

## **Lenient View of Procedural Laws Interest of Justice or Torture\***

By: Justice S.U. Khan<sup>†</sup>

What is law? It is not easy to define (The Concept of law by H.L.A. Hart)<sup>1</sup>. What is justice? It is much more difficult to define. Any such attempt is like trying to enclose fragrance in a net. (Simile borrowed from 'Far from the Madding Crowd' by Thomas Hardy.) Justice is to a great extent subjective in nature and not objective. Dependence of a judge on his subjective sense of justice is like following red herring. Plato propounded that after appointing learned persons of impeccable character and integrity as judges, decision of cases must be left solely on their wisdom and judgment which must not be hindered by pre set laws, rules, procedures and precedents<sup>2</sup>. We cannot go back to that stage.

The observations, particularly the clause that 'procedure should be hand maid not the mistress' of Justice Krishna Iyer in *Sushil Kumar Sen v. State of Bihar AIR 1975 SC 1185 (para 586): 1975 (1) SCC 774*<sup>3</sup> have been quoted with approval and followed in innumerable cases.

Justice Krishna Iyer, himself a champion of rights and dignity of labour, became oblivious of that momentarily. In post industrialization period, with lot of labour reforms laws, even hand

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\* See also my article "Arrears as Barometer" published in 2010 (2) SCC Journal Section page 1 dealing with several provisions of law responsible for filing of unduly large number of cases and causing huge pendency in courts.

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maids can neither be maltreated nor required to perform such functions which are not part of their duties.<sup>4</sup>

What is the aim and purpose of law, substantive as well as procedural? One answer may be, perfect or near perfect justice to all or almost all the persons concerned. This is utopia. It is simply not possible. (See also my article 'search of Near Perfect Social Order' published in 2011 (3) SCC Journal Section page 1) If law attempts to lift this mountain, it will at once crumble and get totally crushed leaving no law, justice or order in the Society.

The only possible, pragmatic object of law can be maximum possible justice to maximum possible number of people concerned. Law and its enforcement is a strong medicine. Some strong medicines have side effects also. If in order to do justice to large number of affected persons injustice to few is inevitable, the bargain is worthwhile. There is nothing like absolute justice. Imprisonment of a murderer, who is bread earner of his family, is injustice to the dependant family members, who have done nothing wrong.

Granting repeated adjournments, permitting filing of written statement at a highly belated stage, entertaining amendment application liberally, granting blanket ad interim / temporary injunction order (or status quo order) readily or refusing to grant, as a rule, even conditional ad-interim / temporary injunction order may be justice to one party but it will also be injustice to the other.

Justice and injustice are comparative terms. Both have to be weighed against each other and on the basis of experience balance sheet is to be prepared to see whether there is debit balance or credit balance. (It has not been logic but experience which has been life of law – Oliver Wendell Holmes.)

Few harsh cases do not make good law. Rather hard cases make bad law. <sup>5</sup> Accordingly they cannot be a ground to dilute the law. There is nothing like 100% either in law or life. There is no medicine of a particular ailment which can 100% cure all the patients suffering there from.

It is a principle of physics that all the energy cannot be converted into work done. (The second law of Thermodynamics states that heat energy cannot be converted into an equivalent amount of work). Some waste is inevitable.

However balanced diet and exertion / exercise one may take, the body is bound to discharge some refuse, otherwise it will mean that the body system is faulty endangering survival itself.

When there is huge traffic on roads fast track high ways and express ways are constructed, accidents are inevitable which may be minimized but not completely ruled out. (For roads, fast track high ways and express ways read courts). Only when all the vehicles on road move slowly, accident free scenario may be guaranteed. (For vehicles read cases.)

Similarly best possible just laws are bound to yield some waste / injustice.

To grant liberty to a party in order to serve the ends of justice, is, more often than not end of justice to the other side.

If the harsh, but reasonable, restrictions (e.g. Order 8 Rule 1, Order 17 and Section 148 C.P.C.) are strictly adhered to, they may initially be harmful to a small number of litigants. However after sometime this number will drastically reduce as everyone would be alert realizing that there is no chance of any sympathy or concession by Court. This is how discipline is imposed and works.

Suppose a professor of a university who takes first period of a class in quite lenient and liberally permits late comers to attend the class with only occasional mild advisories. Several students will be coming late. One day he declares that from tomorrow he will not be permitting any late comer to enter the class. Students are not likely to take him seriously and on the next day there will hardly be any decrease in the number of late comers. However, the professor does not allow any student to enter the class after the scheduled time. From the next day situation would improve a lot. After few days if some student is not in a position to reach in time, he will not come at all. One day after few weeks a student comes late, gives an excellent reason for delay and pleads for entry in the class which is granted. From the next day number of students coming late and giving excuses/ explanations will increase. The professor will be listening to their tales and permitting those whose explanations are

found reasonable. Such decisions will also eat into the precious time of lecture. After some time the position will be back to square one.

### **Time Schedule:**

Experience taught us (particularly the Law Commission) that one of the major causes of delay in decision of suit was the practice of seeking and granting time, innumerable times, to file written statement (W.S.). On the recommendation of Law Commission, Order 8 Rule 1 C.P.C. was amended w.e.f. 01.07.2002 and it was provided that normally w.s. shall be filed within 30 days from service of summons but on genuine grounds court could grant a maximum further time of 60 days (total 90 days from date of service). This could be great check on delay in suits. However in one or two percent cases it could also cause injustice to defendants where they might be having very genuine grounds for not filing w.s. in 90 days. In one of such cases, *Kailash v. Nanhku AIR 2005 SC 2441* the Supreme Court declared the provision to be directory, placing reliance upon the above quoted observation (procedure should be handmaid) in *Sushil Kumar*. The result was that permitting filing of w.s. even after 90 days became norm and refusal an exception. <sup>6</sup> (Now Supreme Court in *New India Assurance co. v. Hilli Multipurpose Cold Storage Pvt. Ltd. AIR 2016 SC 86* has held the authority of *Kailash v. Nankhu* to be per incuriam as it sought to disagree with an earlier authority of same strength i.e. three judges.)

The other provision made through Amendment of 1999 (w.e.f. 01.07.2002) for checking delay was restricting the power to enlarge time under Section 148 CPC infra to one month.

*“S. 148 Enlargement of Time: Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period \*[not exceeding thirty days in total], even though the period originally fixed or granted may have expired.”*

(Portion in brackets added w.e.f. 01.07.2002)

*Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353*(para 45) has declared this restriction also to be directory. (See also *Nashik Municipal Corporation v. M/s R.M. Bhandari AIR 2016 SC 1090* para 15)

Fixing strict time schedule is neither unjust nor shocking to judicial conscience otherwise Section 5 Limitation Act (power to condone delay in filing appeal or application, other than Execution application) will have to be applied to suits, as well as Execution application, also. In some cases an aggrieved person or his legal representative may have a very genuine rather fool proof, reason for not filing suit within the time prescribed by the Limitation Act. A suit can very well be filed on the last day of limitation. Suppose 3 or 4 days or a week before expiry of period of limitation for a suit, the aggrieved person is seriously injured in an accident and becomes

unconscious or critically ill which state continues till the expiry of limitation for suit. Even in such situation the Court has absolutely no power to entertain suit after expiry of period of limitation.

**Heavy cost, payable before the next date:**

If a party is trying to delay the proceeding of a suit, imposition of heavy cost for adjournment, in any form, payable before the next date failing which defaulter party shall not be permitted to participate in the proceedings of the suit will go a long way in curbing the tendency of delay.

Obviously the party which stands to benefit by delay, will adopt delaying tactics i.e. plaintiff if he has got effective ad hoc / temporary injunction order otherwise defendant. This aspect must play an important role in deciding adjournment application or such application which is likely to delay the proceedings e.g. application for amendment of pleading. Quantum of cost must also be dependent on this consideration.

Often petitions are filed in the High Court seeking a direction for expeditious, time bound, disposal of suit/ proceeding pending before subordinate Civil Judge (or appeal / revision pending before subordinate District Judge / Additional District Judge). Normally time bound directions are given which are not possible to be complied with, in most of the cases. I as Allahabad High Court Judge passed following order in almost all such petitions (except

when suit had been filed only few months before seeking direction; in which eventuality the petition was dismissed).

‘Petition is disposed of with the direction to the Court below to make efforts to decide the suit/ case expeditiously. Absolutely no unnecessary adjournment shall be granted to any of the parties. If any adjournment in any form is granted it shall be on heavy cost which shall not be less than Rs. 500/- per adjournment payable before the next date failing which defaulter party shall not be permitted to participate in the proceedings.’

In such orders passed after 2010 the amount of Rs. 500/- was substituted by Rs. 1000/-.

The orders proved to be quite fruitful.

If the Supreme Court is not inclined to relook into its judgments making time schedule prescribed by 1999/2002 C.P.C. Amendments directory (discussed under previous sub-heading) then the other effective check may be imposition of very heavy cost (minimum Rs. 25000/-) for taking on record the w.s. beyond 90 days, extending the time beyond 30 days under Section 148 C.P.C. etc. with the additional rider of payment of cost before the next date with the default clause, supra. The cost may be enhanced depending upon the delay and the stakes involved.

In *Shibu Chandra v. Pasupati Nath Auddya AIR 2002 SC 1252* (3 Judges Bench) dealing with striking off the defence of tenant for depositing monthly rent late, it was held that High Court

wrongly condoned the delay in making deposit. However in spite of this categorical finding it was directed in para 16 as follows:-

*“16. On the facts of this case, it does appear to us that the Respondent did not have sufficient cause for not depositing the amount of rent for such a long period of time. However, as the High Court has exercised its discretion, we do not propose to interfere. However, in our opinion, on the facts of this case, the leniency which has been shown to the Respondent should be on heavy costs. Considering the cost of litigation today, in our view, the Respondent should pay in both these Appeals cost fixed at Rs. 50,000/- (i.e. Rs. 25,000/- in each Appeal). The same should be paid within a period of 6 weeks from today. If such cost is paid his Appeal shall stand dismissed with no further Order as to costs. If, however, the said sum of Rs. 50,000/- or any part thereof is not paid within the period aforesaid, then the Appeal shall stand allowed and the impugned Judgment dated 2nd June, 1998 shall stand set aside and the Order of the trial Court dated 4th September, 1997 shall stand revived.”*

Same principle of heavy cost can very well be applied to late filing of w.s. and in relation to other delaying tactics.

After reversal of my judgment by the Supreme Court in *Kailash v. Nanku*, supra, I started issuing directions ( in the writ petitions filed against orders of the courts below taking or refusing to take on record written statement after 90 days) to take on record written statement on payment of cost ranging from Rs. 15000/- to Rs. 25000/- payable within short, fixed period.

Cost for adjournment after commencement of evidence:

Relevant portion of Order 17 Rule 1 C.P.C. as amended by 1999 Amendment (w.e.f. 01.07.2002) is quoted below:

**“1. Court may grant time and adjourn hearing.- (1)**  
*The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the Suit for reasons to be recorded in writing:*

*Provided that no such adjournment shall be granted more than three times to a party during hearing of the suit.*

*(2) Costs of adjournment—in every such case the court shall fix a day for the further hearing of the suit, and shall make such orders as to costs occasioned by the adjournment or such higher costs as the court deems fits:*

*Provided that,—*

*(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary.”*

The Supreme Court in *Salem Bar Association v. Union of India* AIR 2005 SC 3353 supra has also diluted the above restriction and held that the Court has got ample power to grant adjournments even after three adjournments. Here also imposition of heavy cost say minimum Rs. 2000/- payable before next date may prove to be

great check. The cost shall increase with every adjournment. In suitable cases depending upon the stakes, or number of witnesses returning unexamined, cost may be much higher. This is also the mandate of above quoted Rule 1(2) and its proviso (a). Nowadays (in 2016) normally amount of Rs. 100/-, 200/- or 300/- is being awarded as cost. It is virtually no cost. The cost is received and kept by the learned counsel for the other side. Cost may be directed to be deposited by the party on whom it has been imposed, in the Bank Account of the other side.

### **Changes Introduced in procedure of taking oral evidence:**

#### Examination – in – chief on Affidavit:

According to order 18 Rule 4(1) C.P.C. as substituted by Amendment of 2002, 'In every case the examination – in – chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.'

On the date on which such affidavit is filed, witness has to be presented for cross examination. However as a rule the other side seeks adjournment to study the affidavit. Requirement of supply of the copy of the affidavit two or three days before the date fixed for its filing may avoid the need of adjournment.

In some informed quarters it is being mooted that this provision is proving counterproductive and by saving small time spent in recording examination – in – chief in Court, much more

time is being added to the time taken in cross examination. The reason is that the affidavit containing examination – in – chief is prepared by the advocate at his leisure and is bound to be quite lengthy, three or four times more than such examination in court. This necessarily makes the cross examination correspondingly lengthier. The matter requires serious thought and analysis.

Taking evidence by commissioner:

The provision of taking evidence (cross examination and re examination) by commissioner introduced by Amendment of 2002 (we.f. 1.7.2002) in Order 18 Rule 4 C.P.C. is seldom used by Courts. Lot of time of court is consumed in taking evidence and in order to save that for hearing arguments utilization of this provision is highly desirable. Even in the most complicated, sensational and delicate four consolidated suits (Ram Janam Bhumi, Babri Masjid dispute, which was heard and decided on 30.9.2010 by a Full Bench of Lucknow Bench of Allahabad High Court) evidence was directed to be taken by Commissioner after 1.7.2002. More than half oral evidence of 86 witnesses running into more than 14,000 pages was recorded by Commissioner. Without this provision and recourse to it probably the suit would not have been decided even by now (2016). The evidence was recorded by O.S.D. who was of A.D.J. level.

Normally advocates are to be appointed as Commissioners to record evidence. However for this purpose, services of those

retired judges who are agreeable for the same may also be taken. If a room or two in the Court premises is reserved for this purpose, it will be more effective. Retired judges who are appointed as Chairmen of permanent Lok Adalats may also be given this additional duty, which will be cost effective.

### **Temporary Injunction/ Stay**

#### Temporary Injunction:

In most of the suits application for temporary injunction is filed along with the plaint. The litigants and their advocates (even judges) virtually exhaust their time and energy on temporary injunction matter, ignoring the suit. In many such cases the only purpose of the suit is getting ad interim/ temporary injunction. If ad interim injunction is granted plaintiff invariably delays the disposal of temporary injunction application, otherwise the defendant. (Same thing happens with the suit after final decision of temporary injunction application) Granting ad interim injunction only till the next date is absolutely no solution as the extension of such order till the next date is the easiest thing in the courts. About 10 such extensions are routine. (In *Ram Sagar Tiwari v. Ram Lakhani Yadav* 2013 (98)ALR 578 it was noticed that ad interim injunction in a suit of 2010 had been extended at least 20 times, in *Santosh Kumar v. Addl. Civil Judge* 2013 (98) ALR 599, in a suit of 2009, more than 20 times and in *Manju v. Badri Prasad* 2013 (98) ALR 658, in a suit of 2011, 31 times.) In several cases where ad interim ex parte injunction is not granted and only notice is issued,

plaintiff rushes to the High Court under Article 227 of the Constitution. Granting ad interim ex parte injunction liberally or being too strict in this regard, both are equally bad.

The best, most effective way of controlling ad interim / temporary injunction part of the suit proceedings and of checking misuse of such order is what has been evolved by the Supreme Court in *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria* AIR 2012 SC 1727 (three judges) (hereinafter referred to as Maria's case). The whole authority deserves to be prescribed as compulsory reading material for all the trial Courts. Paras 86, 87, 90, 91 and 92 are quoted below:

*“86. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness.*

*87. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent*

*interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties.*

90. *Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases, honest litigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the Courts do not critically examine pleadings and documents on record. In case while granting or refusing injunction, the Court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent.*

91. *The Court while granting injunction should broadly take into consideration the prevailing market rentals in the locality for similar premises. Based on that, the Court should fix adhoc amount which the person continuing in possession must pay and on such payment, the plaintiff may withdraw after furnishing an undertaking and also making it clear that should the Court pass any order for reimbursement, it will be a charge upon the property.*

92. *The Court can also direct payment of a particular amount and for a differential, direct furnishing of a security by the person who wishes to continue in possession. If such*

*amount, as may be fixed by the Court, is not paid as security, the Court may remove the person and appoint a receiver of the property or strike out the claim or defence. This is a very important exercise for balancing equities. Courts must carry out this exercise with extreme care and caution while keeping pragmatic realities in mind and make a proper order of granting mesne profit. This is the requirement of equity and justice.”*

(underlining in all the paragraphs supplied)

If ad interim/ temporary injunction is granted on deposit of a reasonable lump sum amount and/ or regular deposit (every month, three months etc.) of reasonable amount it will greatly check both delay and misuse.

It is extremely unfortunate that not even in one percent of suits condition is attached with ad interim / temporary injunction order.

If ex parte ad interim injunction is not granted and after institution of the suit the defendant changes the position of the property (or other matter) in dispute, the Court shall consider to restore status quo ante. This can very well be done as any party is also entitled to temporary mandatory injunction in certain circumstances. It will be more appropriate if while issuing notice without granting ad interim injunction order it is indicated that in case the position prevailing on the said date is disturbed by the defendant and the court while hearing temporary injunction matter finally comes to the conclusion that in case change had not been

affected, plaintiff would have been entitled to temporary injunction, the defendant would be directed to restore the position through interim order itself.

In *Maria's case*, supra, the view taken by Delhi High Court in *Thomas Cook v. Hotel Imperial AIR 2007 (NOC) 169* was quoted in para 82 and approved in para 83. The Delhi High Court had held that even a person in wrongful possession cannot be evicted except through due process of law. However it was further held that decision on temporary injunction application satisfies this requirement. Part of portion of Delhi High Court's judgment, quoted in para 82 of *Maria's case*, is quoted below:

*82.....“In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the 'recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law.”*

The safeguard of **heavy cost** discussed under previous sub-heading can also be applied to temporary injunction proceedings. If after obtaining ex parte ad interim injunction plaintiff delays

disposal of temporary injunction application, by seeking adjournment on any ground or for any purpose, very heavy cost (normally Rs. 2000/- or more depending upon the valuation of property) must be imposed which must be payable before the next date and short date say after a week must be fixed. For further adjournments, cost must gradually increase. In this regard another expedient may also be followed as was done in the aforesaid authorities of *Ram Sagar*, para 3, *Santosh Kumar*, para 2 and *Manju*, para 2 (2013 (98) ALR) all decided by me wherein it was directed as follows:

*'It is directed that if on a single date plaintiff seeks adjournment or advocates are on strike ad interim injunction shall not be extended. This practice shall be followed in every suit'* (para 2 of *Santosh Kumar*)

Similarly if ex parte interim injunction is not granted and the defendant seeks adjournment, similar cost must be imposed upon him and after one or two adjournments court may grant ad interim injunction order. In *Ram Sagar*, supra it was observed in para 3 'Similarly if ad interim injunction is not granted ex parte and on the next date defendant seeks adjournment or does not appear, desirability of granting ad interim injunction shall be considered by the Court'.

Status quo order is extremely risky rather slippery. It shall be avoided as far as possible:

In Misc.Appeal (or FAFO) against grant of temporary injunction or rejection of application for the same, **file of the trial Court is summoned** invariably delaying the disposal of suit unnecessarily. In *Anil Kumar Jain v. Kamla Devi* 2013 (97) ALR 389 I directed as follows in paras 4 and 5:

*“4. Learned counsel for the petitioner states that during last 12 years no progress in the suit could be made as file of the suit had been summoned in the misc. appeal field by the plaintiff. This is horrible state of affairs. In misc. civil appeals or civil revisions under Section 115, C.P.C. there is absolutely no occasion for summoning the record of the trial court which unnecessarily delays the proceedings of the suit even though no stay order is passed in misc. appeal/ revision directing stay of proceedings of the suits. In normal course, in misc. appeals against orders passed on temporary injunction applications proceedings of the suits are not stayed. However, due to summoning of the file of the trial court practically no progress can be made in the suit. Accordingly, it is directed that in no misc. civil appeal or civil revision under Section 115, C.P.C. file of the trial court shall be summoned. The party filing the misc. appeal or revision shall file all such documents, which are available on the file of the trial court and on which he wants to place reliance through affidavit. Similarly respondent may also file copies of all such documents which are available on the file of the trial court and on which they want to place reliance through affidavit.*

*5. Office is directed to circulate copy of this order to all the District Judges of U.P. for further circulation to all the A.D.Js. subject to approval of Hon'ble the Chief Justice/ Administrative Committee.”*

The Administrative Committee directed the judgment to be circulated. It is since being followed strictly in U.P.

Supreme Court also in *G.N. Verma v. State of Jharkhand* AIR 2014 SC 3549 (paras 4 and 5) expressed concern on routine summoning of files of trial Courts in appeals, revisions etc. just for the reason that Rules required that. However in this regard it is important to note that O. 41 R. 13 C.P.C. which necessarily required sending of the file by trial Court to appellate court has been deleted w.e.f. 1.7.2002.

Another reason of delay in disposal of temporary injunction application in suit and consequently delay in disposal of suit is holding a **mini trial** at that stage and writing **very long judgments** while deciding temporary injunction application. In this regard in paras 5 and 6 of *Rajesh Kumar v. Rajendra Kumar saxena* 2013 (97) ALR 597, I held as follows:

*“5. Before parting with the case it is essential to note a disturbing feature of the case. Trial Court rejected the temporary injunction application in 15 closely typed pages discussing several authorities also. If the learned Civil Judge (Junior Division) consumed 15 pages in writing the judgment of temporary injunction application probably he would consume 40-50 pages in deciding the suit. Writing lengthy judgments particularly while deciding interim matters is the main cause of delay in disposal of the cases.*

*6. At the stage of deciding temporary injunction application sort of mini trial is not required. Such judgment*

*shall not consume more than 2 or 3 pages. The Court is only required to look into the three classical aspects of the matter while deciding temporary injunction i.e., prima facie case, balance of convenience and irreparable loss and injury.”*

Stay:

Order staying execution of decree in appeal (or Revision against decree or final order e.g. under Section 25 Provincial Small Causes Courts Act or Revision under various Rent Control Acts) shall be conditional which will also avoid delay in disposal of appeal / revision. After the judgment of the Supreme Court in *M/s Atma Ram Properties v. M/s Motors 2005 (1) SCC 705* conditional stay orders in Appeals / Revisions directed against orders of eviction of tenants are being passed. According to the above authority condition may be of payment of current market rent. Following the said authority Allahabad High Court in *Ganga Prasad v. M/s Hanif Opticians 2005 (2) ARC 723* (decided by me) issued general directions in para 5 as follows:

*“5. Accordingly it is directed that in revisions under Section 25 Provincial Small Causes Court Act or appeals under Section 22 of U.P.Act No. 13 of 1972 District Judge or Addl. District Judge while granting stay order shall impose condition of payment of reasonable amount which may be about 50% of the current rent (i.e. rent on which building in dispute may be let out at the time of grant of stay order. In this regard no detailed inquiry need be made. Mere guess work based on common sense may do). The tenants enjoying the tenanted property on highly inadequate rent tend to prolong the disposal of the appeal or revision for continuing their possession without payment of proper rent/damages for use and occupation. If the stay against eviction is granted on the*

*condition of monthly payment of reasonable amount, this practice can sufficiently be checked.”*

**Amendment of pleadings:**

As observed in *Revajeetu Builders and developers v. Narayanaswamy & Sons 2009 (10) SCC 84*, 80% of amendment applications under Order 6 Rule 17 C.P.C. are filed only to delay the proceedings of the suit. (Para 33, quoting from the book *Justice, Courts and delays* by Arun Mohan, Senior Advocate.) Here also obviously the party which benefits by delay will adopt the device for the same.

Just as under the new Cr.P.C. of 1973/74 emphasis shifted from death penalty to life imprisonment similarly by insertion of the proviso to order 6 rule 17 C.P.C. w.e.f. 1.7.2002 emphasis shifted from allowing the amendment to rejecting the same. It can be allowed only in exceptional cases which satisfy the test of ‘due diligence’. It is submitted with respect that somewhat contrary/ liberal approach taken in some cases (e.g. *Pradeep Singhvi v. Heero Dhankani, 2004 (13) SCC 432*) requires reconsideration.

Imposition of heavy cost while allowing or rejecting (particularly rejecting) amendment applications will also serve as effective check on the use of this device as delaying tactics. In *Revajeetu, supra*, cost of Rs. 1 lac was imposed while upholding rejection of amendment application.

### **Lengthy Judgments:**

In the Times of India, Lucknow edition dated 30.11.2014 there was a news item with the heading SC Judges bat for succinct judgments. It was mentioned therein that the Supreme Court judges after nearly forty thousand judgments since 1950, many of which run into hundreds of pages had informally come together to accept a hitherto un-admitted yet serious problem-verbose verdicts often create confusion both for law and litigants. It is further reported that the Hon'ble Judges of the Supreme Court feel that adding pages to the judgment is neither desirable nor it serve any purpose and the time has come for 'lean to the point judgment delivered in quick time'. It was further mentioned that Supreme Court was also of the view that for the advocates particularly senior advocates, time limit for arguments must be fixed.

One of the main reasons for delay in disposal is lengthy judgments (as well as lengthy arguments). Unless judges seriously consider to shorten their judgments by pruning unnecessary repetitive material, problem of pendency cannot be solved.

However lead has to come from Supreme Court.

### **Strike**

Advocates' strike is one of the major causes of delay in disposal of cases in courts. There are several judgments of the Supreme Court condemning it but with little effect. In November 2013 when I was Administrative Judge of Allahabad District

Court an untoward incident related with strike took place . The President of Bar Association misbehaved with a lady judge as she was sitting in Court on a strike day. I passed a detailed administrative order on 14.11.2013 containing several directions including the following:

*“In future on a date, when advocates are on strike, neither any bail application nor any temporary injunction or stay application in a civil matter shall be entertained nor any temporary injunction or stay order expiring on the said date shall be extended under any circumstances.*

*If Bar Association sends a request that no adverse order shall be passed on a particular date then on the said date no temporary injunction or stay order shall be extended if the advocate appearing for the party in whose favour the temporary injunction order or stay order has been granted refuses to argue the matter.”*

The order proved successful beyond my imagination. After my retirement in January 2014, the subsequent Administrative Judge continued the order. For a year or so, the Allahabad District Court which was at the top of the districts of U.P. in advocates’ strike remained at the bottom.

Non grant and non-extension of interim orders in suits on strike days is quite efficient check on strikes.

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### **End Note**

1. Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so

many diverse, strange, and even paradoxical ways as the question 'What is law?'

(First sentence of first chapter 'Persistent Questions')

2. 'Plato realized that even in his ideal commonwealth disputes will arise which must be decided by the public authorities. It is the theory of *The Republic* that in deciding such controversies, the judges of the state should have a large amount of discretion. Plato does not wish them to be bound by fixed and rigid rules embodied in a code of law. The state of *The Republic* is an executive state, governed by the free intelligence of the best men rather than by the rule of law. Justice is to be administered "without law".<sup>8</sup>

<sup>8</sup>. See Roscoe Pound, "Justice According to Law," 13 *Columbia Law Review* 696 – 713 (1913); 14 *Col. L. Rev.* 1-26, 103-121 (1914). Karl R. Popper, in *The Open Society and Its Enemies* (Princeton, 1950), chs. 6-8, depicts Plato as the philosopher of racist totalitarianism. A different view is taken by John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago, 1953). See also Jerome Hall, "Plato's Legal Philosophy," in *Studies in Jurisprudence and Criminal Theory* (New York, 1958), pp. 48-82; Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), pp. 13-19; Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore, 1949), pp. 29-76.

(Jurisprudence by Edgar Bodenheimer chapter I 'Greek and Roman Legal Theory' Section 2 'Plato's view of the Law')

3. "The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The

humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. .... Justice is the goal of jurisprudence - processual, as much as substantive."

(Sushil Kumar Sen v. State of Bihar, AIR 1975 SC 1185, para 586)

4. It is interesting to note that in seventies and eighties the concept of handmaid was in vogue. Shorter Oxford English Dictionary 1973 edition (reprinted in 1985) gives one of the meanings of hand maid as female servant or attendant and says nothing further. However tenth edition of 2005 of Pocket Oxford English Dictionary before giving the meaning of the word handmaid as a female servant states that it is **old use**. Twelfth edition of 2011 of Concise Oxford English Dictionary describes the meaning as **archaic**. Accordingly it may be said that the concept 'procedure should be handmaid' developed by Justice Krishna Iyer in 1975 was quite relevant then, but by 2002 when the relevant amendments of C.P.C. were enforced, the concept became outdated and now it is archaic.

#### 5. **Hard cases make bad law**

From Wikipedia, the free encyclopedia

"The maxim dates at least to 1837, when a judge, ruling in favor of a parent against the maintenance of her children, said, "We have heard that hard cases make bad law." [3] The judge's wording suggests that the phrase was not new then.

It was used in 1904 by US Supreme Court Justice Oliver Wendell Holmes, Jr.. Its validity has since been questioned and dissenting variations include the phrase "Bad law makes hard cases", and even its opposite, "Hard cases make good law".

Oliver Wendell Holmes, Jr. made a utilitarian argument for this in his judgment of Northern Securities Co. v. United States (1904): [4]

Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance... but because

of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”

6. In an article ‘what causes Judicial Delay’ by Brajesh Ranjan, a teacher of Procedural Law, on Editorial page of Times of India dated 25.8.2016 (Lucknow Edition) it has been observed about the impact of this judgment that “This case has been applied as a virtual carte blanche by lawyers to file written statements beyond 90 days as a matter of course. Thus the exceptional has become new normal.”