed six weeks. Thus, there can be no detention if the amount involved is less than two thousand rupees. Prior to amendment, detention was permissible even if the sum of five hundred rupees was involved.

Section 79 provides for how the Suit can be filed by or against the Union and State Government.

Section 80 deals with the notice in case of a Suit against the State.

Section 89 deals with settlement of disputes outside the courts. This is a newly added section by amendment of the Code in 1999. It provides that the court may explore the possibility as to whether the matter can be settled outside the court either by arbitration, conciliation, mediation, Lok Adalat etc. This provision has been introduced to reduce the work of over-burdened civil courts.

Section 91 deals with public nuisance and other wrongful acts affecting the public. It is corresponding to the provisions of Section 133 Cr.P.C. for

removal of nuisance. But Section 91 deals with the public nuisance only, though Section 133 Cr. P.C. Covers public as well as the private nuisance.

Section 94 provides for supplemental proceedings. In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, issue a warrant of arrest against the defendant to bring him before the Court to show cause for giving security for his appearance and for failure thereof, to commit him to civil prison. It may also direct the defendant to furnish security and for failure thereof, to attach any of his properties, and also grant temporary injunction and in case of disobedience thereof, the person guilty thereof can be sent to civil prison and his properties may also be attached and sold. The Court has also been given a power to pass other interlocutory order as may appear to the Court to be just and convenient. Such a wide power has been given to the Court to prevent any person to defeat the cause of justice. Generally, the Court should not pass any interim order in exercise of power under this Section unless there are compelling circumstances to do so, and while considering an application for such a relief, regard must be have to the nature of the controversy and the issues involved in the main matter. (Vide Sub-Committee of Judicial Accountability Vs. Union of India, AIR 1992 SC 63; Meerut Collegiate Association Vs. Arvind Nath Seth, AIR 1982 All 172; and Ratiram Pundik Cheddar Vs. Pundik Arjun Khedkar, AIR 1982 Bom 79).

Section 95 This provision has been amended for providing maximum amount of compensation in case of malacious prosecution upto fifty thousand rupees for injury to the reputation to the defendant, but the Court does not have competence to award compensation to the tune beyond its pecuniary jurisdiction.

Prior to the amendment, compensation could be awarded upto a sum of one thousand rupees and the defendant was at liberty to file a separate Suit for damages. The purpose of this provision is to award compensation to the defendant for the expenses or injury caused to him as a result of the plaintiff obtaining an order of his (defendant's) arrest or attachment or obtaining a temporary injunction against him on insufficient grounds. In certain circumstances, injury may include injury to reputation. However, the remedy under this Section is very special and the compensation should be granted in exceptional circumstances where Court comes to the finding that

the plaintiff had abused the process of the Court by malacious prosecution. (Vide Basamma Vs. Peerappa, AIR 1982 Kant 9).

Section 96 provides for appeal, and the provision has been amended by 1999 Act that appeal would lie only, provided there is a dispute for more than of Rs.10,000/-.

In the First Appeal, it is permissible for the appellate court to re-examine and re-appreciate the evidence. The right to institute the suit is an inherent right, but the right of appeal is statutory. (Vide Baldev Singh Vs. Surendra Mohan Sharma, AIR 2003 SC 225; Narvada Devi Gupta Vs. Birendra Kumar Jaiswal, (2003) 8 SCC 745; and Triputi Balaji Developers Vs. State of Bihar, AIR 2004 SC 235).

Section 100 provides for a second appeal on the substantial question of law. Second Appeal does not lie on questions of facts.

The High Courts should not entertain a second appeal under Section 100 of the Code unless it raises a substantial question of law. In Panchu Gopal Barua Vs. Umesh Chandra Goswami & ors., AIR 1997 SC 1041, the Court observed that while entertaining the second appeal, the Court should not over-look the change brought about by the Amendment Act of 1976 restricting the scope of second appeal drastically and now it applies only to appeals involving substantial question of law, specifically set-out in the memorandum of appeals and formulated by the High Court. The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine-qua-non for the exercise of jurisdiction under the provisions of Section 100 of the Code.

It is the obligation on the Court of Law to further the clear intendment of the Legislature and not to frustrate it by ignoring the same.

Similarly, in Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar & ors., AIR 1999 SC 2213, the Apex Court held that right of appeal is a creation of the Statute. Thus, being a substantive statutory right, it has to be regulated in accordance with law in force, ensuring the full compliance of the conditions mentioned in the provision. Therefore, the

Court has no power to enlarge the scope of those grounds mentioned in the statutory provision. Second appeal cannot be decided merely on equitable grounds as it lies only on substantial question of law, something distinct from the substantial question of fact. The Court cannot entertain the second appeal unless the substantial question of law is involved.

In Kashibai Vs. Parwatibai, (1995) 6 SCC 213, the Hon'ble Supreme Court held that the High Court cannot ignore the statutory provisions of Section 100 of the Code and re-appreciate the evidence and interfere with the findings of facts unless the substantial question of law or a question of law duly formulated is to be decided. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.

In Kshitish Chandra Purkait Vs. Santosh Kumar Purkait & ors., AIR 1997 SC 2517, the Supreme Court observed that while deciding the second appeals, mandatory statutory requirements are seldom borne in mind and second appeals are being entertained without conforming to the above discipline. It further placed reliance upon its earlier judgments in Mahindra & Mahindra Ltd. Vs. Union of India & Anr., AIR 1979 SC 798, wherein the Hon'ble Supreme Court observed as under:-

> "..... It is not every question of law that could be permitted to be raised in the second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in Sub-section (5) of Section 100. Under the proviso, the Court should be 'satisfied' that the case involves a substantial question of law and not a mere question of law. The reason for permitting the substantial question of law to be raised, should be recorded by the Court. It is implicit therefrom that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that would be alleged at a stage of second appeal. It should be a

substantial question of law. The reasons for permitting the plea to be raised should also be recorded."

In Ram Prasad Rajak Vs. Nand Kumar & Bros. & Anr., AIR 1998 SC 2730, the Supreme Court held that existence of substantial question of law is a sine-qua-non for the exercise of jurisdiction under Section 100 of the Code and entering into the question as to whether need of the landlord was bonafide or not, was beyond the jurisdiction of the High Court as the issue can be decided only by appreciating the evidence on record.

Similar view has been reiterated in Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah, (1998) 3 SCC 331; State of Rajasthan Vs. Harphool Singh, (2000) 5 SCC 652; Rajapps Hanamantha Ranoji Vs. Mahadev Channabasappa & ors., AIR 2000 SC 2108; Santakumari & ors. Vs. Lakshmi Amma Janaki Amma, (2000) 7 SCC 60; Satyamma Vs. Basamma (Dead) by LRs., (2000) 8 SCC 567; Santosh Hazari V. Purushottam Tiwari, AIR 2001 SC 965; Kulwant Kaur & Ors. Vs. Gurdial Singh Mann, AIR 2001 SC 1273; M.S.V. Raja Vs. Seeni Thevar, (2001) 6 SCC 652; Hafazat Hussain Vs. Abdul Majeed & Ors., (2001) 7 SCC 189; Pechimuthu Vs. Gowrammal, AIR 2001 SC 2446; Neelakantan & ors. Vs. Mallika Begum, AIR 2002 SC 827; and . Md. Mohammad Ali (Dead) by L.Rs. Vs. Jagdish Kalita & Ors., (2004) 1 SCC 271).

There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

> "A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong."

(Vide Salmond, on Jurisprudence, 12th Edn. page 69, cited in Gadakh Yashwantrao Kankarrao Vs. E.V. alias Balasaheb Vikhe Patil & ors., AIR 1994 SC 678).

In Smt. Bibhabati Devi Vs. Ramendra Narayan Roy & ors., AIR 1947 PC 19, the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing as under:-

> "..... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.
>
> That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not sufficient reason for departure from the practice....."

In Suwalal Chhogalal Vs. Commissioner of Income Tax, (1949) 17 ITR 269, the Apex Court held as under:-

> "A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient evidence."

In Oriental Investment Company Ltd. Vs. Commissioner of Income Tax, Bombay, AIR 1957 SC 852, the Hon'ble Supreme Court considered large number of its earlier judgments, including Sree Meenakshi Mills Ltd. Vs. Commissioner of Income Tax, AIR 1957 SC 49, and held that where the question of decision is whether certain profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assessee or the intermediaries, is a mixed question of fact and law. The Court further held that inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a "mixed question of law and fact" and that a finding on fact without evidence to support it or if based on relevant or irrelevant matters, is not unassailable.

In Sir Chunnilal V. Mehta & Sons Vs. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, the Surpeme Court for the purpose of determining the issue by the Supreme Court itself, held as under:-

> "The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

A Constitution Bench of the Hon'ble Supreme Court, in State of J&K Vs. Thakur Ganga Singh, AIR 1960 SC 356, considered as what may be the substantial question and held that authentic interpretation of

the Constitutional provisions amounts to substantial question of law. However, where the substantial question of law had already been decided by the Authority which is binding on the other Courts like the judgments of the Hon'ble Supreme Court under Article 141 of the Constitution is binding on all other Courts etc., it does not remain a substantial question of law because there remains no scope to interpret further the said provision. While deciding the said case, the Hon'ble Apex Court placed reliance upon its earlier judgments in Charanjit Lal Chowdhary Vs. Union of India & ors., AIR 1951 SC 41; Ram Kishan Dalmia Vs. Justice Tendolkar, AIR 1958 SC 538; and Mohammed Haneef Quareshi Vs. State of Bihar, AIR 1958 SC 731. The same view has been reiterated by the Hon'ble Supreme Court in Bhagwan Swaroop Vs. State of Maharashtra, AIR 1965 SC 682.

In Reserve Bank of India Vs. Ramakrishna Govind Morey, AIR 1976 SC 830, the Hon'ble Supreme Court held that whether trial Court should not have exercised its jurisdiction differently, is not a question of law or a substantial question of law and, therefore, second appeal cannot be entertained by the High Court on this ground.

There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter. (Vide Jagdish Singh Vs. Nathu Singh, AIR 1992 SC 1604; Smt. Prativa Devi Vs. T.V. Krishnan, (1996) 5 SCC 353; Satya Gupta Vs. Brijesh Kumar, (1998) 6 SCC 423 ; Ragavendra Kumar Vs. Firm Prem Machinery & Co., AIR 2000 SC 534; and Molar Mal Vs. M/s. Kay Iron Works Pvt. Ltd., AIR 2000 SC 1261.

In Jai Singh Vs. Shakuntala, AIR 2002 SC 1428, the Hon'ble Supreme Court held that it is permissible to interfere even on question of fact but it has to be done only in exceptional circumstances. The Court observed as under:-

> "While scrutiny of evidence does not stand out to be totally prohibited in the matter of exercise of jurisdiction in the second appeal and that would, in our view, be too broad a proposition and too rigid an interpretation of

law not worth acceptance but that does not also clothe the superior courts within jurisdiction to intervene and interfere in any and every matter- it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extensor stands permissible it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

In Muthu Gounder Vs. Ammayee Ammal, AIR 2002 SC 2481, the Hon'ble Supreme Court held that it is not permissible to interfere with the findings of facts by the courts below and to entertain a second appeal without framing substantial question of law.

In Transmission Corporation of A.P. Vs. Ch. Prabhakar & Ors., (2004) 5 SCC 551, the Hon'ble Supreme Court held that appeal is the right of entering a superior court and invoking its aid and interposition to redress an error of the court below. The right of appeal has been recognised by judicial decisions as a right which vests in a suitor at the time of institution of original proceedings, and it is the institution of the suit which by implication carries with it all rights of appeal then in force or preserved to the parties thereto till the rest of the carrier of the suit. The right of appeal exists as on and from the date of the lis commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of appeal. The vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise. While deciding the case, the Hon'ble Supreme Court placed reliance upon its earlier judgment in Garikapati Veeraya Vs. N. Subbiah Choudhry, AIR 1957 SC 540.

Existence of substantial question of law is a condition precedent for entertaining the second appeal. (Vide Sarjas Rai Vs. Bakshi Inderjeet Singh, (2005) 1 SCC 598.

Section 102 provides that no second appeal would lie where the subject matter of the original Suit for recovery of money is not exceeding Rs.25,000/-. The question may arise that the judgment might have been delivered prior to the date of amendment, i.e., 1st July, 2002, but if the appeal has not been filed and the amount is less than Rs.25,000/- of valuation, whether appeal would be maintainable under Section 102 C.P.C?

In Gujarat State Electricity Board Vs. Shanti Lal R. Desai, AIR 1969 SC 239, the Hon'ble Supreme Court held that Section 6 of the General Clauses Act, 1897 protects only the "accrued rights" which have not specifically been taken away by the amended Act and it also saves the previous operation of an enactment so repelled.

Section 6 of the Act, 1897 protects the "accrued rights" of the litigant if an Act is amended in spite of the fact that certain provisions have been repelled, unless a different opinion appears from the amended Act. Clause (c) thereof is relevant as the repeal shall not "affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repelled."

In Lalji Raja & Sons Vs. Firm Hansraj Nathuram, AIR 1971 SC 974, the Apex Court held that a party seeking the benefit of Section 6 of the Act, 1897 has to satisfy that a right had accrued in his favour under the repelled law which has expressly not been taken away by the amending Act. That a provision to preserve the "right accrued" under a repelled Act was not intended to preserve the abstract rights conferred by the repelled Act. It only applies to specific right given to an individual upon happening of one or other of the events specified in the Statute. While deciding the said case, the Court relied upon the judgments in Hamilton Gell Vs. White, (1922) 2 KB 422; Abbat Vs. Minister of For Lands, 1895 AC 425; and G. Ogden Industries P. Ltd. Vs. Lucus, (1969) 1 All.E.R. 121.

In M.S. Shivananda Vs. K.S.R.T. Corporation & ors., AIR 1980 SC 77, the Hon'ble Supreme Court held that a party, seeking the benefit of Sec. 6 of the Act, 1897, has to show that it had acquired any vested right under the repelled Act which has not been taken away expressly by the repelling Act. In the said case, the Apex Court considered the right of absorption of the employees working under the

contract in view of the provisions of Karnataka Contract Carriage (Acquisition) Act, 1976, which repelled the Ordinance of 1976 with retrospective effect and the Court held that even if there was any vested right of the employees for absorption under the said Ordinance, it had been taken away by the Act and, therefore, Section 6 of the Act, 1897 had no application.

In T. Barai Vs. Henry Ah Hoe & Anr., AIR 1983 SC 150, the Hon'ble Supreme Court considered the effect of amendment of 1976 in the Prevention of Food Adulteration Act, 1954 and held that in case of a simple repeal, there is scarely any room for expression of a contrary opinion, but when the repeal is followed by fresh legislation on the same subject, the Court must look to the provisions of the New Act for determination as to whether they indicate different intention for the purpose of considering the application of Section 6 of the Act, 1897. While deciding the said case, the Apex Court placed reliance upon its earlier judgment in State of Punjab Vs. Mohar Singh, AIR 1955 SC 84, wherein the Court had elaborately dealt with the effect of repeal and held that the Court must find out whether the New Act has destroyed the "rights accrued" to a party under the Old Act.

In Commissioner of Income Tax Vs. M/s. Shah Sadiq & ors., AIR 1987 SC 1217, the Hon'ble Supreme Court held that where the accrued and vested rights under the repelled Act are neither expressly saved nor expressly or impliedly taken away by the repealing Act, the same would continue to be effective and enforceable. In the said case, the saving provision was not exhausted of the rights which had been saved or survived, the repeal of the statute under which such rights had accrued.

In Ambalal Sarabhai Enterprises Ltd. Vs. Amrit Lal & ors., (2001) 8 SCC 397, the Apex Court held that in order to determine whether the provisions of Section 6 of the Act, 1897 are attracted, the Courts have to scrutinize and find whether a person under the repealled statute had any vested right. The Court further observed that the accrued right in terms of Section 6 (c) of the Act, 1897 refers to any right which may not be limited as a vested right but is limited to an accrued right which may be very wide, depending upon the facts and circumstances of a case for the reason that Section 6 covers all kind of rights and privileges embodied

from Clause (a) to (e) of Section 6 and those rights and privileges under it are limited to that which are acquired and accrued.

In Kanaya Ram Vs. Rajendra Kumar, AIR1985 SC 371, the Hon'ble Apex Court held that a mere right to take advantage of the provisions of an Act is not an accrued right. A "right" comprehences every right known to the law as it includes corporial and incorporial right. "Right" means an interest duly recognized and protected by law. A mere hope or expectation or liberty to apply for acquiring a right, is not a right accrued.

In Mithilesh Kumari Vs. Prem Bihari Khare, AIR 1989 SC 1247, the Hon'ble Supreme Court held that even during pendency of an appeal, if a Statute comes into operation, the Court can take judicial notice of it and give effect to its provisions unless contrary is provided. The Court further observed that where there is a right, there is a remedy, but if the remedy is barred, the right is rendered unenforceable. In this way, the Statute becomes a disabling statute and it may affect indiscriminatory of the persons having such rights. A right is a legally protected interest.

The said judgment was not found based on sound reasons and was over-ruled regarding the retrospective application of the provisions of Section 4(1) and 4(2) of the Benami Transaction (Prohibition) Act, 1988, in R. Rajagopal Reddy Vs. P. Chandrashekharan, AIR 1996 SC 238 and it was held that the said provisions would apply prospectively and pending suits were saved. Similar view has been reiterated in C. Gangacharan Vs. C. Narainan, AIR 2000 SC 589.

In Gajraj Singh Vs. State Transport Appellate Tribunal, AIR 1997 SC 412, the Hon'ble Supreme Court, after considering a large number of judgments, including that of Indian Tobacco Co. Ltd. Vs. Commercial Taxes Officer, AIR 1975 SC 155, held that if the intention in enacting either expressly or by necessary implication in the subsequent statute, was to abrogate or wipe off the former enactment wholly or in part, then it would be a case of total pro tanto repeal. The Court further observed as under:-

"Section 6 of General Clauses Act would be applicable in such cases unless the new

legislation manifests intention inconsistent with or contrary to the application of the section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act.... The object of repeal and re-enactment is to obliterate the Repelled Act to get rid of certain obsolete matters."

In Union of India & ors. Vs. Indian Charge Chrome & Anr., (1999) 7 SCC 314, the Supreme Court held that mere pendency of an application does not govern the law applicable and it is the relevant law prevailing on the date of decision-making which has to be applied.

In Anant Gopal Sheorey Vs. State of Bombay, AIR 1958 SC 915, the Hon'ble Supreme Court held that no person has a vested right in any course of procedure. It is the law and the manner prescribed for the time-being by or for the Court in which the case is pending and if by the Act of the Parliament the mode of procedure is altered, he has no other right other than to proceed according to the altered mode. In other words, the change in law of procedure operates retrospectively and unlike the law relating to vested right, is not only prospective.

In Kolhapur Cane-sugar Works Ltd. Vs. Union of India & ors., AIR 2000 SC 811, a Constitution Bench of the Hon'ble Supreme Court has categorically held that Section 6 of the General Clauses Act applies to repeals and not to omission and applies when the repeal is of an Act or Regulation and not of a rule, meaning thereby that the provisions are not attracted in case of an omission of a rule and its effect on pending proceedings would depend upon savings applicable. The Court has to look into the provisions of new Act introduced after omission.

Thus, in view of the above, it becomes crystal clear that for attracting the provisions of Section 6 of the Act, 1897, a party has to satisfy the Court that an accrued right exists in his favour because of pendency of the lis and that had not been taken away by the New Act expressly or impliedly while repealling the old provision. "Accrued", as per dictionaries meaning, means "to arise or spring as a natural growth or result; coming as a natural accession or result; arising in due course." It refers to " the existence of a present enforceable right" or "fixed" or

"assessed and determined." (Vide Gobind Ch. Panda Vs. Darshan Ch. Rout & ors., AIR 1970 Ori. 15; and Mahendra Prasad Vs. Election Officer, AIR 1976 Ori. 1). The case is required to be examined in view thereof.

The amendment in Section 102 of the Code has been made by Section 5 of the Code of Civil Procedure (Amendment) Act, 2002, and the amended provisions read as under:-

> "Sec. 102: No second appeal in certain cases: No second appeal shall lie from any decree when the subject-matter of the original suit is for recovery of money not exceeding Rs. 25,000/-."

Section 16 of the said Amendment Act, 2002 provides for Repeal and Savings and relevant part thereof is as under:-

> " (1).....
>
> (2) Notwithstanding that the provisions of this Act have come into force or repealed under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897:-
>
> (a) The provisions of Section 102 of the Principal Act, as substituted by Section 5 of this Act, shall not apply to or affect any appeal which had been admitted before the commencement of Section 5, and every such appeal shall be disposed of as if Section 5 had not come into force...."

Thus, it is evident from the aforesaid clauses that even if there is a right accrued under Section 6 of the Act, 1897, that had been taken away by the Amendment Act, 2002 in those cases where the appeals have not been admitted before the commencement of the Amendment Act, i.e. from 1-7-2002.

Section 113 provides for reference of the question for determination to the High Court. The civil court if feels that a case requires a substantial question of law to be decided by the High Court, it may make a reference to the High Court for authoritative decision. It generally deals with the validity of the provisions of an Act, Ordinance or Regulation etc.

Section 114 deals with review and is guided by Order 47 Rule 1. Its scope is limited to the extent that there must be an error apparent on the face of the record on new facts which came to the knowledge of the party and he could not know, with due diligence at the time of decision of the case.

Section 115 deals with the revisional power of the High Court. This provision has been amended vide Act of 1999 deleting certain provisions of the Section.

Section 122 empowers the High Court to make rules. The scope of power of the High Court to frame rule has widely been dealt with by the Hon'ble Supreme Court in Aboobacker Babu Haji Vs. Edakkode Pathummakutty Umma, (2004) 11 SCC 183.

Section 148 provides for extending the period to do any particular act by the party. Earlier, there was no such restriction of time, but by the Amendment of 1999, the courts' power has been limited not to extend the time beyond 30 days in total. (Vide Lachmi Narayan Marwary & Ors. Vs. Balmakund Marwary & Anr., AIR 1924 PC 198; Dandapani Goudu Vs. Khetrabasi Goundu, 1972 (2) Cut L.R. 1428; B. Channabyre Gowda & Ors. Vs. State of Mysore, AIR 1974 Kar 136; Nareshchandra Chinubhai Patel Vs. The State of Gujarat & Anr., AIR 1977 Guj 109; Chinnamarkathian alias Muthu Gounder & Anr. Vs. Ayyavoo alias Periana Gounder & Ors., AIR 1982 SC 137; Jogdhayan Vs. Babu Ram, AIR 1983 SC 57; Smt. Periyakkal & Ors. Vs. Smt. Dakshyani, (1983) 2 SCC 127; Pahali Raut Vs. Khulana Bewa & Ors., AIR 1985 Ori 165; Abdul Gaffar Vs. Shahid Hussain, 1991 (2) RLW 1; and Mohammed Yousuf Vs. Bharat Singh, AIR 1999 Raj 185).

In Skipper Tower (P) Ltd. Vs. Skipper Bhawan Flat Buyers' Association, (2002) 10 SCC 116, the Court held that it is the discretion of the Court and the party or his counsel cannot ask for adjournment or extension of time for any reason whatsoever.

In Vareed Jacob Vs. Sosamma Geevarghese, AIR 2004 SCC 3992, the Apex Court held that it is the discretion of the Court and the Court can enlarge the time in exercise of its ancillary power.

Section 151 confers the inherent power upon the civil court. It cannot be resorted to deal with an application for which there is a statutory provision. Thus, it is only in exceptional circumstances where there is no other remedy available under any statutory provisions. For example, power to grant temporary injunction is under Order 39 Rules 1 and 2 of the Code, court cannot exercise the power and grant injunction under Section 151 C.P.C. (Vide Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993; Nain Singh Vs. Koonwarjee & Ors., AIR 1970 SC 997; and State of West Bengal & Ors. Vs. Karan Singh Binayak, (2002) 4 SCC 188). **Consolidation** of Suits is not provided under any other provision of the Code, thus, it can be done in exercise of the powers under this Section.

In Shambhoo Dayal V. Chandra Kali Devi & Ors, AIR 1964 All 350, the Allahabad High Court held that in all, suits can be consolidated provided common question of fact and law are arising and it will not be a case of misjoinder of parties.

Similar view has been reiterated in Ranjit Kumar Pal Chowdhury Vs. Murari Mohan Pal Chowdhury, AIR 1958 Cal 710; and Mst. Ramdayee Vs. Dhanraj Kochar & ors., AIR 1972 Cal 313, observing that the rule of multifariousness is a rule of convenience and it is primarily in the discretion of the court to decide whether the plaintiff should be allowed to proceed with different causes of action in the same suit upon a consideration of all the facts and circumstances of the case.

In M/s Bokaro & Ramgur Ltd. Vs. The State of Bihar & Ors., AIR 1973 Pat 340 and in Nani Gopal Bandhyopadhyaya & Ors. Vs. Bhola Nath Bandhyopadhyaya & ors., AIR 1973 Pat 437, it has been held that the Court has inherent discretionary power to consolidate the suits in exercise of powers under Sec. 151 CPC provided there is sufficient uniformity or similarity in the matters in issue in the suits or determination of suits rest mainly on the common question and it is convenient to try them as analogous cases. In the former case, the Hon'ble Patna High Court held as under : -

> "The question to be considered should also be as to whether or not the non-

consolidation of two or more suits is likely to lead apart from multiplicity of suits, to leaving the door open for conflicting decisions on the same issue which may be common to the two or more suits sought to be consolidated. ... . the convenience of the parties and the expenses in the two suits are subsidiary to the more important considerations, namely, whether it will avoid multiplicity of suits and eliminate chances of conflicting decisions on the same point."

In the State of Rajasthan Vs. Motiram, AIR 1973 Raj 223, the Court took the view that the applicant must satisfy the Court that in case the order of consolidation is not passed it would prejudice the party and would result in failure of justice and he must show that how the separate judgments and decree, if passed, would be void or ineffective as the whole object of inherent exercise of power under Sec. 151 CPC, in absence of any specific provision for consolidation of suits, is only to avoid multiplicity of proceedings and to prevent delay and unnecessary costs and expenses. By consolidation, it cannot be inferred that the Court after consolidation ceases to have jurisdiction to dispose of the consolidated suits separately.

In Harischandra & Anr. Vs. Kailashchandra & Anr., AIR 1975 Raj 14, the Court considered the aspect of 0. 2, R. 2 C.P.C. providing for bar on subsequent suit and held that bar under the said provision does not come into play when two or more suits are filed at the same time, on the same day, in the same Court with the entire cause of action, if included in one suit. However, the proper procedure in such eventuality would be to consolidate them in exercise of inherent exercise of powers under Sec. 151 C.P.C.

In Dr. Guru Prasad Mohanty & ors. Vs. Bijoy Kumar Das, AIR 1984 Ori 209 dealing with the similar provision the Orissa High Court held that the policy of law is to obviate the possibility of two contradictory decisions in respect of the same relief and the object of consolidation of suits is to avoid multiplicity of proceedings and unnecessary delay and protraction of litigation.

In Vishnu Kumar Vs. Smt. Sohni Devi & ors., 1995 DNJ (Raj) 684, the Court examined a case where the trial court has rejected the application to consolidate two separate suits on the ground that though the subject matter involved in both the suits was similar and the parties were also identical but plaintiff had no locus standi to bring that suit and that matter is not in the other suit, hence both suits were not identical and no consolidation was permitted. This Court after placing reliance upon its earlier judgment in Pratap Singh Vs. Madan Lal & Anr., 1992 (2) CLC 702 held that for consolidation of suits certain conditions have to be fulfilled including that the parties must be identical and the rights to be determined must also be identical and in case both the conditions are not fulfilled, consolidation is not permissible.

Similar view has been reiterated in Shew Narayan Singh Vs. Brahmanand Singh & Ors., AIR 1950 Cal 479; Ranjit Kumar Pal Chowdhury Vs. Murari Mohan Pal Chowdhury & Ors., AIR 1958 Cal 710; and Hans Raj Vs. Firm Hazarimal Dipa, 1959 RLW 451 observing that "there must be sufficient unity or similarity in the matters in issue in two Suits to warrant their consolidation.

In Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527 it has been held as follows:-

> "There is difference of opinion between the High Courts on this point. One view is that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code: Varadacharlu Vs. Narasimha Charlu, AIR 1926 Mad 258; Govindarajulu Vs. Imperial Bank of India, AIR 1932 Mad 180; Karuppayya Vs. Ponnuswami, AIR 1933 Mad 500; Murugesa Mudali Vs. Angamuthu Mudali, AIR 1938 Mad 190; and Subramanian Vs. Seetaramma, AIR 1949 Mad 104, the other view is that a Court can issue an interim injunction under circumstances which are not covered by Order 39 of the Code, if the Court is of opinion that

the interests of justice require the issue of such interim injunction; Dhaneshwar Nath Vs. Ghansahyam Dhar, AIR 1940 All 185; Firm Bichchha Ram Baburam Vs. Firm Baldeo Sahai Surajmal, AIR 1940 All 241; Bhagat Singh Vs. Jagbir Sawhney, AIR 1941 Cal 670 and Chinese Tannery Owners' Association Vs. Makhan Lal, AIR 1952 Cal 560. We are of opinion that the latter view is correct and that the Court have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39 C.P.C., there is no expression in Section 94 which expressly prohibits the issue of temporary injunction in circumstances not covered by Order 39 or by any rule made under the Code. It is well-settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression ' if it is so prescribed' is only this that when the rule prescribes the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunction, but it could do that in the exercise of its inherent jurisdiction. No party has a right to inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to

do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 49 of the Code have their effect and not in taking away the right of the Court to exercise the inherent power."

Orissa High Court in another case Krushna Chandra Mohapatra Vs. Chakrakata Jagannath Khuntia, (1972) 38 Cut LT 217 while considering the scope of Section 151of the Code of Civil Procedure observed that when the grounds are not covered by Order 39 of the Code, strictly speaking there may be no bar for the Court to exercise inherent power in granting temporary injunction, provided the interest of justice requires the issue of the same. In view of what has been decided by the Apex Court in the case of Manohar Lal Chopra, AIR 1962 SC 527 there cannot be any doubt in the mind that this Court can exercise jurisdiction under Section 151 of the Code and pass an order of injunction. (Vide Haraparbati Thakurani Bije Vs. Ramakanta Gupta, AIR 2002 Ori 89).

In Vareed Jacob Vs. Sosamma Geevarghese & Ors., AIR 2004 SC 3992 the Apex Court held that the powers of the Court are inherent and in addition to and complementary to the powers of redressal conferred under C.P.C., but that power cannot be exercised if for the redressal of a particular grievance a particular provision of C.P.C. provides for the remedy, and the court can also exercise the power under Section 151 if the circumstances so demand to do justice. While deciding the said case reliance had been placed on Ram Chand & Sons Sugar Mills (P) Ltd. Vs. Kanhayalal Bhargava, AIR 1966 SC 1899 and Jagjit Singh Khanna Vs. Dr. Rakhal Das Mullick, AIR 1988 Cal 95.

The powers under Section 151 C.P.C. can be exercised for doing justice and for purposes of which no specific provision has been made, i.e., as for consolidation of suits etc. (Vide Chitivalasa Jute Mills Vs. Jaypee Rewa Cement, AIR 2004 SC 1687; and Atma Ram Proprietaries (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705).

Section 152 deals with correction of typographical and arithmetical mistakes in a judgment and decree. But under the garb of this exercise of power court cannot change the order itself. (Vide Rai Jatindra Nath Chowdhury Vs. Uday Kumar Das & Ors., AIR 1931 PC 104; Seth

Manakchand Vs. Chaube Manoharlal & Anr., AIR 1944 PC 46; I.L. Janakirama Iyer & Ors. Vs. P.M.. Nilakanta Iyer & Ors., AIR 1962 SC 633; Grindlays Bank Ltd. Vs. The Central Government Industrial Tribunal & Ors., AIR 1981 SC 606; Satnam Verma Vs. Union of India & Ors., AIR 1985 SC 294; State of Bihar Vs. Nilmani Sahu, (1996) 11 SCC 528; Bai Shakriben Vs. Special Land Acquisition Officer, (1996) 4 SCC 533; Dwaraka Das Vs. State of Madhya Pradesh, AIR 1999 SC 1031; K. Rajamouli Vs. A.V.K.N. Swamy, (2001) 5 SCC 37; Jayalakshmi Coelho Vs. Oswald Joseph Coelho, AIR 2001 SC 1084; M/S Plasto Pack Mumbai Vs. Ratnakar Bank Limited, (2001) 6 SCC 689; Lakshmi Ram Bhuyan Vs. Hari Prasad Bhuyan & Ors., (2003) 1 SCC 197; and State of Punjab Vs. Darshan Singh, (2004) 1 SCC 328).

These are the general outlines of the Code of Civil Procedure, but always remember the dictum of the Hon'ble Supreme Court in cases M/s Ganesh Trading Company Vs. Mauji Ram, AIR 1978 SC 484; Har Charan Vs. State of Haryana, AIR 1983 SC 43; and Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, AIR 1969 SC 1267 that procedural law is intended to facilitate and not to obstruct the course of substantial justice. Court must be justice oriented and should grant relief without giving much importance to the rules of the procedure.

Order 1 Rule 3 provides who are the necessary parties in a Suit. A person who is not a party in the proceeding is not bound by any judgment or decree as the order against him is in violation of the principles of natural justice. There may be a party necessary, proper and/or improper, therefore the concept of joinder, non-joinder and mis-joinder of parties has always been very relevant.

Nearly a Constitution Bench of the Hon'ble Supreme Court in Udit Narain Singh Malpaharia Vs Member, Board of Revenue Bihar, AIR 1963 SC 786, has explained as who are the necessary parties and without whom the Suit shall not be maintainable. A necessary party is one without whom no order can be made effectively. Proper party is one whose presence is necessary for a complete and final decision. Suit fails for non-joinder of necessary parties. A Constitution Bench in U.P. Awas Evam Vikas Parishad Vs. Gyan Devi, AIR 1995 SC 724 reiterated the same view. In Iswar B.C. Patel Vs. Harihar Behera, AIR 1999 SC 1341, the Apex Court observed that question of joinder of parties involves joinder of causes of action.

Order 1, Rule 8 provides that persons may be impleaded in representative capacity where they are in large number but having the same interest with the provision of the court. (Vide Diwakar Shrivastava & Ors. Vs. State of Madhya Pradesh & Ors, AIR 1984 SC 468).

Order 1, Rules 9 and 10 provide that in view of mis-joinder and non-joinder of parties, court may proceed and decide the case. However, the judgment/decree shall not be binding upon a non-party.

In Ranjeet Mal Vs General Manager, Northern Railway, New Delhi & Anr, AIR 1977 SC 1701, the Hon'ble Apex Court considered a case where the writ petition had been filed challenging the order of termination from service against the General Manager of the Northern Railways without impleading the Union of India. The Apex Court held as under:

> "The Union of India represents the Railway Administration. The Union carries administration through different servants. These servants all represent the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petition was rightly rejected by the High Court."

While considering the similar view in Chief Conservator of Forests, Government of A. P. Vs. Collector & ors; (2003) 3 SCC 472, the Hon'ble Supreme Court accepted the submission that writ cannot be entertained without impleading the State if relief is sought against the State. The Hon'ble Apex Court had drawn the analogy from Section 79 of the Code of Civil Procedure, 1908, which directs that the State shall be the authority to be named as plaintiff or defendant in a suit by or against the Government and Section 80 thereof directs notice to the Secretary of that State or the

Collector of the district before the institution of the suit and Rule 1 of Order 27 lays down as to who should sign the pleadings. No individual officer of the Government under the scheme of the constitution nor under the Code of Civil Procedure, can file a suit nor initiate any proceeding in the name and the post he is holding, who is not a juristic person.

The Court also considered the provisions of Article 300 of the Constitution which provide for legal proceedings by or against the Union of India or State and held that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be; in the case of the Central Government, the Union of India and in the case of State Government, the State, which is suing or is being sued.

Rule 1 of Order 27 only deals with suits by or against the Government or by officers in their official capacity. It provides that in any suit by or against the Government the plaint or the written statement shall be signed by such person as the Government may, by general or special order, authorize in that behalf and shall be verified by any person whom the Government may so appoint. The Court further held as under:

> "It needs to be noted here that a legal entity – a natural person or an artificial person- can sue or be sued in his/its own name in a court of law or a tribunal. **It is not merely a procedural formality but is essentially a matter of substance and considerable significance.** That is why there are special provisions in the Constitution and the Code of Civil Procedure as to how the Central Government or the Government of a State may sue or be sued. So also there are special provisions in regard to other juristic persons specifying as to how they can sue or be sued. In giving description of a party it will be useful to remember the distinction between **misdescription or misnomer** of a party and **misjoinder or non-joinder** of a party suing or being sued. In the case of

misdescription of a party, the court may at any stage of the suit/proceedings permit correction of the cause-title so that the party before the court is correctly described; however, a misdescription of a party will not be fatal to the maintainability of the suit/proceedings. Though Rule 9 of Order 1 C.P.C. mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the court, be it a plaintiff or a defendant, **otherwise, the suit or the proceedings will have to fail.** Rule 10 Of Order 1 C.P.C. provides remedy when a suit is filed in the name of the wrong plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings."

The Court thus held that writ is not maintainable unless the Union of India or the State, as the case may be, impleaded as a party.

A Full Bench of Kerala High Court in Kerala State represented by Chief Secretary to Government, Trivandrum Vs. General Manager, Southern Railway, Madras, AIR 1965 Ker 277 held that suit is not maintainable if instituted against Railway Administration. The condition precedent for its maintainability is that it must be instituted against the Union of India.

A similar view has been reiterated by Hon'ble Apex Court in State of Kerala Vs. General Manager, Southern Railway, Madras, AIR 1976 SC 2538.

A Constitution Bench of Supreme Court in State of Punjab Vs. O.G.B,. Syndicate Ltd, AIR 1964 SC 669 held that if relief is sought

against the State, suit lies only against the State, but, it may be filed against the Government if the Government acts under colour of the legal title and not as a Sovereign Authority, e.g., in a case where the property comes to it under a decree of the court.

The Rajasthan High Court in Pusha Ram Vs. Modern Construction Co. (P) Ltd., Kota, AIR 1981 Raj 47, held that to institute a suit for seeking relief against the State, the State has to be impleaded as a party. But mis-description showing the State as Government of the State may not be fatal and the name of party may be permitted to be amended, if such an application is filed.

Thus, we reach the inescapable conclusion that the writ is not maintainable against the Government officers or the employees of the State, it lies only against the State and if State is not impleaded, the writ/suit is not maintainable.

Order 2, Rule 2 provides that Suit must include the whole claim. If a relief which could have been claimed is not claimed, party cannot claim it in a subsequent Suit. (Mohd. Khalil Khan Vs. Mahbub Ali Mian, AIR 1949 PC 78).

The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. One great criterion, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit, is whether the same evidence will maintain both actions.

A Constitution Bench of Hon'ble Supreme Court in Gurubux Singh Vs. Bhooralal, AIR 1964 SC 1810, held that even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata enshrined in Explanation IV to Section 11 and Order 2 rule 2 of the Code of Civil Procedure. In Order 2 rule 2 C.P.C., as has been explained, in unambiguous and crystal clear language by the Hon'ble Supreme Court in M/S D. Cawasji & Co. Vs. State of Mysore, AIR 1975 SC 813; Commissioner of Income Tax Vs. T.P. Kumaran, (1996) 10 SCC 561; Union of India and others Vs. Punnilal & Ors., (1996) 11 SCC 112; Kunjan Nair Sivaraman Nair Vs. Narayanan Nair, AIR 2004 SC 1761; and

Sapan Sukhdeo Sable Vs. Assistant Charity Commissioner, AIR 2004 SC 1801).

In Dalip Singh Vs. Maher Singh Rathee, (2004) 7 SCC 650, the Hon'ble Supreme Court held that the sine qua non for applicability of Order 2 Rule 2 C.P.C. is that a person entitled to grant one relief in respect of the same cause of action has omitted to sue for some relief without the leave of the Court.

Similar view has been reiterated in Swami Atmananda & Ors. Vs. Sri Ramkrishna Tapovanam, 2005 AIR SCW 2548.

Order 4 Rule 1- There is a slight change by Amendment 1999; it has been provided that the plaint shall be filed in duplicate; and for failure, plaint shall be rejected.

Order 5 Rule 1- Amendments by the Acts of 1999 and 2002 provide that summons be issued and defendants may file the written statements within thirty days (the time for filing the written statement has been prescribed) from the date of service. It can be extended by the court by recording the reasons being satisfied that there was a genuine ground for not filing the written statements within time. But court does not have a power to extend it beyond 90 days. The amendments also provided that summons shall be accompanied by the copy of the plaint.

Order 5, Rule 9 (vi) has been added by amendment conferring the power upon the High Court to prepare a panel of Courier Agencies for service of summonses.

Order 5 Rule 9-A lays down the procedure for dasti service of summons on defendants.

Order 5 Rule 20 provides for substituted service, i.e., by publication in local newspaper, but it cannot be made in a routine manner.

The substituted service is not permissible unless the Court records the reasons reaching the conclusion that it is not possible to serve the defendant/respondent in an ordinary manner.

A Division Bench of the Calcutta High Court in Teharoonchand Vs. M/s Surajmull Nagarmull, AIR 1984 Cal 82, considered the issue and held as under:-

> "Before issuing summons under Order 5, Rule 20 of the Code, the Court is to be satisfied that the defendant is keeping out of the way for the

purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way. Before such satisfaction, the Court has to consider the case carefully having regard to the nature of the earlier attempts made for the service of summons. Mere assertion of the plaintiff in this respect to attract the provisions of Order 5 Rule 20 of the Code will not be enough. Only when the Court is satisfied from the materials on record that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way, the Court will be entitled to order service of summons under Order 5, Rule 20 of the Code".

Similar view has been reiterated in Ram August Tewari & ors. Vs. Bindeshwari Tewari & ors., AIR 1972 Pat 142.

In Ambika Prasad Vs. Kodai Upadhya, AIR 1945 All 45, this Court considered a case where the defendant could not be served being detained in jail and it was held there that in such a situation as the defendant could not be served, the proper procedure would be to issue processes for substituted service under Order 5 Rule 20 of the C.P.C. and then to proceed with the trial of the suit.

In Smt. M.L. Nagarathnamma Vs. S.R. Suryanarayan Rao, 1985 NOC 214 (Kant), the Division Bench examined a case where summons could not be served in a suit on the defendant teacher on account of her transfer and request was made to serve her by substituted service. The Division Bench of the Karnataka High Court held that unless the enquiry is held and Court comes to the conclusion that she was evading the service, the question of serving her by substituted service did not arise.

Order 6 Rule 1 defines pleadings in a plaint and written statements. It also includes the statements made by a party under Order 10 Rule 1. Provisions of **Order 10 Rule 1** provide for ascertainment whether the allegation in the pleadings are admitted or denied. It enables the Court to ascertain from each party or his counsel whether he admits or denies such

allegations of facts as are made out in the plaint or written statement and are not expressly or by necessary implication admitted or denied by the party against whom they are made. (Vide Ved Prakash Wadhwa Vs. Vishwa Mohan, AIR 1982 SC 816).

The oral statements so recorded become part of the pleadings. (Vide M/s Ganga Ram Sat Narain Vs. Gyan Singh & Co. AIR 1960 Pun 209). The said statements are in the nature of supplementary pleadings and no plea inconsistent with them can be raised at a later stage except by way of amendment of the pleadings.

In Amrita Devi & Ors. Vs. Shripat Rai & Ors., AIR 1962 All 111; and Balmiki Singh Vs. Mathura Prasad & Ors., AIR 1968 All 259, it has been held that statements made under Order 10 Rule 1 C.P.C. are conclusive against those who make them and become part of the pleadings but statements made under Rule 2 may not be conclusive for the reason that where in reply to a question by a Court a counsel for a party inadvertently gives an erroneous reply, the Court can go into the question to find out if the reply given was due to any inadvertence, such a statement can be withdrawn. Similar view has been reiterated in Kailash Chandra Vs. Ratan Prakash & Anr., AIR 1974 All 138; and Sher Singh & Ors. Vs. Pirthi Singh & Ors., AIR 1975 All 259.

In Raja Prithwi Chand Lall Choudhary Vs. Sukhraj Rai & Ors., 1940 FC 25, the Federal Court while dealing with the statement made under O.10 R.1 C.P.C. and O.11 R.1 & 2 C.P.C. observed as under:-

> "When counsel take on themselves the responsibility of making statements on fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This is a rule which needs no clarification. It is honorable obligation of the Bar and of great value in the administration of justice."

However, in the cases referred to above, i.e. Balmiki Singh and Sher Singh (supra) and Smt Azad Kumari Vs. Satya Prakash, AIR 1983 All 435, the view was taken that as O.10 R.2 C.P.C. does not provide for recording the statement of counsel, even a wrong statement which has

been made inadvertently can be withdrawn with the leave of the Court. Material facts have to be pleaded.

Order 6, Rule 5 which provided for further and better statements or particulars, stands deleted by an amendment.

Order 6 Rule 15 provides for verification. A Full Bench judgment of the Allahabad High Court in Rajit Ram & Ors. Vs. Kateskar Nath & Ors., 18 ILR (All.) 396, wherein a plaint had been verified in the form "the contents of the petition or plaint are true to the best of my knowledge and belief." The objection was raised whether such a verification could be treated to be in accordance with law as the verification did not make any reference to the particular paragraph of the plaint or part of the pleadings, nor it was disclosed which part of it was based on personal knowledge or which was based on documents. The Full Bench held that the verification was not free from ambiguity but there was substantial compliance of the requirement of law. More so, even if verification of the plaint is discovered to be defective by the Court of first instance, the Court should ask the party to amend it. In case it is noticed by the first appellate Court, it must ignore it and once the trial has commenced with the settlement of issues, the defect, if it is a defect, need not be taken note of. The Court observed as under:-

> "Although the verification in the present case is not in strict compliance of the Code, it substantially complies with it, and after the trial had commenced with the settlement of issues, the defect, if it was a defect, need not have been taken note of..... For the purpose of answering the remaining questions, we will assume that verification is defective and not in compliance of Section 52 of the Code and that it omitted to indicate which matters were true to the knowledge of the plaintiff and which matters, if any, were stated on information believed to be true. Now, under Section 53, the Court of first instance, only acting under the orders of the Appellate Court, could not return the plaint to

be amended after the settlement of issues; but if the plaint requires amendment and the fact was only discovered after issues had been settled, the Court could, under Section 53 (c), amend the plaint or cause it to be amended at any time before the judgment..... It would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or jurisdiction of the Court; so that practically, in our opinion, on a mere question of defect of verification, it is not necessary for an Appellate Court to pay any attention or take any steps to rectify a defect in the verification of the document."

Similarly, a Constitution Bench of the Hon'ble Supreme Court, in Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore & Anr., AIR 1964 SC 1545, considered the case wherein in verification of the Election Petition, it had not been stated that the advice and information received was believed by him to be true. The Court held as under:-

"It seems clear to us that reading the relevant sections in part VI of the Act, it is impossible to accept the contention that a defect in verification, which is to be made in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings as required by Clause (c) of Sub-section (1) of Section 83, is fatal to the maintainability of the petition."

The same view has been reiterated in F.A. Sapa & Ors. Vs. Singora & Ors., AIR 1991 SC 1557, wherein the Hon'ble Supreme Court considered the case of amendment of material particulars and observed that it should be granted by the Court liberally in the facts and circumstances of the case if the Court

comes to the conclusion that it would be unjust and prejudicial to the opposite party to allow the same, however, such prejudice must be distinct from mere inconvenience. So far as defect in the verification is concerned, the Court held that mere defect in the verification of the election petition is not fatal to the maintainability of the election petition and it cannot be thrown out solely on that ground, rather it should be cured."

The Hon'ble Apex Court remanded the cases to the High Court for issuing appropriate directions to cure the defect in verification within a stipulated period and only in case the same is not cured, consequential order be passed in accordance with law.

In H.D. Revanna Vs. G. Puttaswamy Gowda & Ors., AIR 1999 SC 768, the Hon'ble Supreme Court held that the defect in verification of the election petition or the affidavit accompanying the election petition, is curable and not fatal.

In V. Narayanaswamy Vs. C.P. Thirunavukkarasu, AIR 2000 SC 694, the Hon'ble Supreme Court held that in case the election petition is based on corrupt practice, the existence of material facts, material particulars, correct verification and affidavit are relevant and important and in absence thereof, the Court has jurisdiction to dismiss the petition. "The High Court has, undoubtedly, the power to permit amendment of the petition for supply of better material particulars and also to require amendment of the verification and filing of the required affidavit but there is no duty cast on the High Court to direct suo motu the furnishing of better particulars and requiring amendment of the petition for the purpose of verification and filing a proper affidavit. In a matter of this kind, the primary responsibility for furnishing full particulars of the alleged corrupt practices and to filing of petition in full compliance of the provisions of law is on the petitioner." However, there is a distinction as such a requirement is only for the Election petition based on corrupt practice.

Want of verification or defect therein cannot make the pleading void and a Suit cannot be dismissed on that ground for the reason that this is a

matter of procedure only. (Vide All India Reporter Ltd., Bombay with Branch Office at Nagpur & Anr. Vs. Ramachandra Dhondo Datar, AIR 1961 Bom 292; Purushottam Umedbhai and Co. Vs. M/s Manilal and Sons, AIR 1961 SC 325; and Karam Singh Vs. Ram Rachhpal Singh & Ors., AIR 1977 HP 28). The defect in verification has always been treated as a mere irregularity and curable by amendment at any stage of the proceeding. (Vide Nand Kishore Rai & Anr. Vs. Mst. Bhag Kuer & Ors., AIR 1958 All. 329).

A Constitution Bench of the Hon'ble Supreme Court, in Dinabandhu Sahu Vs. Jadumoni Mangaraj & Ors., AIR 1954 SC 411, over-ruled the objection that election petition with defective verification could not be accepted. In the said case, the Election Tribunal had directed the petitioner to cure the defect in verification by a particular date and the argument had been that the Tribunal ought to have dismissed the petition on the ground of defective verification.

In Sangram Singh Vs. Election Tribunal, Kotah & Anr., AIR 1955 SC 425, the Hon'ble Supreme Court dealt with the provisions of the Code applicable in trial of election petition and made the following observations:-

> "Now Code of Procedure must be regarded as such. Its 'procedure', something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalty; not a thing designed to trip people up. Too taking a consideration of sections that leaves no room for reasonable elasticity of interpretation, the Tribunal be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it."

Placing reliance upon the said judgment in Sangram Singh (supra), the Hon'ble Supreme Court, in Ghanshyam Das Vs. Dominion of India & Ors., (1984) 3 SCC 46, held that when substantial justice and technicalities are pitted against each other, the cause of substantial justice should not be defeated on technicalities for the reason that "our laws

and procedure are based on the principle that as far as possible, no proceeding in a Court of law should be allowed to be defeated on some technicality."

The Constitution Bench of the Hon'ble Supreme Court, in Bhikaji Keshao Joshi & Anr. Vs. Brijlal Nandlal Biyani & Ors., AIR 1955 SC 610, after considering various provisions and earlier judgments, held that so far as verification is concerned, substantial compliance is necessary for the reason that the elections should not be set-aside merely as an abuse for the purpose of maligning the successful candidate by leveling vague, false and irresponsible charges against him. However, the petition cannot be dismissed in the early stages and the Tribunal should ask for furnishing the better particulars and only in case of non-compliance of such order, it could strike out of such of the charges which remain vague and can call upon the petitioner to substantiate the allegations in respect of those which are reasonably specified.

In S.R. Ramraj Vs. Special Court Bombay, AIR 2003 SC 3039, the Court observed that while making the verification, a person is under legal obligation to verify the averments of fact made in the plaint correctly, and in case he verifies falsely, he may be held responsible for perjury and Contempt of Court.

Order 6 Rule 15 (4) provides for affidavit in support of pleadings, vide Amendment Act 1999.

Order 6 Rule 16 provides striking down of frivolous and very vexatious pleadings.

Order 6 Rule 17 provides amendment of the pleadings. By Amendment of 2002, a proviso has been added that amendments should generally be allowed at the stage of pre-trial of the Suit. But subsequent thereto, the court must be satisfied as to why the pleadings could not be brought in, unless it was based on subsequent developments.

The issue involved herein is being considered by the courts every day. Amendment in the pleadings may generally be allowed and the amendment may also be allowed at a belated stage. However, it should not cause injustice or prejudice to the other side. The amendment sought should be necessary for the purpose of determining the real question in controversy between the parties. Application for amendment may be rejected if the other party cannot be placed in the same position as if the

pleadings had been originally correct, but the amendment would cause him injury which could not be compensated in terms of cost or change the nature of the Suit itself as it cannot be permitted to create an entirely new case by amendment. A right accrued in favour of a party by lapse of time cannot be permitted to be taken away by amendment. Amendment can also be allowed at appellate stage. Introduction of an entirely new case, displacing even admission by a party is not permissible. (Vide Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil & Ors., AIR 1957 SC 363; Nanduri Yogananda Laxminarsimhachari & Ors. Vs. Sri Agasthe Swarswamivaru, AIR 1960 SC 622; M/s Modi Spinning & Weaving Mills Co. Ltd. Vs. M/s Ladha Ram & Co., AIR 1977 SC 680; Ishwardas Vs. State of M.P., AIR 1979 SC 551; and Mulk Raj Batra Vs. District Judge, Dehradun, AIR 1982 SC 24).

Similar view has been reiterated in G. Nagamma & Anr. Vs. Siromanamma & Anr., (1996) 2 SCC 25; B.K. Narayana Pillai Vs. Parameshwaran Pillai & Anr., AIR 2000 SC 614. However, a party cannot be permitted to move an application under Order 6 Rule 17 of the Code after the judgment has been reserved. (Vide Arjun Singh Vs. Mohindra Kumar & Ors., AIR 1964 SC 993).

A Constitution Bench of the Hon'ble Supreme Court in Municipal Corporation of Greater Bombay Vs. Lala Pancham & Ors, AIR 1965 SC 1008, observed that even the court itself can suggest the amendment to the parties for the reason that main purpose of the court is to do justice, and therefore, it may invite the attention of the parties to the defects in the pleadings, so that same can be remedied and the real issue between the parties may be tried. However, it should not give rise to entirely a new case.

In Jagdish Singh Vs. Natthu Singh, AIR 1992 SC 1604, the Hon'ble Supreme Court held that the Court may allow to certain extent even the conversion of the nature of the Suit, provided it does not give rise to entirely a new cause of action. An amendment sought in a plaint filed for specific performance may be allowed to be done without abandoning the said relief but amendment seeking for damages for breach of contract may be permitted.

If the plaintiff wants to add certain facts, which the plaintiff had not chosen to mention in the original plaint and the same had been in his knowledge when the plaint was instituted, the plaintiff cannot be allowed

to make fresh allegation of facts by way of amendment at a belated stage. (Vide Gopal Krishanamurthi Vs. Shreedhara Rao, AIR 1950 Mad. 32; and Gauri Shankar Vs. M/s Hindustan Trust (Pvt) Ltd., AIR 1972 SC 2091).

In Union of India & Ors. Vs. Surjit Singh Atwal, AIR 1979 SC 1701, the Apex Court held that in case of gross delay, application for amendment must be rejected.

It is settled legal proposition that if a right accrued in favour of a party, as the order impugned has not been challenged in time, the said right cannot be taken away by seeking amendment in pleadings. (Vide Radhika Devi Vs. Bajrangi Singh, AIR 1996 SC 2358; and Dondapati Narayana Reddy Vs. Duggireddy Venkatanarayana Reddy, (2001) 8 SCC 115).

In G. Nagamma & Ors. Vs. Siromanamma & Anr., JT 1998 (4) SC 484, the Hon'ble Apex Court held that in an application under Order 6 Rule 17, even an alternative relief can be sought; however, it should not change the cause of action or materially affect the relief claimed earlier.

In Vineet Kumar Vs. Mangal Sain Wadhera, AIR 1985 SC 817, the Hon'ble Supreme Court held that normally amendment is not allowed if it changes the cause of action, but where the amendment does not constitute the addition of a new cause of action, or raises a new case, but amounts to not more than adding to the facts already on record, the amendment should be allowed even after the statutory period of limitation.

In Fritiz T.M. Clement & Anr. Vs. Sudhakaran Nadar & Anr., AIR 2002 SC 1148, the Hon'ble Supreme Court held that in case the original plaint is cryptic and amendment sought to incorporate about some undisputed facts elaborating plaintiff's claim is based on the said admitted facts, amendment should be allowed as it would place the defendant in a better position to defend and would certainly not prejudice his cause. More so, if the claim does not challenge the nature of the relief and rate of fee etc. is challenged without challenging the total amount claimed, such amendment may be allowed even at a belated stage.

In Gurdial Singh Vs. Raj Kumar Aneja, (2002) 2 SCC 445, the Hon'ble Supreme Court deprecated the practice adopted by the Courts entertaining the application under O. 6 R. 17 of the Code containing very

vague and general statements of facts without having necessary details in amendment application enabling the Court to discern whether the amendment involves withdrawal of an admission made earlier or attempts to introduce a time-barred plea or claim or is intended to prevent the opposite party from getting the benefit of a right accrued by lapse of time, as amendment cannot be permitted to achieve the said purposes.

Similarly, in Om Prakash Gupta Vs. Ranbir B. Goyal, AIR 2002 SC 665, the Hon'ble Supreme Court reiterated the same view extending the scope of O. 6 R. 17 of the Code, observing that amendment should not disturb the relevant rights of the parties those existed on the date of institution of a Suit, but subsequent events may be permitted to be taken on record in exceptional circumstances if necessary to decide the controversy in issue. The Court held as under:-

> "Such subsequent event may be one purely of law or founded on facts. In the former case, the court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 C.P.C.. Such subsequent event, the Court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining real questions in controversy between the parties. In Trojan & Co. Vs. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235, this Court has held that the decision of a case cannot be based on grounds outside the

> pleadings of the parties and it is the case pleaded that has to be founded; without the amendment of the pleadings the Court would not be entitled to modify or alter the relief. In Sri Mahant Govind Rao Vs. Sita Ram Kesho, (1988) 25 IA 195 (PC), Their Lordships observed that, as a rule, relief not founded on the pleadings should not be granted."

In Muni Lal Vs. The Oriental Fire & General Insurance Co. Ltd., AIR 1996 SC 642, the Hon'ble Apex Court held that the relief of amendment should be granted to "render substantial justice without causing injustice to the other party or violating fair-play and the Court should be entitled to grant proper relief even at the stage of appellate forum." Similar view has been reiterated in Jagdish Singh Vs. Natthu Singh, AIR 1992 SC 1604.

In Smt. Ganga Bai Vs. Vijay Kumar, AIR 1974 SC 1126, the Hon'ble Supreme Court observed as under:-

> "The power to allow an amendment is undoubtedly wide and may, at any stage, be properly exercised in the interest of justice, the law of limitation notwithstanding, but the exercise of such far-reaching discretionary power is governed by judicial consideration and wider the discretion, greater ought to be the care and circumspection on the part of the Court."

In M/s Ganesh Trading Co. Vs. Maoji Ram (Supra), the Hon'ble Supreme Court observed that where amendment is found to be necessary for promoting the ends of justice and not for defeating it, the application should be allowed. Similar view had been reiterated in B.K.N. Pillai Vs. P. Pillai & Anr., AIR 2000 SC 614.

In Estrella Rubber Vs. Dass Estate (P) Ltd., (2001) 8 SCC 97, the Supreme Court held that mere delay in making the amendment application is not enough to reject the application unless a new case is made out, or serious prejudice is shown to have been caused to the other side so as to take away any accrued right.

Similarly, in Siddalingamma & Anr. Vs. Mamtha Shenoy, (2001) 8 SCC 561, the Hon'ble Supreme Court held that the Doctrine of Relation Back applies in case of amendment for the reason that the amendment generally governs the pleadings as amended pleadings would be deemed to have been filed originally as such and the evidence has to be read and appreciated in the light of the averments made in the amendment petition. Similar view has been reiterated in Raghu Thilak D. John Vs. S. Rayappan & Ors., AIR 2001 SC 699.

In Jayanti Roy Vs. Dass Estate (P) Ltd., AIR 2002 SC 2394, the Apex Court held that if there is no material inconsistency between the original averments and those proposed by the amendment, application for amendment should be allowed. However, the application should be moved at a proper stage. Application filed at unduly delayed stage should normally be rejected.

In Sampat Kumar Vs. Ayyakannu & Anr., (2002) 7 SCC 559, the Hon'ble Supreme Court held that any amendment seeking to introduce a cause of action, which arose during pendency of the Suit, may be permitted in order to avoid multiplicity of Suit. But, it should not change the basic structure of the Suit. More so, court should be liberal to allow amendment at the time of pre-trial of a Suit but must be strict and examine the issue of delay where the application for amendment is filed at a much belated stage of commencement of the trial.

In Nagappa Vs. Gurudayal Singh & Ors., AIR 2003 SC 674, the Hon'ble Supreme Court held that amendment can be allowed even at an appellate stage in a case where law of limitation is not involved and the facts and circumstances of the particular case so demands, in order to do justice with the parties. The case involved therein had been under the provisions of Sections 166, 168 and 169 of the Motor Vehicles Act, 1988 and as the Act does not provide for any limitation for filing the claim petition, the amendment at appellate stage was allowed.

In Hanuwant Singh Rawat Vs. M/s Rajputana Automobiles, Ajmer, (1993) 1 WLC 625, Rajasthan High Court summarised the legal position as under:-

> (i) That the amendment of pleadings should ordinarily be allowed by the Court, once it is satisfied that the amendment is necessary for

the just and proper decision of the controversy between the parties;

(ii) The amendment of the pleadings should not ordinarily be declined only on the ground of delay on the part of the appellant in seeking leave of the Court to amend the pleadings, if the opposite party can Suitably be compensated by means of costs etc. Even inconsistent pleas can be allowed to be raised by amendment in the pleadings;

(iii) However, amendment of pleadings cannot be allowed so as to completely alter the nature of the Suit;

(iv) Amendment of the pleadings must not be allowed when amendment is not necessary for the purpose of determining the real questions in the controversy between the parties;

(v) The amendment should be refused where the plaintiff's Suit would be wholly displaced by the proposed amendment;

(vi) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time or by operation of some law;

(vii) The amendment in the pleadings should not be allowed where the court finds that amendment sought for has not been made in good faith or suffers from lack of bona fides; and

(viii) Ordinarily, the amendment must not be allowed where a party wants to withdraw from the admission made by it in the original pleadings."

In M/s Modi Spinning & Weaving Mills Co. Ltd. (supra), the Hon'ble Supreme Court specifically held that amendment in the pleadings

is not permitted if it seeks to "displace the plaintiff completely from the admissions made by the defendant in the written statement."

In Heeralal Vs. Kalyan Mal & Ors., (1998) 1 SCC 278, the Hon'ble Supreme Court held that once a written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendant cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause some irreparable prejudice.

It is settled proposition of law that admission is the best evidence unless the party who has admitted it proves it to have been admitted under a wrong presumption or it could not have been otherwise factually correct. In Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi & Ors., AIR 1960 SC 100, the Hon'ble Apex Court observed as under:-

> "An admission is the best evidence that an opposing party can rely upon and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."

The same view had been reiterated in K.S. Srinivasan Vs. Union of India & Ors., AIR 1958 SC 419; Basant Singh Vs. Janki Singh, AIR 1967 SC 341; Prem Ex-Serviceman Co-operative Tenant Farming Society Ltd. Vs. State of Haryana, AIR 1974 SC 1121; and Avadh Kishore Dass Vs. Ram Gopal & Ors., AIR 1979 SC 861.

In Nagubai Ammal & Ors. Vs. B. Shama Rao & Ors., AIR 1956 SC 593, the Apex Court had taken the same view holding that the statements admitting the factual position must be given full effect and while deciding the same, the Hon'ble Supreme Court placed reliance on the decision in Slatterie Vs. Pooley, (1840) 6 M&W 664, wherein the Court had observed that "what a party must admit to be true, may reasonably presumed to be so."

In Rakesh Wadhawan Vs. M/S Jagdamba Industrial Corporation & Ors., AIR 2002 SC 2004, the Apex Court held that admission being a piece of evidence can be explained and it does not conclusively binds a party unless it amounts to estoppel.

The Court held that the court would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of application. (Vide T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board & Ors., (2004) 3 SCC 392).

In Pankaja & Anr. Vs. Yellappa (Dead) by L.Rs. & Ors., AIR 2004 SC 4102, the Supreme Court held that there is no absolute rule that amendment should not be allowed at a belated stage in a particular case. Even if amendment sought is barred by limitation, if the Court after examining the facts and circumstances of the case comes to the conclusion that amendment serves the ultimate cause of justice and avoids further litigation, the amendment should be allowed.

It is obligatory on the part of the Court, when it allows the amendment, to give time to the other parties to reply properly, failing which, the decree would be illegal, as it is mandatory that the parties may be given chance to contest the question in controversy. The Court has a discretion even to allow amendment even if it is barred by limitation, if the facts so require. (Vide Ramnik Vallabh Das Madhwani Vs. Tara Ben Pravin Lal Madhwani, AIR 2001 SC 1084; and T.N. Alloy Foundry Ltd. Vs. T.N. Electricity Board, (2004) 3 SCC 392).

Thus, in view of the above, the law can be summarised that amendments should be allowed if an application is moved at a pre-trial stage, and even at a later stage if the party wants to introduce the facts in respect of the subsequent development as it would be necessary to avoid the multiplicity of the proceedings. The amendment is not permissible if the very basic structure of the plaint is changed or the amendment itself is not bona fide. In case the facts were in the knowledge of the party at the time of presenting the pleadings, unless satisfactory explanation is furnished for not introducing those pleadings at the initial stage, the amendment should not be allowed. Amendment should also not be permitted where it withdraws the admission of the party or the amendment sought is not necessary to determine the real controversy involved in the case.

Order 6 Rule 18 provides that parties are bound to incorporate the amendments or if apply for the order passed by the court within time and if no time is given, then within 14 days, or within the time, if any, extended by the court.

Order 7, Rule 11 provides for dismissal of a Suit and empowers the court to reject the plaint in case plaint does not disclose a cause of action

where the relief claimed is undervalued and in spite of time given by the court to correct the valuation within time, plaintiff fails to do so and where the sufficient court-fee has not been paid and the deficiency is not made good in spite of time granted by the court or where the Suit is barred by law. Two further facts have been added by Amendments of 1999 and 2002 that a plaint can be rejected if not filed in duplicate or where the provisions of Order 7 Rule 9 have not been complied with. (See Pearlite Liners Pvt. Ltd. Vs. Manorma Sirsi, 2004 AIR SCW 273).

While deciding the application under Order 7, Rule 11 it is not necessary to call for the written statement. It may be decided merely by going through the averments made in the plaint. (Vide Saleem Bhai Vs. State of Maharashtra, AIR 2003 SC 759).

Order 7, Rule 11 of the Code castes a duty on the Court to reject the plaint for non-disclosure of cause of action. Irrespective of any objection taken by the defendant. It is the duty of the Court to see if the plaint really discloses any cause of action or if the plaint is barred under the provisions of any law. (Vide I.T.C. Limited Vs. Rakesh Behari Srivastava, AIR 1997 All 323).

Order 7, Rule 11, to which clauses (e) and (f) have been added, which enable the Court to reject the plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule 9 of Order 7. It appears that the said clauses being procedural would not require the automatic rejection of the plaint at the first instance. If there is any defect as contemplated by Rule 11 (e) or non-compliance as referred to in Rule 11 (f), the Court should ordinarily give an opportunity for rectifying the defects, and in the event of the same not being done, the Court will have the liberty or the right to reject the plaint. (Vide Salem Advocate Bar Association, Tamil Nadu Vs. Union of India, AIR 2003 SC 189).

A similar view has been reiterated in Raj Narayan Sareen Vs. Lakshmi Devi, (2002) 10 SCC 501; Saleem Bhai Vs. State of Maharashtra (2003) 1 SCC 557; Ramesh Chandra Ardawatiya Vs. Anil Punjwani, AIR 2003 SC 2508; Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner, AIR 2004 SC 1801; and Chandra Uttam Chodanker Vs. Dayanand Rayu Mandrakar, (2005) 2 SCC 188.

An application for rejecting the plaint can be filed at any stage of the proceeding. However, it should be done at the earliest. (Vide Vitthalbhai (P) Ltd. Vs. Union Bank of India, (2005) 4 SCC 315.

Order 7, Rule 14 has been added by amendment as a substitute of Order 13, Rule 2, which stood deleted by amendment regarding the production of documents, on which the party relies.

Order 8, Rule 1 provides that the defendant must file written statement within 30 days of the service of summons on him. The court may extend the period by recording reasons upto 90 days. Thus, extension can be given only for a period of 60 days. However, by the discretion of the Court to extend the time further. (Vide Ramesh Chand Ardawatiaya Vs. Anil Panjwani, AIR 2003 SC 2508; and Iridion India Telecom Ltd. Vs. Motorola Inc, (2005) 2 SCC 145).

Order 8, Rule 5 provides that every allegation of fact in the plaint must be specifically and necessarily denied, not admitting the pleading otherwise it will be assumed that defendant had admitted the allegation. (Vide Tek Bahadur Bhujil Vs. Debi Singh Bhujil & Ors, 1966 SC 292; Jahuri Sah Vs. Dwarika Prasad Jhunjhunwala & Ors, AIR 1967 SC 109; Rakesh Wadhwa (Supra); M.L.Subbaraya Setty Vs. M.L.Nagappa Setty, (2002) 4 SCC 743; Rakesh Wadhawan & Ors. Vs. Jagdamba Industrial Corporation & Ors., AIR 2002 SC 2004; and Sushil Kumar Vs. Rakesh Kumar, (2003) 8 SCC 673.

Order 8, Rule 9 provides for subsequent pleadings. In Shakoor & Ors. Vs. Jaipur Development Authority, Jaipur & Ors., AIR 1987 Raj 19, the Court considered the application of the provisions of Order 8 Rule 9 even in a case of miscellaneous application under Order 39 Rule 1, C.P.C. and held that undoubtedly the contingency of filing a rejoinder does not arise in every case because it would arise only in such cases where some new plea or fact is introduced by the defendant in his reply, only with the leave of the Court and the purpose of putting such an embargo is that plaintiff may not be permitted to introduce a pleading subsequently by a rejoinder. The procedure provided for a trial of the Suit and miscellaneous proceedings is meant for finding out truth and to do justice. The procedure is always a hand-maid of justice and full opportunity should be given to the parties to bring forth their case before the Court, unless such procedure is specifically prohibited under the law and if Court is satisfied that subsequent pleadings should not be permitted, the plaintiff cannot be denied his right to file a rejoinder.

In Veerasekhara Varamarayar Vs. Amirthavalliammal & Ors., AIR 1975 Mad. 51, the Division Bench of Madras High Court held that where the defendant brings the new facts in the written statement, the plaintiff must get a chance to file a rejoinder challenging the truth and binding nature of the allegations/averments made in the written statement. But law does not compel the plaintiff to file a replication/ rejoinder and the plaintiff cannot be deemed to have admitted the same simply because he had not filed the rejoinder.

In Rohan Lal Choudhary Vs. Prem Prakash Gupta, AIR 1980 Pat. 59, the Patna High Court has taken the same view holding that the plaintiff is entitled to join issues with the defendant in respect to all those allegations which are made in the written statement and may lead evidence in rebuttal of those allegations notwithstanding the fact that he did not file any rejoinder.

In M/s Ajanta Enterprises Vs. Bimla Charan Chatterjee & Anr., 1987 RLR 991, this Court held that it is not permissible to file a rejoinder to all allegations made in the written statement and the rejoinder or replica can be filed with the permission of the Court only if the defendant has raised a plea of new facts and, thus, permission must be granted after taking into consideration all the facts and circumstances of the case, especially the pleas which have been raised in the written statement. In the garb of submitting a rejoinder, a plaintiff cannot be allowed to introduce new pleas in his plaint so as to alter the basis of his plaint. In a rejoinder, plaintiff may simply explain if certain additional facts have been taken in the written statement but he cannot be allowed to come forward with an entirely new case in the rejoinder. The original pleas cannot be permitted to be altered under the garb of filing a rejoinder. Rejoinder/replication cannot be permitted for introducing pleas which are not consistent with the earlier pleas.

In State of Rajasthan Vs. Mohammed Ikbal, 1998 DNJ (Raj.) 275, the Court considered its earlier judgments in M/s Ajanta Enterprises (supra) and M/s Gannon Dunkerley & Co. Ltd. Vs. Steel Authority of India Ltd., Rourkela, AIR 1993 Orissa 141, and held that the plaintiff cannot be allowed to introduce new pleas under the garb of filing rejoinder, so as to alter the basis of his plaint. In rejoinder, plaintiff has a right to explain only the additional facts incorporated by the defendant in his

written statement. In rejoinder, plaintiff cannot be permitted to come forward with an entirely new case or raise inconsistent pleas so as to alter his original cause of action.

In Ishwar Lal & Anr. Vs. Ashok & Anr., 1998 (2) RLW 730, the Court held that rejoinder affidavit can be filed only with leave of the Court and it is a matter of judicial discretion vested in the trial court which should be exercised only if there are cogent reasons to allow the plaintiff to file rejoinder to the written statement. In Saiyed Sirajul Hasan Vs. Sh. Syed Murtaza Ali Khan Bahadur & Ors., AIR 1992 Del. 162, the Delhi High Court had held that rejoinder cannot be filed as a matter of right and it is an absolute discretion of the Court to grant leave to present a fresh pleading. A party seeking permission under Order 8 Rule 9 has to provide "cogent reason for permission" to file additional plea.

In M/s Anant Construction (P) Ltd. Vs. Ram Niwas, 1995 (1) Current Civil Cases 154, the Delhi High Court held that a replication to written statement cannot be filed, nor can be permitted to be filed ordinarily much less in routine. The Court has a discretion to permit replication after scrutinizing the plaint and the written statement, if it comes to the conclusion that the plaintiff can be permitted to join specific pleadings to a case, specifically and newly raised in the written statement, and if such a need arises for the plaintiff introducing a plea by way of "confession and avoidance." The Court further held that a mere denial of the defendant's case by the plaintiff need no replication for the reason that he can safely rely on rules of implied or assumed traverse and joinder of issue.

Thus, in sum and substance, the plaintiff cannot be permitted to raise a new plea under the garb of filing rejoinder-affidavit, or take a plea inconsistent to the pleas taken by him in the petition, nor the rejoinder can be filed as a matter of right, even the Court can grant leave only after applying its mind on the pleas taken in the plaint and the written statement.

Leave can be granted by the Court to file replication/ rejoinder on an oral request of petitioner-plaintiff as held in a case reported in 1972 (2) Mys. L.J. 328, for the reason that the provisions of Order 8 Rule 9 C.P.C. do not require any written application.

Order 9, Rule 9 provides no bar for Suit on different cause of action but where a Suit is wholly or partly dismissed in default, the plaintiff cannot

bring a fresh Suit in respect of the same cause of action, but may apply for setting aside the dismissal order and the court being satisfied may set aside the order of dismissal.

Order 9, Rule 13 provides for setting aside the ex parte decree against the defendant. Where a decree has been passed ex parte against a defendant and he applies for setting aside the same, he has to satisfy the court that summons had not been duly served or he was prevented by **sufficient cause** from appearing when the Suit was called on for hearing.

"Sufficient cause" is an expression which is used in large number of Statutes. Its ordinary dictionary meaning is 'adequate' or 'enough', 'any justifiable reason' for which the party could not act. It means the party should not be negligent or want of bona fide cannot be imputed in view of the facts and circumstances of a case or party cannot be alleged 'not acting diligently' or 'remaining inactive.' Facts and circumstances of each case must afford sufficient ground to enable the court to exercise discretion for the reason that when court exercises discretion, it has to be exercised judiciously. (Vide Ramlal & Ors. Vs. Rewa Coalfields Ltd., AIR 1962 SC 361; Sarpanch, Lonand Gram Panchayat Vs. Ramgiri Gosavi & Anr., AIR 1968 SC 222; and Surinder Singh Sibia Vs. Vijay Kumar Sood, AIR 1992 SC 1540).

In Banarsi Das Vs. Dalmia Dadri Cement Co. Ltd., AIR 1959 Pb. 232, the Court held that the word "sufficient" means: 'adequate', 'enough', as much as may be necessary to answer the purposes intended. It embraces no more than that which provides a platitude which when done suffice to accomplish the purpose intended in the light of the existing circumstances and when viewed from reasonable standard of practical and cautious-men.

In Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993 the Court explained the difference between the good cause and the sufficient cause and observed that every sufficient cause must be a good cause and must afford an explanation for non-appearance, nor conversely of a sufficient cause which is not a good one.

In Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee & Ors, AIR 1964 SC 1336, the Hon'ble Apex Court held that the applicant must satisfy the Court that it was prevented by any sufficient

cause from prosecuting its case, and unless the satisfactory explanation is furnished, the Court should not allow the application.

In Brij Indar Singh Vs. Lala Kanshi Ram & Ors., AIR 1917 P.C. 156, it has been observed that true guide for a Court is to exercise the distinction as to whether the applicant acted with reasonable diligence in prosecuting his case.

In Matadin Vs. A. Narayanan, AIR 1970 SC 1953, the Hon'ble Apex Court held that in order to determine as to whether there was a sufficient cause for the non-appearance, which required to be examined either the mistake was bona fide or was merely a device to cover an ulterior purpose.

In State of Bihar & Ors. Vs. Kameshwar Prasad Singh & Anr., AIR 2000 SC 2306, the Court held that while considering as to whether there was a sufficient cause, the Court must bear in mind the object of doing substantial justice to all the parties concerned and the technicalities of law should not prevent the Court from doing substantial justice and doing away the illegality perpetuated on the basis of the impugned judgment.

In Madanlal Vs. Shyamlal, AIR 2002 SC 100; Davender Pal Sehgal Vs. Pratap Steel Rolling Mills (P) Ltd., AIR 2002 SC 451; and Ramnath Sao alias Ram Nath Sao & Ors. Vs. Gobardhan Sao & Ors., AIR 2002 SC 1201, the Hon'ble Apex Court has observed that the expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case, no strait-jacket formula is possible.

Order 10, Rules 1A, 1B and 1C provide for procedure and for alternative forum for resolving the dispute as required under Section 89 of the Code.

Order 11, Rule 21 deals with discovery and inspection. It deals with the discovery of interrogatories and further empowers the court to dismiss the Suit for want of prosecution of the order passed by the court and in case defendant fails to comply with the order of the court, its defence may be struck out and where an order under this rule has been passed, the plaintiff is precluded to bring a fresh Suit on the same cause of action.

Order 13, Rule 2 deals with the production of documents. However, the earlier provision had been deleted by the Amendment Act, 1999 which provided to produce the documents in a particular manner explaining the court as to how the documents could not be produced at earlier stage.

Order 14, Rule 1 deals with the settlement of issues and determination of Suits on issues of law or on issues agreed upon.

It provides how the issues are to be framed. There may be certain cases where issues have not been framed, but parties knew what was the controversy, and lead the evidence. In such a case, it cannot be held that trial has not been conducted in accordance with law.

In Siddik Mahomed Shah Vs. Mt. Saran & Ors., AIR 1930 PC 57, the Privy Council considered the scope of relying upon the evidence led on one issue to determine the other issue when the second issue had not been properly framed. The Privy Council held that generally it is not permissible to rely upon such an evidence in absence of factual foundation, but such a rule would not apply to a case where parties went to trial with the knowledge that a particular question was in issue, though no specific issue had been framed thereon and adduced evidence relating thereto.

In Nedunuri Kameswaramma Vs. Sampati Subba Rao, AIR 1963 SC 884, the Hon'ble Supreme Court considered the case where all the issues had not been framed and the issues which had been framed, could have been framed more elaborately, and held as under:-

> "Since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those by the other side, it cannot be said that the absence of an issue was fatal to the case, or that there that was mis-trial which vitiates proceedings. We are, therefore, of opinion that the Suit could not be dismissed on this narrow ground and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion."

Similar view had been reiterated by the Hon'ble Supreme Court in Nagubai Ammal Vs. B. Shama Rao, AIR 1956 SC 593; and Sayeda Akhtar Vs. Abdulahad, (2003) 7 SCC 52. Similarly, in Kunju Kesavan Vs. M.M. Philip & Ors., AIR 1964 SC 164, the Hon'ble Supreme Court observed as under:-

> "The parties went to trial, fully understanding the central fact whether the succession as laid down to the Ezhava Act applied to Bhagwathi Valli or not. The absence of an issue, therefore, did not lead to a mis-trial sufficient to vitiate the decision."

In Kali Prasad Agarwalla Vs. M/s Bharat Coking Coal Ltd. & Ors., AIR 1989 SC 1530, the Apex Court held that where the parties going to trial with full knowledge of what they had to prove and adduce evidence in support of respective claims, the plea cannot be entertained that in absence of proper pleadings, evidence cannot be looked into. In Bakshi Lochan Singh & Ors. Vs. Jathedar Santokh Singh & Ors., AIR 1971 Del. 277, the Division Bench of the Delhi High Court observed as under:-

> "We do not find any substance in the complaint of the appellants that issues were not framed in the Suit. The object of framing issues in a Suit is to determine the rival contentions of the parties so that the Suit may proceed with respect to those contentions. The appellants have not pointed out to us any contention raised by them in the written statement which has not been dealt with by the learned Single Judge. That being so, the absence of issues cannot be said to have prejudice the appellants."

It is settled proposition of law that the validity of an order is to be tested on the touch-stone of doctrine of prejudice. (Vide Janki Nath Sarangi Vs. State of Orissa, (1969) 3 SCC 392; K.L. Tripathi Vs. State Bank of India, AIR 1984 SC 273; Maj. G.S. Sodhi Vs. Union of India,

AIR 1991 SC 1617; Managing Director, ECIL, Hyderabad & Ors. Vs. B. Kanunakar & Ors., (1993) 4 SCC 727; Krishan Lal Vs. State of J&K, (1994) 4 SCC 422; State Bank of Patiala & Ors. Vs. S.K. Sharma, (1996) 3 SCC 364; S.K. Singh Vs. Central Bank of India & Ors., (1996) 6 SCC 415; and State of U.P. Vs. Harendra Arora & Anr., AIR 2001 SC 2319.

In Smt. Kaniz Fatima Vs. Shah Naib Ashraf, AIR 1983 All. 450, the Allahabad High Court has taken the view that non-framing of issues on questions and recording findings thereon and passing decree on such findings is not permissible in law and further held that non-framing of issue on certain pleas raised by the parties and finding recorded on such plea cannot be made foundation of decision on any other plea merely because evidence had been led by the parties on former pleas. While recording the aforesaid proposition of law, the Court placed reliance upon its earlier Division Bench judgment in Jagannath Prasad Bhargava Vs. Lala Nathimal, AIR 1943 All. 17, wherein the Court had held as under:-

> "It is very obvious legal principle that there should be no decision against a person who has not had an opportunity of being heard upon the point which is to be decided."

The Court further placed reliance upon the judgment of Oudh Court in Mt. Aliya Begam & Ors. Vs. Mt. Mohini Bibi & Ors., AIR 1943 Oudh 17; Ganno Vs. Srideo Sidheshwar, 1902 ILR (2) Bom. 360; and Haridas Mundhra Vs. Indian Cable Co. Ltd., AIR 1965 Cal. 369 and held that it was the duty of the Court to frame issues even if the counsel for the parties or the party did not insist for it as refusal by the counsel for a party to help in framing of issues did not absolve the Court from framing the issue unless it is satisfied that the defendant did not want to make any defence.

However, in Dharamshala Agwar Sukhla & Ors. Vs. Sanatan Dharam Sabha (Regd), Barnala & Ors., AIR 1985 NOC 79, the Punjab & Haryana High Court held that non-framing of issues, where the parties were fully aware of real dispute and they lead evidence thereon, the finding recorded by the Court cannot be held to have vitiated.

A similar view has been reiterated in Sayeda Akhtar Vs. Abdul Ahad, (2003) 7 SCC 52.

Order 14, Rule 2 requires the court to dispose of a case on a preliminary issue.

In Smt. Tara Devi Vs. Sri Thakur Radha Krishna Maharaj, AIR 1987 SC 2085, the Hon'ble Supreme Court considered a case as to whether the valuation made by the plaintiff himself is taken to be correct on its face value and proceed with the trial. The Apex Court held that the court fee has to be paid in view of the provisions of the Court Fee Act, 1870 and the valuation by the plaintiff is ordinarily to be accepted; however, plaintiff does not have any absolute right or option to place any valuation whatsoever on such relief and where the plaintiff manifestly and deliberately under-estimates the relief, the Court is entitled to examine the correctness of the valuation given by the plaintiff and to revise the same if it is patently arbitrary or unreasonable. While deciding the said case, the Hon'ble Supreme Court placed reliance upon its earlier judgments in Sathappa Chettiar Vs. Ramanathan Chettiar, AIR 1958 SC 245; and Meenakshisundaram Chettiar Vs. Venkatachalam Chettiar, AIR 1979 SC 989.

In M/s Commercial Aviation & Travel Company & Ors. Vs. Mrs. Vimla Pannalal, AIR 1988 SC 1636, reiterating the same view, the Hon'ble Supreme Court held that the Court must accept plaintiff's valuation tentatively unless it is found demonstratively arbitrary. The Court observed as under:-

> "But there may be cases under Section 7 (iv) (of the Court Fee Act, 1870 and the Suit Valuation Act, 1887) where certain positive objective standard may be available for the purpose of determination of the valuation of the relief. If there be materials or objective standards for the valuation of the relief, and yet the plaintiff ignores the same and puts an arbitrary valuation, the Court, in our opinion, is entitled to interfere under O. VII, Rule 11 (b) of the Code of Civil Procedure, for the Court will

be in a position to determine the correct valuation with reference to the objective standards or materials available to it. .....in such a case, the Court would be competent to direct the plaintiff to value the relief accordingly..... The plaintiff will not be permitted to put an arbitrary valuation de hors such objective standards or materials..... The plaintiff cannot choose a ridiculous figure for filing the Suit most arbitrarily where there are positive materials and/or objective standards of valuation of the relief appearing on the face of the plaint."

In Abdul Hamid Shamsi Vs. Abdul Majid, AIR 1988 SC 1150, the Hon'ble Supreme Court considered a case under the provisions of the Court Fee Act and the Suit Valuation Act and held as under:-

"If a plaintiff chooses whimsically a ridiculous figure, it is tantamount to not exercising his right in this regard. In such a case it is not only open to the Court but it is its duty to reject such a valuation. The cases of some of the High Courts, which have taken a different view, must be held to be incorrectly decided."

Same view has been taken by the Calcutta High Court in Nalini Nath Mallik Thakur Vs. Radhashyam Marwari & Ors., AIR 1940 Cal. 482; and Patna High Court in Kishori Lal Marwari Vs. Kumar Chandra Narain Deo, AIR 1939 Pat. 572.

In Smt. Cheina & Ors. Vs. Nirbhay Singh, 1997 (1) RLW 688, the Court examined the scope of the provisions of O. 7 R. 11 of the Code and observed that if an objection is raised and the application under O. 7 R. 11 is filed, the Court is bound to decide such an application and if it appears to the Court that the valuation of the Suit is ex facie arbitrary or absurd and if the Court, after determination, comes to the conclusion that the Suit had been under-valued, it must direct the valuation to be amended or court fees to be paid in accordance with such valuation.

Only in exceptional circumstances where it is not possible to determine the correctness of the valuation without taking evidence, the Court may not reject the plaint but keep the question open to be tried in the Suit. The Court further held that even if the application under O. 7 R. 11 of the Code has not been filed but valuation of the Suit has been objected in the written statement, as it is a pure question of law, the Court must treat it as a preliminary issue and decide it as such at the initial stage. Similar view has been taken in Jagdish Rai & Ors. Vs. Smt. Sant Kaur, AIR 1976 Del. 147; and Resham Lal & Ors. Vs. Anand Sarup & Anr., AIR 1974 P&H 97.

In Gauri Shanker Vs. Pukh Raj & Ors., 1989 (1) RLW 195, this Court has held that an issue as to the jurisdiction of the court depending upon the valuation of the subject matter of the Suit, has to be tried as a preliminary issue.

In Panna Lal Vs. Mohan Lal & Ors., AIR 1985 Raj. 178, the Court examined a similar issue under the Rajasthan Court Fee & Suit Valuation Act, 1961 and held that if the defendant pleads in his written statement that the subject matter of the Suit has not been properly valued, or that the court fees paid is not sufficient, questions arising on such plea shall be taken and decided before hearing of the Suit as contemplated by O. 14 of the Code. The Court further held that in Section 11 (2) of the Code, the Legislature has employed the word "plead" and it has further been provided therein that all question arising out of such "pleas" shall be heard and decided before the hearing of the Suit as contemplated by O. 6 R. 1 of the Code.

In Ratan Lal Vs. Roshan Lal & Ors., 1986 RLR 248, the Court, in a case similar to the case in hand, held that for the purpose of Rajasthan Court Fee & Suit Valuation Act, 1961, in a Suit for pre-emption, valauation should be on consideration for sale which pre-emptor seeks to avoid. The Court held that if the pre-emptor wants to avoid 'sale' and not 'consideration', the Suit should be valued on amount of consideration of sale mentioned in sale-deed or on market value of the property, whichever is less.

In Maj. S.S. Khanna Vs. Brig. F.J. Dillon, AIR 1964 SC 497, the Hon'ble Supreme Court considered the issue regarding the maintainability of a Suit and held as under:-

"Under O. 14 R. 2 of the Code, where issues, both of law and of facts, arise in the same Suit and the court is of the opinion that the case or any part thereof may be disposed of on the issue of law only, it shall try those issues first, and for that purpose, may, if it thinks fit, postpone the settlement of issues of facts until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of facts may be exercised only where in the opinion of the court, the whole Suit may be disposed of on the issues of law alone. But the Code confers no jurisdiction upon the court to try the Suit on mix issues of law and facts as preliminary issues. Normally, all the issues in a Suit should be tried by the court, not to do so, specially when the decision on issues even of law depends upon the decision of issues of facts will result in a lope-sided trial of the Suit."

It may be pertinent to mention here that preliminary issue, which was sought to be tried first, was as to whether the Suit was not maintainable and the plaintiff was not entitled to institute as alleged in paragraphs Nos. 15, 16, 17 and 18 of the written statement ? Thus, it was not one of the issues for the decision of which the plaint had to be rejected. It was an issue of maintainability of Suit on the objections raised by the defendants.

In Amir Chand Vs. Harji Ram & Ors., 1986 RLR 985, the Court held that any issue of law, determination of which would dispose of the Suit itself, must be decided as the preliminary issue and in case the trial court has refused to do so, it would amount to committing material irregularity in exercise of its jurisdiction and the revisional court must exercise its power and direct the trial court to decide the same as a preliminary issue.

Order 16 empowers the court to summon the witnesses and can force the witnesses to appear in court.

Order 17, Rule 1 empowers the court to adjourn the case from time to time. However, by Amendment Act, 1999 its provisions have been amended not to give adjournment to a party more than 3 times during the hearing of the Suit, and for that purpose, cost may also be imposed.

Seeking unnecessary adjournment on non-existent grounds with the oblique motive to delay the trial of the Suit, "are instances of contumacious conduct, tending to interfere with administration of justice, inviting action of contempt." ('Vide Ramji Lal Sharma Vs. Civil Judge, Allahabad & Ors., AIR 1988 All. 143).

Tendency to procrastinate proceedings by seeking adjournment deserves deprecation but at the same time sufficiency of reasons for seeking adjournment requires to be examined. (Vide Surendra Kumar & Anr. Vs. Rajendra Kumar Agarwal, AIR 1990 All. 49).

Undoubtedly, taking unnecessary adjournments causes problems to the Court and inconvenience to the other party, but courts should adopt an attitude not to penalize the party on that count. More so, procedural ill can be adequately compensated in terms of costs. (Vide K. Patel Chemo Pharma P. Ltd. & Ors. Vs. Laxmibai Ramchandra Iyer & Ors., 1993 (Supp) 2 SCC 174; and Chief General Manager, Telecom & Anr. Vs. G. Mohan Prasad & Ors. (1999) 6 SCC 67.

In Om Prakash Sharma & Ors. Vs. Ram Dutt and Anr., 1999 DNJ (Raj.) 21, the Court has taken a view that while considering the application of such a nature, the Court must examine the nature of the Suit as well as the facts and circumstances of the case.

In State Bank of India Vs. Kumari Chandra Govindji, (2000) 8 SCC 532, the Hon'ble Supreme Court considered the scope of Order 17 Rule 1 of the Code of Civil Procedure and observed as under:-

> "In ascertaining whether a party had reasonable opportunity to put forward his case or not, one should not ordinarily go beyond the date on which the adjournment is sought for. The earlier adjournment, if any, granted would certainly be for reasonable ground and that

aspect need not be once again examined if on the date on which adjournment is sought for the party concerned has a reasonable ground. The mere fact that in the adjournments had been sought for could not be of any materiality. If the adjournment had been sought for on flimsy grounds, the same would have been rejected."

Adjournment cannot be sought as a matter of right; not even on the ground that the counsel has no instruction from his client (Vide Mary Alvares Vs. Roy Alvares (2004) 9 SCC 578.

Order 18, Rules 3A, 3B, 3C and 3D have been introduced by amendment permitting the party to submit the written arguments in support of his case and shall form the part of the record, and empower the Court to fix time limit for oral arguments by either of the parties in a case as it thinks fit.

Order 18, Rules 4 and 5- These provisions have been amended by Amendment Act, 1999 providing to record the examination-in-chief of the parties on affidavit. Different High Courts have taken a different view. However, the Hon'ble Supreme Court in Ameer Trading Corporation Limited Vs. Shapoorji Data Processing Ltd., (2004) 1 SCC 702 explained that under Rules 4 and 5 wherever the evidence of a witness is recorded, his examination-in-chief can be dispensed with taking his evidence on affidavit.

Order 18, Rule 17-A which dealt with the production of evidence, not previously known, for which, could not be produced despite due diligence, stood deleted by amendment.

Order 18, Rule 19 had been brought by amendment, conferring the power upon the Court to record evidence on commission.

Order 19 Rule 2- The court may enforce the attendance of deponent in any affidavit for cross-examination.

It is settled legal proposition that affidavit is not an evidence within the meaning of Section 3 of the Evidence Act as held by the Courts in Prakash Rai Vs. J.N. Dhar, AIR 1977 Del 73; Radha Kishan Vs. Navratan Mal Jain & Anr., AIR 1990 Raj. 127; S. Sukumar Vs. Spl. Commissioner of Commercial Taxes, Madras, AIR 1991 Mad. 238;

and M/s Glorious Plastics Ltd. Vs. Laghate Enterprises & Ors., AIR 1993 Bom 224.

In Sudha Devi Vs. M.P. Narayanan & Ors., AIR 1988 SC 1381, the Hon'ble Supreme Court held that affidavits are not included in the definition of "evidence" in Section 3 of the Evidence Act and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under O. 19 Rr. 1 & 2 of the Code. Similar view has been reiterated in Range Forest Officer Vs. S.T. Hadimani, AIR 2002 SC 1147, wherein the Apex Court held that filing of an affidavit only of his own statement in his favour cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion of a particular fact-situation.

A Division Bench of the Allahabad High Court, in Khushi Ram Dedwal & Anr. Vs. Additional Judge, Small Causes Court/ Prescribed Authority, Meerut & Ors., 1998 (1) RCJ 315, considered the scope of application of O. XIX of the Code in an application under the Rent Control Act and held that cross-examination of a deponent must be refused if found not necessary and would only hamper the expeditious disposal of the case. The Court held as under:-

> "The principle that a party is to be permitted to cross-examine on the principle of natural justice cannot be accepted in every case. Oral examination in all cases is not contemplated. Even in disciplinary inquiries in exceptional cases oral evidence may not be insisted upon as held in Hira Nath Mishra Vs. Principal, Rajendra Medical College, AIR 1973 SC 1260, and State of Haryana Vs. Rattar Singh, AIR 1977 SC 1512. If a party wants to cross-examine, he has to give the necessary facts in the application as to why the cross-examination is necessary. The Prescribed Authority will give the reasons either for allowing or refusing the cross-examination. The reasons disclosed in the order of the Prescribed

> Authority will show whether he acted fairly or not. Considering every aspect of the matter the authority under the provisions of U.P. Act No. 13 of 1972 can permit the cross-examination of a deponent of an affidavit only when it is necessary in the case."

In Ganpat Singh & Anr. Vs. Ashok Kumar & Ors., 2000 (1) WLC 499, this Court again reiterated the law laid down in Smt. Sudha & Ors. (supra) observing as under:-

> ".....two conditions are necessary for grant of permission under Order 19 Rule 2 C.P.C. The first is that the application should be bona fide which means that it should be supported by sufficient and cogent reasons and the second is that the Court should be satisfied that permitting the cross-examination of the deponent was necessary in the interest of justice. It is obvious that for the purpose coming to the conclusion whether it is necessary or not necessary to allow the permission of cross-examination the deponent of an affidavit, it is the court concerned and none else which has to arrive at an independent conclusion."

In Chotu Khan Vs. Abdul Karim, AIR 1991 Raj. 119, the Court had considered the scope of provisions of O. 19 Rr. 1 and 2 of the Code placing reliance upon large number of its earlier judgments including Sultan Khan Vs. Brij Mohan, 1970 RLW 74 and came to the conclusion that the said provisions make it abundantly clear that the Court may order the attendance of deponent for cross-examination and the said provisions do not empower the Court to issue process to enforce the attendance of the deponent. The Court further held that if a party fails to produce the deponent of the affidavit filed by him for cross-examination, affidavit of the deponent failing to attend the Court must be ignored.

In Sultan Khan (supra), this Court observed as under:-

> "On the other hand, if the provision contained in O. 19 R. 2 C.P.C. is taken to mean compulsion and as a rule cross-examination is allowed in interlocutory proceedings, there would be invariably considerable delay in the disposal of the same and it is very likely that in number of cases the delay involved may defeat the object of the application..... These considerations lean in favour of giving the word 'may' its ordinary meaning in this rule, i.e., implying a discretion..... It is in the discretion of the Court to order the attendance of the deponents for their cross-examination on the affidavits filed by them."

A Division Bench of the Rajasthan High Court in Ram Swaroop & Ors. Vs. Bholu Ram, AIR 1991 Raj 56, considered the scope of application of O. 19 while considering the application under O. 39 Rr. 1 and 2 for grant of temporary injunction and held as under:-

> "Apart from the principles of natural justice, having regard to the statutory provisions contained in Section 30 and O. 19 Rr. 1 and 2 C.P.C. read with O. 39 R. 1, we are of the view that the Court possesses power to call the deponent for cross-examination when an affidavit has been filed in support of an application under O. 39 R. 1 C.P.C.."

While deciding the said case, this Court placed reliance upon large number of judgments, including Kanhaiyalal S. Dadlani, Supdt. Central Excise, Nagpur Vs. Meghraj Ramkaranji, AIR 1954 Nag. 260, wherein the view has been taken that expression "any application" in O. 19 R. 2 of the Code would include any application under the Code, since the Code does not define the word "application" nor does it make any distinction between one application and another. Similar view has been reiterated in Shib Sahai Vs. Tika, AIR 1942 Oudh 350, holding as under:-

"A perusal of this rule leaves no doubt that it is open to a Court on sufficient ground to allow proof of facts by means of affidavit, but if the production of the declarant of the affidavit is required in good faith for cross-examination by any party, the Court shall not use such affidavit in support of facts alleged therein without the production of the declarant. Rule 2 of Order 19 C.P.C. puts the matter further beyond doubt. This rule is to the effect that upon any application, evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent."

In Pijush Kanti Guha Vs. Smt. Kinnori Mullick, AIR 1984 Cal 184, the Calcutta High Court considered the scope of application elaborately under O. XIX of the Code, while considering the application for temporary injunction, and held that there is a discretion left with the Court and no party can claim an absolute right to call the declarants of the affidavits for cross-examination, but it has to be determined on the facts of each case.

In Ranjit Ghosh Vs. Hindustan Steel Ltd., AIR 1971 Cal 100, the Court held that while deciding interlocutory applications, where the affidavits form sheet-anchor and facts are being tried to be proved by affidavits, the other party may be given an opportunity to meet the contents thereof, otherwise the order would stand vitiated being passed in "non-conformance to the procedure established by law."

In Abdul Hameed Khan Vs. Mujeed-Ul-Hasan & Ors., AIR 1975 All 398, it was held that if contents of affidavits are contradicted, the Court may summon the deponents of the affidavits for cross-examination.

While examining a case under the provisions of the Industrial Disputes Act, 1947, the Hon'ble Supreme Court, in M/s Bareilly Electricity Supply Co. Ltd. Vs. The Workmen & Ors., AIR 1972 SC 330, considered the application of O. 19 Rr. 1 and 2 of the Code and observed as under:-

"But the application of principles of natural justice does not imply that what is not evidence, can be acted upon. On the other hand, what it means is that no material can be relied upon to establish a contested fact which are not spoken to by the persons who are competent to speak about them and are subject to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal, the question that naturally arises is : is it a genuine document, what are its contents and are the statements contained therein true..... If a letter or other document is produced to establish some fact which is relevant to the inquiry, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accordance with the principles of natural justice as also according to the procedure under O. 19 of the Code and the Evidence Act, both of which incorporate the general principles."

In Needle Industries (India) Ltd. & Ors. Vs. N.I.N.I.H. Ltd. & Ors., AIR 1981 SC 1298, the Hon'ble Apex Court considered the case under the Indian Companies Act and observed that " it is generally dissatisfactory to record a finding involving grave consequences to a person on the basis of affidavits and documents without asking that person to submit to cross-examination." unless the parties have agreed to proceed with the matter on the basis of affidavits only.

In Ramesh Kumar Vs. Kesho Ram, AIR 1992 SC 700, the Hon'ble Supreme Court considered the scope of application of provisions of O. 19 Rr. 1 and 2 in a Rent Control matter, observing as under:-

"The Court may also treat any affidavit filed in support of the pleadings itself as one

under the said provisions and call upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross-examination, may have recourse to that procedure."

Order 21, Rule 1 deals with the execution of decree and orders, and the payment under the decree.

Order 22 deals with substitution of legal representatives and abatement of proceedings.

Order 22, Rule 4 deals with the procedure in case of death of one or several defendants or sole defendant and fixes the period of limitation to bring an application for substitution of legal representatives of the deceased defendant, failing which proceedings would stand abated. In case there are several defendants and only one dies, the proceedings would not abate qua the other defendants.

Order 22, Rule 6 is an exception as it provides that there shall be no abatement of the proceedings in case the death occurs of either of the parties where the cause of action survives or not after the hearing of the case stands concluded. However, the judgment has not been pronounced, and in such a case, it cannot be held that the judgment is in favour of a dead person.

It is settled law that once after hearing the arguments in a case judgment is reserved, no application can be entertained. (Vide Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993; N.P. Thirugnanam (D) Lrs. Vs. Dr. R. Jagan Mohan Rao & Ors., AIR 1996 SC 116; Neki Vs. Satnarain, AIR 1997 SC 1334).

Order 23, Rule 1 deals with withdrawal and adjustment of Suits. It permits a person to withdraw the Suit, but he shall not be entitled to maintain another Suit unless he has taken the leave of the Court while withdrawing the earlier Suit.

The Hon'ble Supreme court time and again held that even if the earlier writ petition has been dismissed as withdrawn, Public Policy, which is reflected in the principle enshrined in order XXIII Rule 1 C.P.C., mandates that successive writ petition be not entertained for the same relief.

In Hulas Rai Baij Nath Vs. Firm K.B. Bass & Co., AIR 1968 SC 111, the Apex Court considering the provision of Order XXII, Rule 1 of C.P.C., and particularly, sub-rule (3) thereof in crystal clear words held that where plaintiff withdraws from a suit without the permission of the Court to file a fresh, he is precluded from instituting a fresh suit in same subject matter against the same parties.

In Sarguja Transport Service Vs. State Transport, AIR 1987 SC 88, the Hon'ble Apex Court held as under:-

> ".....The principle underlying R.1 of O. XXIII of the Code, is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or **by withdrawing it without the permission of the Court to file fresh suit.** Invito beneficium non datur. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of R. 1 O. XXIII. The principle underlying the above **rule is founded on public policy,** but it is not the same as the rule of res judicata contained in S. 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim,

litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of R. 1 of O. XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court.....

.....It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition....."

In M/s. Upadhyay & Co. Vs. State of U.P. & ors., AIR 1999 SC 509, the Apex Court has emphasized to apply the principle enshrined under Order XXIII Rule 1 C.P.C., being based on public policy, in all the Courts' proceedings. The Apex Court held that the principle was applicable also in case of filing the special leave petition before the Apex Court under Article 136 of the Constitution. It was further clarified by the Court that liberty to

file a fresh can be granted only in certain contingencies as provided under the said provision.

A Division Bench of this Court in Khacher Singh Vs. State of U.P. & ors., AIR 1995 All 338, considered the issue at length and interpreted the provisions of Rule 7 of Chapter XXII of the Allahabad High Court Rules, 1952 which bar the filing of the second writ petition on the same cause of action and held that the second petition for the same cause of action not to be maintainable. Other Division Benches in L.S. Tripathi Vs. Banaras Hindu University & ors., (1993) 1 UPLBEC 448; and Saheb Lal Vs. Assistant Registrar (Administration), Banaras Hindu University, Varanasi & ors., (1995) 1 UPLBEC 31, held that filing successive writ petitions for the same cause of action is not only against the public policy, but also amounts to abuse of the process of the Court.

Similar view has been reiterated by the Division Bench of the Delhi High Court in S. Jaswant Singh (deceased by L.Rs.) Vs. S. Darshan Singh (deceased by L.R.) & ors., AIR 1992 Del 80.

A Division Bench of Rajasthan High Court in Radhakrishna & anr. Vs. State of Rajasthan & ors., AIR 1977 Raj 131, observed that undoubtedly, the Code of Civil Procedure does not apply to the writ jurisdiction, but the principles enshrined in its provision can be made applicable so far as they are in consonance with the rules framed by the High Court or where the rules are silent and applying the provisions of Order XXIII, Rule 1 in writ jurisdiction as similar provisions existed in the Rajasthan High Court Rules putting an embargo to file a successive writ petition for the same cause of action, observed that the Court can permit a party to withdraw the petition with liberty to file a fresh one, but that power is **subject to the conditions prescribed** in the provisions of Order XXIII, Rule 1 of the Code and not beyond it.

In Baniram & ors. Vs. Gaind & ors., AIR 1982 SC 789, the Apex Court held that permission to withdraw a case with liberty to file afresh on the same cause of action can be granted provided it is in the interest of justice or advances the cause of justice.

The right to withdraw a suit or abandonment of the whole or a part of claim is not absolute. Such right cannot be exercised to abuse the process of the Court or play fraud upon the party as well as upon the Court. Therefore, it is necessary that if a person wants to approach the Court again, he must

seek liberty of the Court to file a fresh petition. Even the Court cannot grant a permission to withdraw a petition straightway, as it has to consider and examine as to whether any right has been accrued in favour of any other person.

While considering the oral prayer or application for withdrawal of a petition the Court has to bear in mind that the act of the party should not be to defeat a right accrued in favour of any other person or the prayer was to over reach the Court. However, the prayer may be granted in order to remove the public inconvenience or when the petitioner does not want to press the petition. (Vide Shaik Hussain & Sons Vs. M.G. Kanniah & anr., AIR 1981 SC 1725; and Smt Madhu Jajoo Vs. State of Rajasthan & ors., AIR 1999 Raj 1).

Order XXIII, Rule 1 of the Code does not confer an unbridled power upon the Court to grant permission to withdraw the petition, with liberty to file afresh, on the same cause of action; it can do so only on the limited grounds mentioned in the provision of Order XXIII, Rule 1 of the Code, and they are, when the Court is satisfied that the suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject matter, and that too, on such term as the Court thinks fit. The grounds for granting a party permission to file a fresh suit, including a formal defect, i.e., in the form or procedure not affecting the merit of the case, such as also of statutory notice, under Section 80 of the Code, mis-joinder of the parties or cause of action, non-payment of proper Court-fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject matter of the suit, absence of territorial jurisdiction of the Code or defect in prayer clause etc. Non-joinder of a necessary party, omission to substitute heirs etc may also be considered in this respect, or where the suit was found to be premature, or it had become infructuous, or where relief could not be, and where the relief even if granted, could not be executed, may fall within the ambit of sufficient ground mentioned in that provision. (Vide Ms. Kankan Trading Co. Vs. Suresh Govind Kamath Tarkas & Ors., AIR 1986 SC 1009; Muktanath Tewari & Anr. Vs. Vidyashanker Dube & Ors., AIR 1943 All 67; and Ramrao Bhagwantrao Inamdar & Anr. Vs. Babu Appanna Samage & Ors., AIR 1940 Bom. 121 (F.B.)).

The Court can grant such permission even suo motu without any application. The granting of permission to withdraw a suit with liberty to file a fresh suit removes the bar of res judicata; it restores the plaintiff to the position, which he would have occupied had he brought no suit at all.

Order 23, Rule 3 provides for compromise of a Suit. However, consent decree cannot be passed in contravention of the law.(Vide Nagindas Ramdas Vs. Dalpatram Iccharam alias Brijram & Ors., AIR 1974 SC 471; C.F. Angadi Vs. Y.S. Hirannayya, AIR 1972 SC 239; State of Punjab & Ors. Vs. Amar Singh & Anr., AIR 1974 SC 994; and Smt Nai Bahu Vs. Lala Ramnarayan, AIR 1978 SC 22).

However, in the proceedings under Order 23, Rule 1, third party's right cannot be set at naught by a consent order. (Vide Ram Chndra Singh Vs. Savitri Devi, (2003) 8 SCC 319).

Where a decree is passed on compromise of the parties, it can still be said to be a judgment and decree on facts and the Court has a power to make changes in the compromise agreement. It is binding on the parties. (Vide Jineshwardas Vs. Jagrani, AIR 2003 SC 4596; Rajasthan Financial Corporation Vs. Man Industrial Corporation Ltd., (2003) 7 SCC 552; Dr. Renuka Datla Vs. Solboy Pharmaceutical Y.B., (2004) 1 SCC 149; and Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai, AIR 2004 SC 1815).

Order 26 deals with commission and commissions to examine witnesses.

Order 26, Rule 4-A has been inserted by Amendment Act, 1999. It empowers the court that in order to have a expeditious disposal of a case, the court can issue the commission of any person residing within the local limits of its jurisdiction and evidence so recorded shall be read in evidence. It may be necessary in case of recording of the evidence of a person who is not capable to come to the court.

Order 37 deals with summary procedure. **Rule 4** thereof, provides a power to set aside the decree in summary proceedings. Because of the involvement of petty matters they are tried summarily, if defendant satisfies the court that it could not defend it properly or could not remain present and a decree is passed.

Provisions in O. 37 R. 4 of the Code provide for "special circumstance." In Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas, AIR 1965 SC 1144, the Supreme Court held that once an application under O. 37 R. 4 of the Code is filed, the existence of "special grounds" is required to be there to set-aside the judgment and decree and in view of the specific provisions thereof, the provisions of Section 151 of the Code are not attracted.

"Special circumstances" means something of higher gravity than 'sufficient cause', something beyond control of the person concerned or absolutely unavoidable circumstance. Thus, it is not synonymous with sufficient cause.

In L.R. Raja Vs. Sha Rikhabdas Suresh Kumar, 1986 MLJ 108, while considering the case under O. 37 R. 4 of the Code, the Madras High Court held as under:-

> "In invoking O.37 R.4, the defendant will have to satisfy two conditions; viz (1) there was no due service of summons in the Suit or that he was prevented by sufficient cause from getting leave to defend the Suit and (2) that he has a substantial defence to raise in the Suit. Special circumstances mentioned in O.37 R.4 only contemplate the aforesaid conditions which the defendant must satisfy to entitle him to have the decree set aside and get leave to defend the action."

In Subash Raina Vs. Suraj Parkash, AIR 1977 J&K. 30, a similar view has been reiterated and it was held that "special circumstance" is not synonymous with the "sufficient cause" occurring in O.9 R.13 of the Code.

In Karumilli Bharathi Vs. Prichikala Venkatachalam, AIR 1999 A.P. 427, the Andhra Pradesh High Court considered a similar provision and reiterated the same view holding that there is a distinction in "sufficient cause" and "special circumstances." The Court further observed as under:-

"It is certain for the reasons offered to explain the special circumstances, should be such that a person absolutely had no possibility of appearing before the Court on a relevant day ... ... Thus, a special circumstance would take with it a cause 'or' reason which prevented a person in such a way, that it is almost difficult for him to attend the Court or to perform certain acts which he is required to do. Thus, the reason 'or' cause found in 'special circumstances' is more strict or more stringent than 'sufficient cause'. What would constitute a special circumstance would depend upon facts of each case."

This Court in Mohan Lal Vs. Om Prakash, AIR 1989 Raj. 132 also considered the issue and observed as under:-

"Under R. 13 of O. 9, the Court has power to set aside the ex parte decree if the defendant succeeds in satisfying the Court that he was prevented by sufficient cause from appearing in the Court. Under R. 4 of O. 37, it is necessary for the defendant to say that special circumstances exist to set aside the decree. Mere sufficient ground cannot be equated with special reason, sufficient cause and 'special circumstances' appearing in R.13 of O. 9 and R. 4 of O. 37 respectively are not synonymous. Legislature in its wisdom has used the words special circumstances in R. 4 of O. 37. The gravity of the reasons is more high in case of 'special circumstances' as provided under R. 4 of O. 37. It will not be out of place here to mention that the words sufficient cause and special reasons carry different meanings. The word cause cannot be

equated with reasons and similarly, the word sufficient cannot be equated with special. Special circumstances ordinarily mean that the defendant was prevented to appear in the Court on account of unavoidable circumstances beyond his control. In special circumstances, I hold that the meaning to the words sufficient cause under R. 13 O. 9 cannot be given to the words used in R. 4 O.37 to the words 'special circumstances'.

Therefore, in view of the above, the party seeking setting-aside the judgment under O. 37 R. 4 is required to satisfy the Court that (i) it had the substantial defence, which could have been allowed to him to get the leave to defend in the Suit; (ii) he could not appear in the matter because of unavoidable circumstances; and (iii) it was absolutely impossible for him to appear as the circumstances had been beyond his control.

In Rajni Kumar Vs. Suresh Kumar Malhotra, AIR 2003 SC 1322, the Apex Court has reiterated the same view explaining the scope of special circumstances.

Order 39, Rules 1 and 2 deals with power to grant interim relief.

In Premji Ratansey Shah Vs. Union of India & Ors., (1994) 5 SCC 547, the Hon'ble Supreme Court held that temporary injunction should be granted by a court after considering all the pros and cons of the case in a given set of facts to protect the possession of a person and the relief of temporary injunction cannot be granted just on merely asking that relief for the reason that such a relief is discretionary and equitable.

In S.M. Dyechem Ltd. Vs. Cadbury (India) Ltd., AIR 2000 SC 2114, the Hon'ble Supreme Court considered the principle governing the grant of temporary injunction, observing that the three basic principles, i.e. prima facie case, balance of convenience and irreparable injury, have to be considered in a proper perspective in the facts and circumstances of a particular case and in case the principles have not been properly applied, the appellate court can interfere in an interlocutory proceeding under O. 39 Rr. 1 and 2 of the Code.

In Anand Prasad Agarwalla Vs. Tarkeshwar Prasad & Ors., AIR 2001 SC 2367, the Hon'ble Supreme Court re-stated the principles for grant of temporary injunction, but observed that it may not be appropriate for any court to hold a mini trial at the stage of grant of temporary injunction. That was a case where the temporary injunction was refused to a person who was in possession of the land.

In Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., AIR 1999 SC 3105, the Hon'ble Supreme Court held as under:-

> "We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunctions are as below:-
>
> (i) Extent of damages being an adequate remedy;
>
> (ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor;
>
> (iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;
>
> (iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case-the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can cannot be compensated otherwise."

In Hindustan Petroleum Corporation Ltd. Vs. Sri Sriman Narayan & Anr., AIR 2002 SC 2598, the Hon'ble Supreme Court explained the purpose of grant of temporary injunction, observing as under:-

"It is elementary that grant of an interlocutory injunction during the pendency of the legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court normally applies the following tests:-

(i) whether the plaintiff has a prima facie case;

(ii) whether the balance of convenience is in favour of the plaintiff; and

(iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

> The discretion whether or not to grant an interlocutory injunction has to be taken at the time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the "balance of convenience" lies. (See Gujarat Bottling Co. Ltd. & Ors. Vs. Coca Cola Co. & Ors., (1995) 5 SCC 545)."

In Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors., (1990) 2 SCC 117, the Apex Court, discussing the principles to be kept in mind in considering the prayer for interlocutory mandatory injunction, observed as under:-

> "The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded

the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm. Courts have evolved certain guidelines. Generally stated these guidelines are:-

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and

> there may be exceptional circumstances needing action, applying them as a pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

It is settled law that even if all the necessary ingredients are established, the court may refuse to grant an interim injunction.

In Mahadeo Savalaram Shelke & Ors. Vs. Pune Municipal Corporation & Anr., (1995) 3 SCC 33, the Hon'ble Supreme Court held that the courts, in cases where injunctions are to be granted, should necessarily consider the effect on public purposes thereof and also Suitably mould the relief.

In National Airport Authority & Ors. Vs. Vijaydutt, AIR 1990 MP 326, it was held as under:-

> "Apart from what has been stated above, relief of temporary injunction is an equitable one and is in the domain of the courts' judicial discretion. Therefore, even where the three well-known conditions (prima facie case, balance of convenience and irreparable injury) requisite for grant of the relief exist, the court, on the facts and in the circumstances of the case, in exercise of its discretion judiciously, may still refuse the relief as where there has been delay and the party applying for the relief has not come with clean hands."

In The Municipal Corporation of Delhi Vs. Suresh Chandra Jaipuria & Anr., AIR 1976 SC 2621, the Hon'ble Supreme Court, while dealing with the provisions of Section 41 (h) of the Specific Reliefs Act, 1963, laid down that injunction, which is a discretionary equitable relief, cannot be granted when an equally efficacious relief is obtainable in any other usual mode or proceeding except in the cases of breach of trust.

In Smt. Chandra Kumari Vs. State of Rajasthan & Ors., 2000 (2) WLC 279, the Court held that temporary injunction in favour of a

person holding title but is not in possession, cannot be granted. This judgment has been passed in consonance with the law laid down by the Hon'ble Supreme Court in Terene Traders Vs. Ramesh Chandra Jamnadas & Co., AIR 1987 SC 1492.

In Sree Jain Swetamber Terapanthi Vid(S) Vs. Phundan Singh & Ors., AIR 1999 SC 2322, the Supreme Court held that it is one thing to conclude that the trial court has not made its prima facie satisfaction on merits but granted temporary injunction and it is another thing to hold that the trial court has gone wrong in recording the prima facie satisfaction.

In Dalpat Kumar & Anr. Vs. Prahlad Singh & Ors., AIR 1993 SC 276, the Hon'ble Supreme Court explained the scope of aforesaid material circumstances, but observed as under:-

> "The phrases 'prima facie case', 'balance of convenience' and 'irreparable loss' are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts rest eloquent and speak for themselves. It is well nigh impossible to find from facts prima facie case and balance of convenience."

In Smt. Vimla Devi Vs. Jang Bahadur, AIR 1977 Raj 196, this court held as under:-

> "The order refusing temporary injunction is of a discretionary character. Ordinarily Court of appeal will not interfere with the exercise of discretion by the trial court and substitute for it its own discretion. The interference with the discretionary order, however, may be justified if the lower court acts arbitrarily or perversely, capriciously or in disregard of sound legal principles or without

considering all the relevant records..... A mere possibility of the appellate court coming to a different conclusion on the same facts and evidence will also not justify interference. ....The appellate court would be acting contrary to the well established principles more so when it does not deal with the reasoning that prevailed with the trial court and further when it does not apply its judicial mind on the materials placed on the record..... A prima facie case implies the probability of the plaintiff obtaining a relief on the materials placed before the court at that stage. Every piece of evidence produced by either party has to be taken into consideration in deciding the existence of a prima facie case to justify issuance of a temporary injunction....."

The interim order should not be passed in favour of a dishonest person or where the Suit is not maintainable at all for the reason that this is the relief in equity and Court should not help a guilty person. Nor interim relief can be granted in favour of a trespasser or a person not in possession. (Vide Nair Service Society Ltd. Vs. K.C. Alexander & Ors., AIR 1968 SC 1165; M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, AIR 1972 SC 2299; Ratiram Pundlik Khedkar Vs. Pundlik Arjun Khedkar, AIR 1982 Bom 79; Kayamuddin Shamsuddin Khan Vs State Bank of India, (1998) 8 SCC 676; K. Bhaskaran Vs. Sankaran Vaidhyan Balen & Anr. (1999) 7 SCC 510; and Hem Chand Jain Vs. Anil Kumar, AIR 1993 Del 99).

In exercise of the power under Order 39, Rule 1 of the Code, injunction can also be passed against the plaintiff, as the last two clauses of the Rule refer to orders of injunction against defendants, whereas the first clause (a) does not confine to application filed by the plaintiffs. The words "by any party to the suit" in the said application are sufficient enough to indicate that the Legislature intended such orders to be passed even on applications filed by the defendants. (Vide Vincent Vs. Aisumma, AIR 1989 Ker 81; Sathyabhama Amma Vs. Vijaya Amma, AIR 1995 Ker 74; and Shiv Ram

Singh Vs. Mangara, AIR 1989 All 164). The purpose for granting temporary injunction is to maintain status quo.

A similar view has been reiterated in Satyam Infoway Ltd. Vs. Sifynet Solutions (P) Ltd., (2004) 6 SCC 145.

The Court should not grant a relief which can be granted at a final stage or which amounts to final relief unless there are special circumstances. Only in extraordinary circumstances Court may be justified in granting a relief at the time of conceding the interlocutory application, but for that reasons must be recorded by the Court, as has been held by the Calcutta High Court in Indian Cable Co. Ltd. Vs. Smt Sumitra Chakraborty, AIR 1985 Cal 248, wherein the Court placed a very heavy reliance upon the judgment in Acrow Limited Vs. Rex Chain Belt, (1971) 3 All ER 1175.

No interim relief amounting to final relief can be granted at the initial stage in the nature of interim relief as the Hon'ble Apex Court has consistently and persistently deprecated such a practice. (Vide State of Jammu & Kashmir Vs. Mohammed Yakoob Khan & Ors., (1992) 4 SCC 167; U.P. Junior Doctors Action Committee & Ors. Vs. Dr. B. Shital Nandwani, 1992 Suppl (1) SCC 680; Gurunanak Deo University Vs. Parminder Kumar Bansal & Anr., AIR 1993 SC 2412; Saint John's Teachers Training Institute (for Women) & Ors. Vs. State of Tamil Nadu & Ors., (1993) 3 SCC 595; Dr. B.S.Kshirsagar Vs. Abdul Malik Mohammad Musa, 1995 Suppl (2) SCC 593; The Bank of Maharashtra Vs. Ray's Shopping and Transport Company Pvt. Ltd., AIR 1995 SC 1368; Commissioner/Secretary, Government of Health & Medical Education Department Vs. Dr. Ashok Kumar Kohli, 1995 Suppl (4) SCC 214; Union of India Vs. Shri Ganesh Steel Rolling Mills, (1996) 8 SCC 347; and State of Madhya Pradesh Vs. M.V.Vyavsaya and Co., (1997) 1 SCC 156).

The logic behind this remains that the ill-conceived sympathy emasculates as interlocutory judgment exposing judicial discretion to criticism to degenerating private benevolence and the Court should not be guided by misplaced sympathy, rather it should pass interim orders making accurate assessment of even the prima facie legal position. The Court should not embrace the authorities under the Statute by taking over the functions to be performed by the Statutory Authorities.

In Union of India Vs. Era Educational Trust, (2000) 5 SCC 57, the Hon'ble Supreme Court after considering its large number of judgments held that while passing the interim order in exercise of writ jurisdiction under Article 226 of the Constitution, principles laid down for granting interim relief under Order 39 of Code should be kept in mind. It can neither be issued as a matter of right nor it should be in the form which can be granted only as final relief.

In Morgan Stanley Mutual Fund Vs. Kartick Das, (1994) 4 SCC 225, the Hon'ble Apex Court held that ex-parte injunction could be granted only under exceptional circumstances. The factors which should weigh for grant of injunction are—(a) whether irreparable or serious mischief will ensue to the plaintiff; (b) whether the refusal of ex-parte injunction would involve greater injustice than grant of it would involve; (c) even if ex-parte injunction should be granted, it should only be for limited period of time; and (d) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court.

In Burn Standard Co. Ltd. & ors. Vs. Dinabandhu Majumdar & Anr., (1995) 4 SCC 172, the Hon'ble Supreme Court deprecated the practice of grant of interim relief which amounts to final relief, observing that High Court should exercise its discretion while granting interim relief reasonably and judiciously, and if loss can be repairable or the loss can be satisfied by giving back wages etc. in the end, if petition ultimately succeeds, it is not desirable that the relief should be granted by interim order. Hon'ble Apex Court further observed as under:-

> "It should be granted only in exceptional circumstances where the damage cannot be repaired, for the reason that if no relief for continuance in service is granted and ultimately his claim.....is found to be acceptable, the damage can be repaired by granting him all those monetary benefits which he would have received and he continued in service. We are, therefore, of the opinion that in such cases it would be imprudent to grant interim relief."

Similar view has been reiterated in A.P. Christians Medical Educational Society Vs. Govt. of A.P., AIR 1986 SC 1490; State of Jammu &

Kashmir Vs. Mohd Yakoob Khan & ors., 1992 (4) SCC 167; U.P. Junior Doctors Action Committee & Ors. Vs. Dr. B. Shital Nandwani, 1992 Suppl (1) SCC 680; Guru Nanak Dev University Vs. Parminder Kumar Bansal & Anr., AIR 1993 SC 2412; Saint John's Teachers Training Institute (for Women) & Ors. Vs. State of Tamil Nadu & Ors., 1993 (3) SCC 595; Dr. B.S. Kshirsagar Vs. Abdul Khalik Mohd Musa, 1995 Suppl (2) SCC 593; The Bank of Maharastra Vs. Race Shipping & Transport Co. (P) Ltd., AIR 1995 SC 1368; Commissioner/Secretary, Government of Health & Medical Education Department Vs. Dr. Ashok Kumar Kohli, 1995 Suppl (4) SCC 214; Burn Standard Co. Ltd. & Ors. Vs. Dinabandhu Majumdar & Anr., AIR 1995 SC 1499; Union of India Vs. Shree Ganesh Steel Rolling Mills Ltd., 1996 (8) SCC 347; State of Madhya Pradesh Vs. M.V. Vyavsaya and Co., AIR 1997 SC 993; Central Board of Secondary Education Vs. P. Sunil Kumar, (1998) 5 SCC 377; Union of India Vs. Era Educational Trust, (2000) 5 SCC 57; Council for Indian School Certificate Examination Vs. Isha Mittal & Anr., (2000) 7 SCC 521; State of U.P. & Ors. Vs. Modern Transport Company, Ludhiana & Anr., (2002) 9 SCC 514; State of U.P. & Anr. Vs. U.P. Rajkiya Nirman Nigam Karmchari Sangharsh Morcha & Ors., JT (2002) 5 SC 322; Union of India & Ors. Vs. M/s. Modiluft Ltd., AIR 2003 SC 2218; Regional Officer, CBSE Vs. Km. Sheena Peethambaran & Ors., (2003) 7 SCC 719; State of U.P. Vs. Ram Sukhi Devi, 2004 AIR SCW 6955.

No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the Suit is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that the suit/writ is found, ultimately, devoid of any merit, shows that a frivolous petition had been filed. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action of the Court. (Vide Dr. A.R. Sircar Vs. State of Uttar Pradesh & Ors., 1993 Suppl. (2) SCC 734; Shiv Shanker & Ors. Vs. Board of Directors,

Uttar Pradesh State Road Transport Corporation & Anr., 1995 Suppl (2) SCC 726; the Committee of Management, Arya Inter College Vs. Sree Kumar Tiwary, AIR 1997 SC 3071; and GTC Industries Ltd. Vs. Union of India & Ors., (1998) 3 SCC 376).

Mandatory injunction should be granted in rarest of the rare cases as it amounts to granting the final relief. It can be passed only to restore status quo and not to establish a new state of things, differing from the state which existed at the date, when the suit was instituted. (Vide Nandan Pictures Ltd. Vs. Art Pictures Ltd. & Ors., AIR 1956 Cal 428; Rajalekshmi Amma & Anr. Vs. Kunjipillai Amma & Ors., AIR 1959 Ker 277; The University of Bihar & Anr. Vs. Rajendra Singh, AIR 1978 Pat 144; Dyneshwar Hari Masurkar Vs. Atmaram Babusso Pednekar & Ors., AIR 1980 Goa 30; U.P. State Electricity Board Vs. R. Wheeler & Anr., AIR 1983 All 8; Indian Cable Co. Ltd. Vs. Smt Sumitra Chakraborty, AIR 1985 Cal 248; Bala Din Yadav Vs. Ramdulare & Ors., AIR 1990 All 19).

Order 39, Rule 2-A deals with the power to enforce the order passed by the court and impose the punishment. It is settled legal proposition that sale deeds so executed are a nullity as having been executed in disobedience of the interim order of the Court. In Mulraj Vs. Murti Raghunathji Maharaj, AIR 1967 SC 1386 the Hon'ble Supreme Court considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal, **subsequent action would be a nullity.**

Similar view has been reiterated in Surjit Singh & Ors. Vs. Harbans Singh & Ors., (1995) 6 SCC 50; and Govt. of A.P. Vs. Gudepu Sailoo & Ors., AIR 2000 SC 2297.

A Constitution Bench of the Hon'ble Supreme Court, in State of Bihar Vs. Rani Sonabati Kumari, AIR 1961 SC 221, has categorically held that the said provisions deal with the willful defiance of the order passed by the civil court. The Apex Court held that there must be willful disobedience of the injunction passed by the court and order of punishment be passed unless the court is satisfied that the party was, in fact, under a misapprehension as to the scope of the order or there was an unintentional wrong for the reason that the order was ambiguous and reasonably capable of more than one interpretation or the party never intended to disobey the order but conducted himself in accordance with the interpretation of the

order. The proceedings are purely quasi-criminal in nature and are, thus, punitive. Even the corporate body like municipality/government can be punished though no officer of it be a party by name. A similar view has been reiterated by the Hon'ble Supreme Court in Aligarh Municipal Board & Ors. Vs. Ekka Tonga Mazdoor Union & Ors., AIR 1970 SC 1767; by the Allahabad High Court in Ratan Narain Mulla Vs. The Chief Secretary, Govt. of U.P. & Ors.,1975 Cr.L.J. 1283; and by the Delhi High Court in M/s Jyoti Limited Vs. Smt. Kanwaljit Kaur Bhasin & Anr., 1987 Cri. L.J. 1281.

In Tayabbhai M. Bagasarwalla & Ors. Vs. Hind Rubber Industries Pvt. Ltd., AIR 1997 SC 1240, the Hon'ble Supreme Court dealt with a case of disobedience of an injunction passed under O. 39 Rr. 1 and 2 of the Code, wherein the contention was raised that the proceedings under O. 39 R. 2A cannot be initiated and no punishment can be imposed for disobedience of the order because the civil court, which granted the injunction, had no jurisdiction to entertain the Suit. The Apex Court rejected the contention holding that a party aggrieved of the order has a right to ask the court to vacate the injunction pointing out to it that it had no jurisdiction or approach the higher court for setting aside that order, but so long the order remains in force, the party cannot be permitted to disobey it or avoid punishment for disobedience on any ground, including that the court had no jurisdiction, even if ultimately the court comes to the conclusion that the court had no jurisdiction to entertain the Suit. The party, who willingly disobeys the order and acts in violation of such an injunction, runs the risk for facing the consequence of punishment.

In Samee Khan Vs. Bindu Khan, AIR 1998 SC 2765, the Hon'ble Supreme Court held that in exercise of the power under O. 39 R. 2A of the Code, the civil court has a power either to order detention for disobedience of the disobeying party or attaching his property and if the circumstances and facts of the case so demand, both steps can also be resorted to. The Apex Court held as under:-

> "But the position under R. 2A of Order 39 is different. Even if the injunction order was subsequently set aside the disobedience does not get erased. It may be a different matter that the rigor of such disobedience may be toned

down if the order is subsequently set aside. For what purpose the property is to be attached in the case of disobedience of the order of injunction? Sub-rule (2) provides that if the disobedience or breach continues beyond one year from the date of attachment the Court is empowered to sell the property under attachment and compensate the affected party from such sale proceeds. In other words, attachment will continue only till the breach continues or the disobedience persists subject to a limit of one year period. If the disobedience ceases to continue in the meanwhile the attachment also would cease. Thus, even under Order 39 Rule 2-A the attachment is a mode to compel the opposite party to obey the order of injunction. But detaining the disobedient party in civil prison is a mode of punishment for his being guilty of such is obedience."

Thus, in view of the above, it becomes crystal clear that the proceedings are analogous to the contempt of court proceedings but they are taken under the provisions of O. 39 R. 2A of the Code for the reason that the special provision inserted in the Code shall prevail over the general law of contempt contained in the Contempt of Courts Act, 1972 (for short, "the Act, 1972"). Even the High Court, in such a case, shall not entertain the petition under the provisions of Act, 1972. (Vide Ram Rup Pandey Vs. R.K. Bhargava & Ors., AIR 1971 All 231; Smt. Indu Tewari Vs. Ram Bahadur Chaudhari & Ors., AIR 1981 All 309; and Rudraiah Company Vs. State of Karnataka & Ors., AIR 1982 Kar 182).

In Md. Jamal Paramanik & Ors. Vs. Md. Amanullah Munshi, AIR 1989 (NOC) 50 (Gau), the Gauhati High Court held that it is not permissible for a court to impose a fine or compensation as one of the punishments, for the reason that the provisions of O. 39 R. 2A do not provide for it. In Thakorlal Parshottamdas Vs. Chandulal Chunnilal, AIR 1967 Guj 124, Hon'ble Mr. Justice P.N. Bhagwati (as His Lordship then

was) held that the punishment for breach of interim injunction could not be set-aside even on the ground that the injunction was ultimately vacated by the appellate court. In Rachhpal Singh Vs. Gurdarshan Singh, AIR 1985 P&H 299, a Division Bench of Punjab & Haryana High Court held that if an interim injunction had been passed and is alleged to have been violated and application for initiating contempt proceeding under O. 39 R. 2A has been filed but during its pendency the Suit itself is withdrawn, the court may not be justified to pass order of punishment at that stage. Thus, it made a distinction from the above referred Gujarat High Court's decision in Thakorlal Parshottamdas (supra) that contempt proceedings should be initiated when the interim injunction is in operation.

A Constitution Bench of the Hon'ble Supreme Court in The State of Bihar Vs. Rani Sonabati Kumari, AIR 1961 SC 221, observed that the purpose of such proceedings is for the enforcement or effectuation of an order of execution. Similarly, in Sitaram Vs. Ganesh Das, AIR 1973 Alld 449, the Court held as under:-

> "The purpose of Order 39, Rule 2-A, Civil P.C. is to enforce the order of injunction. It is a provision which permits the Court to execute the injunction order. Its provisions are similar to the provisions of Order 21, Rule 32, Civil P.C. which provide for the execution of a decree for injunction. The mode of execution given in Order 21, Rule 32 is the same as provided in Rule 2-A of Order 39. In either case, for the execution of the order or decree of injunction, attachment of property is to be made and the person who is to be compelled to obey the injunction can be detained in civil prison. The purpose is not to punish the man but to see that the decree or order is obeyed and the wrong done by disobedience of the order is remedied and the status quo ante is brought into effect. This view finds support from the observations of the Supreme Court in the case of State of Bihar v. Sonabati Kumari,

AIR 1961 SC 221; while dealing with O. 39, Rule 2(iii), Civil P.C. (without the U.P. Amendment) the Court held that the proceedings are in substance designed to effect enforcement of or to execute the order, and a parallel was drawn between the provisions of O. 21, R. 32 and of O. 39, R. 2 (iii), C.P.C. which is similar to Order 39, R. 2-A. This curative function and purpose of Rule 2-A of Order 39, Civil P.C. is also evident from the provision in Rule 2-A for the lifting of imprisonment, which normally would be when the order has been complied with and the coercion of imprisonment no longer remains necessary. Hence, even if Sitaram had earlier been sent to the civil imprisonment, he would have been released on the tin shed being removed, and it would therefore now serve no purpose to send him to prison. For the same reason, the attachment of property is also no longer needed. The order of the Court below has lost its utility and need no longer to be kept alive."

In Kochira Krishnan Vs. Joseph Desouza, AIR 1986 Ker 63, it has been held that violation of injunction or even undertaking given before the court, is punishable under O. 39 R. 2A of the Code. The punishment can be imposed even if the matter stood disposed of, for the reason that the court is concerned only with the question whether there was a disobedience of the order of injunction or violation of an undertaking given before the court, and not with the ultimate decision in the matter. While deciding the said case, the Court placed reliance upon the judgment of the Privy Council in Eastern Trust Co. Vs. Makenzie Mann & Co. Ltd., AIR 1915 PC 106, wherein it had been observed as under:-

"An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts...."

The Court had taken a similar view in Magna & Anr. Vs. Rustam & Anr., AIR 1963 Raj 3. Thus, it is evident from the above discussion that the proceedings are analogous to the proceedings under the Act, 1972. The only distinction is that as the legislature, in its wisdom, has enacted a special provision, enacting the provisions of O. 39 R. 2A, it would prevail over the provisions of the Contempt of Courts Act.

Order 40, Rule 1 empowers the Court to appoint the receiver. Power to appoint includes the power to suspend, remove or terminate him. (Vide Rayrappan Vs. Madhavi Amma, AIR 1950 FC 140).

Order 41, Rule 1 stood amended to the effect that there may be one appeal against the separate judgments and decrees if two or more than two Suits have been tried together and a common judgment has been delivered. It shall be accompanied by the copy of the judgment. Earlier, it was necessary to file the copy of the degree also, and therefore, separate appeals were maintainable.

Order 41, Rule 13 which provided that Appellate Court had to give notice to the court below, against which, appeal had been filed-stood deleted by amendment.

Order 41, Rule 27 deals with the issue of taking evidence at appellate stage. The provisions of O. 41, R. 27 of the Code have been considered elaborately by the Hon'ble Supreme Court in Arjan Singh Vs. Kartar Singh & Ors., AIR 1951 SC 193, wherein the Hon'ble Apex Court held that the said provisions are applicable when some inherent lacuna or defect becomes apparent while examining the case and are not applicable where a discovery is made outside the Court of fresh evidence and application is made to import it. The true test to allow the application is as to whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced. While deciding the said case, the Hon'ble Supreme Court placed reliance upon two judgments of the Privy Council in Kessowji Vs. G.P.P. Railway, 1934 Ind. App. 115; and Parsotim Thakur & Ors. Vs. Lal Mohar Thakur & Ors., AIR 1931 PC 143.

A Five Judges' Bench of the Hon'ble Supreme Court in K. Venkataramiah Vs. A. Seetarama Reddy, AIR 1963 SC 1526, considering the said provisions, held as under:-

> ".....The Appellate Court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for 'any other substantial cause.' There may well be cases where even though the Court finds that it is able to pronounce judgment on the set of the record as it is and so it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. Thus, it made it clear that the object of the said provision is to ask a party to adduce additional evidence."

The Court further made it clear that though the provisions provide for recording the reasons for accepting or rejecting the application under the provisions but it is not mandatory.

In Soonda Ram & Anr. Vs. Rameshwarlal & Anr., AIR 1975 SC 479, the Hon'ble Supreme Court considered the case under the said provisions of the Rajasthan Act, 1950 and held that if the issue can be decided on the basis of the evidence on record and there was no defect in the pleadings of such a nature that would enable the Court to obliterate and ignore the evidence adduced on the points involved, the application under O. 41 R. 27 should not be allowed.

In Natha Singh Vs. Financial Commissioner Taxation, Punjab, AIR 1976 SC 1053, the Hon'ble Apex Court held that unless additional evidence is necessary to pronounce the judgment, it should not be permitted to be adduced as "the discretion given to the Appellate Court to

receive and admit additional evidence, is not an arbitrary one but it is judicial one circumscribed by the limitation specified in O. 41 R., 27 of the Code. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence, so brought on record, has to be ignored.

Reiterating the same view in The Land Acquisition Officer, City Improvement Trust Board Vs. H. Naryanaiah & Ors., AIR 1976 SC 2403, the Apex Court further observed that for allowing the application the Appellate Court must record reasons to show that it had considered the requirement of O. 41 R. 27 of the Code so that it may be examined as how the Appellate Court found the admission of such evidence to be necessary for some substantial reason, and if it finds it necessary to admit it, an opportunity should be given to the other side to rebut any inference arising from its existence by leading other evidence.

In Syed Abdul Khader Vs. Rami Reddy & Ors., AIR 1979 SC 553, the Hon'ble Supreme Court considered its large number of earlier judgments and held that the provisions of O. 41 R. 27 of the Code do not confer a right on the party to adduce additional evidence, but if the Court hearing the action requires any document so as to enable it to pronounce judgment, it has the jurisdiction to permit additional evidence to be adduced and in case the appellate court has given cogent reasons on such application and order has been passed in the interest of justice, it does not require any interference.

In Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia & Ors., AIR 1980 SC 446, the Hon'ble Supreme Court held that there can be no justification to entertain the application under O. 41 R. 27 at a belated stage and it deserves to be rejected on this count alone.

Similarly, in M.M. Quasim Vs. Manohar Lal Sharma, AIR 1981 SC 1113, the Hon'ble Supreme Court held that the said provisions are meant for adducing additional evidence "inviting the Court's attention to a subsequent event of wide importance cutting at the root of the plaintiff's right to continue the action."

In Shivajirao Nilangekar Patil Vs. Dr. Mahesh Madhav Gosavi, AIR 1987 SC 294, the Apex Court held that if the application unnecessarily prolongs the disposal of the case and not directly

connected with the immediate issue, it deserves rejection. Party filing such an application has to establish with his best efforts that such additional evidence could not have been adduced at the first instance; secondly, the party affected by the admission of additional evidence, should have an opportunity to rebut such evidence; and thirdly, the additional evidence was relevant for determination of the issue.

In Mahavir Singh & Ors. Vs. Naresh Chandra & Anr., AIR 2001 SC 134, the Apex Court considered the issue elaborately and observed as under:-

> "Principle to be observed ordinarily is that the Appellate Court should not travel outside the record of the lower Court and cannot take evidence in appeal. However, Section 107 (d) C.P.C. is an exception to the general rule and an additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The Court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as a right, to the admission of such evidence and the matter is entirely in the discretion of the Court, which is, of course, to be exercised judiciously and sparingly."

While deciding the said case, the Hon'ble Supreme Court placed reliance upon a large number of its earlier judgments, including the Municipal Corporation of Greater Bombay Vs. Lala Pancham & Ors., AIR 1965 SC 1008, wherein it has been held that a mere defect in coming to a decision is not sufficient for admission of evidence under the rule.

In the case of Mahaveer Singh (supra), by the time the Hon'ble Supreme Court decided the case the additional evidence had been taken on record. The Court rejected the prayer that the evidence already taken on record may be considered by the Court below while making the final decision as the provisions could become un-ending and additional

evidence can be taken only in the circumstances prescribed under O. 41 R. 27 of the Code.

In N. Kamalam (Dead) & Anr. Vs. Ayyasamy & Anr., (2001) 7 SCC 503, the Hon'ble Supreme Court held as under:-

> "Needless to record that the Court shall have to be conscious and must always act with great circumspection in dealing with the claims for letting in additional evidence, particularly in the form of oral evidence at the appellate stage and that too, after a long lapse of time. In our view, a plain reading of O. 41 R. 27 would depict that rejection of the claim for production of additional evidence after a period of ten years from the date of filing of the appeal, as noticed above, cannot be permitted to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted. "

In Vasantha Viswanathan & Ors. Vs. V.K. Elayalwar & Ors., (2001) 8 SCC 133, the Hon'ble Supreme Court observed that while considering an application for additional evidence, the Court should keep in mind that the said evidence was not put to the other side while he was deposing as a witness in the Suit. Therefore, the application under the said provisions should not be accepted in a routine manner.

In P. Purushottam Reddy Vs. Pratap Steel Ltd., AIR 2002 SC 771, the Apex Court examined a case, wherein the High Court had remanded the case to the trial Court to take additional evidence and decide the case afresh. The Court came to the conclusion that such a view was not permissible in the fact situation of that case; thus, the order of remand was set-aside observing as under:-

> ".....Although the order of remand has been set-aside..... yet it should not be understood as depriving the High Court of its power to require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any

other substantial cause, within the meaning of Clause (b) of Sub-rule (1) of Rule 27 of Order 41. That power inheres in the Court and the Court alone which is hearing the appeal. It is the requirement of the Court (and not of any of the parties) and the conscience of the Court feeling inhibits in satisfactory disposal of the lis which rule the exercise of this power."

Order 41 Rule 31 deals with the contents, date and signature of the judgment.

The issue has been considered time and again. In Moran Mar Basselios Catholicos & Anr. Vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526, Hon'ble Apex Court held that it must be evident from the judgment of the Appellate Court that the Court has properly appreciated the case, applied its mind and decided on considering the evidence on record.

In Thakur Sukhpal Singh Vs. Thakur Kalyan Singh & Ors., AIR 1963 SC 146, the Supreme Court held that the provisions of Rule 31 of Order 41 C.P.C. should be reasonably construed and should be held to require the various particulars mentioned under Rule 31 to take into consideration. The Court placed reliance upon its earlier judgment in Sangram Singh Vs. Election Tribunal, Kota, AIR 1955 SC 425, wherein it had observed that the procedural law has been designed to facilitate justice and too technical consideration of the Section that leaves no room for reasonable elasticity of interpretation, should therefore, be guarded against, as the same may frustrate the cause of justice.

In Girijanandini Devi Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124, the Hon'ble Apex Court has observed that when the Appellate Court agrees with the view of the trial court in evidence, it did not re-state the effect of evidence or reiterate reasons given by the trial Court. The expression of general agreement with reasons given by the court's decision, which is under appeal, would ordinarily be suffice.

In Balaji Mohaprabhu & Anr. Vs. Narasingha Kar & Ors., AIR 1978 Ori 199, the Orissa High Court held that it would amount to substantial compliance of the provisions of Order 41, Rule 23 C.P.C. if the Appellate Court's judgment is based on independent assessment of the

relevant evidence on all important aspects of the matter and the findings by the Appellate Court are well-founded and quite convincing.

In Nihal Chand Agrawal & Ors. Vs. Gopal Sahai Bhartia & Ors., AIR 1987 Del 206, the Delhi High Court held that under Order 41, Rule 31 of the Code of Civil Procedure, it is mandatory upon the trial court to independently weigh the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. As the first appellate court is the final court of fact, it must not record a mere general expression of concurrence with the trial court's judgment. Similar view has been expressed in Bogamal Gohain & Ors. Vs. Lakhinath Kalita & Ors., AIR 1991 Gau 100.

In Samir Kumar Chatterjee Vs. Hirendra Nath Ghosh, AIR 1992 Cal 129, the Calcutta High Court held that the court of first appeal should not merely endorse the findings of the trial court. In order to meet the requirement of Order 41, Rule 31 C.P.C., the Appellate Court must give reasons for its decision independently to that of the trial Court.

In a recent judgment, the Court, in Kuldeep Singh & Anr. Vs. Chandra Singh, 1999 AIHC 979, has held that in order to meet the requirement of substantial compliance of the provisions of Order 41 Rule 31 C.P.C., the first appellate court must deal all the points agitated before it and it must record reasons in support of its findings, and if the provisions have substantially been complied with, the judgment would not vitiate.

Order 47, Rule 1 deals with the power of review.

Section 114 read with O. 47 R.1 C.P.C. prescribes the limitations for entertaining a review petition. The same are : that the party filing the application for review has discovered a new and important matter or evidence after exercise of due diligence which was not within its knowledge or could not be produced by it at the time when the decree was passed; or order made or on account of some mistake or error apparent on the face of the record; or 'for any other sufficient reason.'

The aforesaid limitations are prescribed in a crystal clear language and before a party submits that it had discovered a new and important matter or evidence which could not be produced at the earlier stage, the condition precedent for entertaining the review would be to

record the finding as to whether at the initial stage, the party has acted with due diligence. "Due" means just and proper in view of the facts and circumstances of the case. (Vide A.K. Gopalan Vs. State of Madras, AIR 1950 SC 27).

Some mistake or error, if made ground for review, it must be apparent on the face of the record and if a party files an application on the ground of 'some other sufficient reason', it has to satisfy that the said sufficient reason is analogous to the other conditions mentioned in the said rule i.e. discovery of new and important matter or evidence which it could not discover with due diligence or it was not within his knowledge, and thus, could not produce at the initial stage. Apparent error on the face of record has been explained to include failure to apply the law of limitation to the facts found by the Court or failure to consider a particular provision of a Statute or a part thereof or a statutory provision has been applied though it was not in operation. Review is permissible if there is an error of procedure apparent on the face of the record, e.g., the judgment is delivered without notice to the parties, or judgment does not effectively deal with or determine any important issue in the case though argued by the parties. There may be merely a smoke-line demarcating an error simplicitor from the error apparent on the face of record. But, there cannot be a ground for entertaining the review in the former case. "Sufficient reason" may include disposal of a case without proper notice to the party aggrieved. Thus, if a person comes and satisfies the Court that the matter has been heard without serving a notice upon him, review is maintainable for the "sufficient reason" though there may be no error apparent on the face of record.

The expression 'any other sufficient reason' contained in O. 47 R.1 of the Code means "sufficient reason" which is analogous to those specified immediately to it in the provision of O. 47 R. 1 of the Code.

In Chhajju Ram Vs. Neki & Ors., AIR 1922 PC 112, it was held by the Privy Council that apology must be discovered between two grounds specified therein, namely; (i) discovery of new and important matter or evidence; and (ii) error apparent on the face of record before entertaining the review on any other sufficient ground. The same view has been reiterated in Debi Prasad & Ors. Vs. Khelawan & Ors., AIR

1957 All 67; and Mohammad Hasan Khan Vs. Ahmad Hafiz Ahmad Ali Khan & Anr., AIR 1957 Nag 97.

In S. Nagraj & Ors. Vs. State of Karnataka & Anr., 1993 Supp (4) SCC 595, the Hon'ble Apex Court considered the scope of review and observed as under:-

> "Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law, the courts and even the Statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice ... ... The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under mis-apprehension of true state of circumstances has been held to be sufficient ground to exercise the power."

The Court further held that the purpose of review is rectification of an order which stems from the fundamental principle that the justice is above all and it is exercised only to correct the error which has occurred by some accident, without any blame. While deciding the said case, the Hon'ble Supreme Court placed reliance upon a large number of judgments, including in Raja Prithwi Chand Lal Choudhury Vs. Sukhraj Rai & Ors., AIR 1941 FC 1; and Rajunder Narain Rae Vs. Bijai Govind Singh (1836) 1 MOO PC 117. The same view has been reiterated by the Hon'ble Apex Court in Oriental Insurance Co. Ltd. & Anr. Vs. Gokulprasad Maniklal Agarwal & Anr. (1999) 7 SCC 578.

A Full Bench of the Himachal Pradesh High Court, in The Nalagarh Dehati Co-operative Transport Society Ltd., Nalagarh Vs. Beli Ram & Ors., AIR 1981 HP 1, considered the scope of review and held that not considering an existing judgment of the Hon'ble Supreme Court may be a ground of review and for the same it placed reliance upon the

judgments of the Privy Council in Rajah Kotagiri Venkata Subbamma Rao Vs. Rajah Vellanki Venkatrama Rao, (1900) 27 IA 197 (PC), wherein it was held that the purpose of review, inter alia, is to correct an apparent error which should not have been there when the judgment was given. The Court also placed reliance upon the judgment of the Federal Court in Hari Shankar Vs. Amath Nath, 1949 FC 106, wherein it was held as under:-

> ".....the error could not be one apparent on the face of record or even analogous to it. When, however, the Court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of O. 47 R.1, Civil Procedure Code."

In Thadikulangara Pylee's son Pathrose Vs. Ayyazhiveettil Lakshmi Amma's son Kuttan & Ors., AIR 1969 Ker 186, the Kerala High Court considered a review application which was filed on the ground of subsequent judgment of the Court and dismissed the same observing as under:-

> "If it is borne in mind that a judicial decision only declares and does not make or change the law, although it might correct previous erroneous views of the law, a review on the basis of subsequent binding authority would not be a review of a decree which, when it was made, was rightly made, on the ground of the happening of a subsequent event."

While deciding the said case, the Court placed reliance upon the judgments of the Privy Council in Rajah Kotagiri Venkata Subbamma (supra); Chhajju Ram (supra); Bisheshwar Pratap Sahi & Anr. Vs. Parath Nath & Anr., AIR 1934 PC 213; and on judgments of the Hon'ble

Supreme Court in A.C. Estates Vs. M/s Serajuddin & Co., AIR 1966 SC 935; and Moran Mar Basselies Catholicos & Anr. Vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526.

In Sow. Chandra Kanta & Anr. Vs. Sheik Habib, AIR 1975 SC 1500, the Hon'ble Apex Court dismissed a review application observing as under:-

> ".....thus, making it that a review proceeding virtually amounts to a rehearing. May be ..... a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious subject and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave of error is crept in earlier by judicial fallibility."

Similar view has been reiterated by the Hon'ble Supreme Court in Sajjan Singh Vs. State of Rajasthan, AIR 1965 SC 845; G.L. Gupta Vs. D.N. Mehta, AIR 1971 SC 2162; M/s Northern India Caterers' (India) Ltd. Vs. Lt. Governor of Delhi, AIR 1980 SC 674; Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma & Ors., AIR 1979 SC 1047; and Green View Tea & Industries Vs. Collector, Golaghat, AIR 2002 SC 180.

Similarly, in Devaraju Pillai Vs. Sellayya Pillai, AIR 1987 SC 1160, the Hon'ble Apex Court held that if a party is aggrieved of a judgment by a Court, the proper remedy for such party is to file an appeal against that judgment. A remedy by way of an application for review, is entirely misconceived and if a Court entertained the application for review then it has totally exceeded its jurisdiction in allowing the review merely because it takes a different view in construction of the document.

In Delhi Administration Vs. Gurdeep Singh Uban, AIR 2000 SC 3737, the Hon'ble Apex Court deprecated the practice of filing review application observing that review, by no means, is an appeal in disguise and it cannot be entertained even if application has been filed for clarification, modification or review of the judgment and order finally passed for the reason that a party cannot be permitted to circumvent or bye-pass the procedure prescribed for hearing a review application. The

Court also rejected the argument that review application should be entertained to do justice in the case, observing as under:-

> "The words 'justice' and 'injustice', in our view, are sometimes loosely used and have different meanings to different persons, particularly to those arrayed on opposite sides..... Justice Cardozo said, 'The Web is tangled and obscure, shot through with a multitude of shades and colours, the skeins irregular and broken. Many hues that seems to be simple, are found, when analysed, to be complex and uncertain blend. Justice itself, which we are wont to appeal to as a test as well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards or even to describe them, have never wholly succeeded."

- It is settled legal proposition that for the fault of the counsel, client should not suffer. But, in a case where a lawyer does not appear or pleads any instruction, the Court should give a notice to the party either to appear in person or to make an alternative arrangement. (Vide Rafiq & Anr. Vs. Munshilal & Anr., AIR 1981 SC 1400 ; Goswami Krishna Murarilal Sharma Vs. Dhan Prakash & Ors, (1981) 4 SCC 574; Smt. Lachi Tewari & Ors, AIR 1984 SC 41; Tahil Ram Issardas Sadaranganj & Ors Vs. Ramchand Issardas Sadaranganj & Anr., 1992 AIR SCW 3445; Bani Singh & Ors Vs. State of U.P., AIR 1996 SC 2439 ; Sushila Narhari Vs. Nandkumar & Ors., (1996) 5 SCC 529; and G. Raj Mallaiah & Anr. Vs. State of Andhra Pradesh, AIR 1998 SC 2315).

- The Court has no competence to issue a direction contrary to law. (Vide Union of India & another vs. Kirloskar Pneumatic Co. Ltd., (1996) 4 SCC 453; State of U.P. & ors. V. Harish Chandra & ors., (1996) 9 SCC 309; and Vice Chancellor, University of Allahabad & ors. V. Dr. Anand Prakash Mishra & ors., (1997) 10 SCC 264).

In State of Punjab & ors. V. Renuka Singla & ors., (1994) 1 SCC 175, dealing with a similar situation, the Hon'ble Apex Court observed as under:-

> "We fail to appreciate as to how the High Court or this Court can be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations."

Similarly, in Karnataka State Road Transport Corporation v. Ashrafulla Khan & ors., JT 2002 (2) SC 113, the Hon'ble Apex Court has held as under:-

> "The High Court under Article 226 of the Constitution is required to enforce rule of law and not pass order or direction which is contrary to what has been injected by law."

Therefore, Courts are not competent to pass an order running counter to the statutory provisions. The Courts are meant to enforce the law and not to direct any person not to act in accordance with law.

In the end, I take opportunity to thank the Institute of Judicial Training and Research, Lucknow for giving me an opportunity to meet and having interaction with the newly recruited judicial officers of the States of U.P. and Himachal Pradesh.

Dear friends, I wish you all a very successful career as a judicial officer.

Thank you,

(Dr. B.S. Chauhan)