CODE OF CIVIL PROCEDURE

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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 Civil Procedure Code, 1908 (hereinafter referred to as '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 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 Garden of Eden God did not punish Adam and Eve without giving them opportunity to show cause as to why they had eaten the prohibited fruit. The first reported case of principles of natural justice in Dr. Bentely's case, i.e., **R V. University of Cambridge,** (1723) 1 STR 757, wherein reference of the incident of Garden of Eden was made.

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

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.

The first Code of Civil Procedure was enacted in 1859 by the Committee headed by Mr. John Romily. It was amended in 1877 and, subsequently, in 1882, however, those amendments did not serve the purpose, therefore, the present Code of Civil Procedure was enacted in 1908. It was drafted by the Committee headed by Sir Earle Richards. The Committee before submitting the draft to the West Minister Parliament travelled India, read its history and ancient texts and then knew the traditions and culture of this country, and draft legislation was prepared keeping all such things in view. For example, Section 112 of the Evidence Act, 1872, drafted by Sir James Fitzjames Stephens, is based on Mahabharat as he realised that the issue of paternity has been very sensitive in the Hindu society and it was not permissible to challenge someones' paternity. There was no analogous provision to it in England till 1966 when they amended the provisions of Section 9 of the Marriage Law.

Section 2(2)

(See: **Paras Nath Rai v. State of Bihar** AIR 2013 SC 1010, **Rajinder Kumar** v. **Kuldeep Singh & Ors.** 2014(2) SCALE 135).

Section 7

(See: **Ramji Gupta v. Gopi Krishna Agrawal,** AIR 2013 SC 3099)

Section 8

(See: **Ramji Gupta v. Gopi Krishna Agrawal,** AIR 2013 SC 3099)

Section 11 -Res Judicata

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" (a thing adjudged must be taken as truth) is the full maxim which has, over the years, shrunk to mere " res judicata". (Vide: **Kunjan Nair Sivaraman Nair v. Narayanan Nair** (2004) 3 SCC 277).

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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 v. ED-, Appakadh Ayiassa Bi & Ors.**, AIR 1949 PC 302; and **Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors.**, AIR 1953 SC 65).

In **Smt. Raj Lakshmi Dasi & Ors. v. Banamali Sen & Ors.**, AIR 1953 SC 33, the apex Court while dealing with the doctrine of *res judicata* referred to and relied upon the judgment in **Sheoparsan Singh v. Ramnandan Singh**, AIR 1916 PC 78 wherein it had been observed as under:

> *"…….. the rule of res judicata, while founded on ancient precedents, is dictated by a wisdom which is for all time….. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: 'If a person though defeated at law, sue again, he should be answered, ''you were defeated formerly". This is called the plea of former judgment.'... And so the application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law''*

The apex Court in **Satyadhyan Ghosal & Ors. v. Smt. Deorajin Debi & Anr.**, AIR 1960 SC 941 explained the scope of principle of *res-judicata* observing as under:

> *"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. 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, When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."*

A similar view has been re-iterated by the apex court in **Daryao & Ors. v. The State of U.P. & Ors.,** AIR 1961 SC 1457; **Greater Cochin Development Authority v. Leelamma Valson & Ors.**, AIR 2002 SC 952; and **Bhanu Kumar Jain v. Archana Kumar & Anr.**, AIR 2005 SC 626.

The Constitution Bench of the apex court in **Amalgamated Coalfields Ltd. & Anr. v. Janapada Sabha Chhindwara & Ors.**, AIR 1964 SC 1013, considered the issue of *res judicata* applicable in writ jurisdiction and held as under:

> *"…Therefore, there can be no doubt that the general principle of res judicata applies to writ petitions filed under Article 32 or Article 226. It is necessary to emphasise that the application of the doctrine of res judicata to the petitions filed under Art. 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in courts of law."*

In **Hope Plantations Ltd. v. Taluk Land Board, Peermade & Anr.,** (1999) 5 SCC 590, the apex Court has explained the scope of finality of the judgment of this Court observing as under:

> *"One important consideration of public policy is that the decision pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by the appellate authority and other principle that no one should be made to face the same kind of litigation twice ever because such a procedure should be contrary to consideration of fair play and justice. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it."*

(See also: **Burn & Co., Calcutta v. Their Employees**, AIR 1957 SC 38; **G.K. Dudani & Ors. v. S.D. Sharma & Ors.**, AIR 1986 SC 1455; and **Ashok Kumar Srivastav v. National Insurance Co. Ltd. & Ors.**, AIR 1998 SC 2046).

A three-Judge Bench of the apex court in **The State of Punjab v. Bua Das Kaushal,** AIR 1971 SC 1676 considered the issue and came to the conclusion that if necessary facts were present in the mind of the parties and had gone into by the court, in such a fact-situation, absence of specific plea in written statement and framing of specific issue of *res judicata* by the court is immaterial.

A similar view has been re-iterated by the apex court in **Union of India v. Nanak Singh,** AIR 1968 SC 1370 observing as under:

> *"The apex Court in **Gulabchand Chhotalal v. State of Gujarat**, AIR 1965 SC 1153 observed that the provisions of Section 11 of the Code of Civil Procedure are not exhaustive with respect to all earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not*

necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. There is no good reason to preclude, such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest."

It is a settled legal proposition that the ratio of any decision must be understood in the background of the facts of that case and the case is only an authority for what it actually decides, and not what logically follows from it. "The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact-situation of the decision on which reliance is placed."

Even otherwise, a different view on the interpretation of the law may be possible but the same should not be accepted in case it has the effect of unsettling transactions which had been entered into on the basis of those decisions, as reopening past and closed transactions or settled titles all over would stand jeopardized and this would create a chaotic situation which may bring instability in the society.

(See also: **Dr. Subramanian Swamy v. State of Tamil Nadu & Ors.** (2014) 1 SCALE 79).

If the issue has been already decided on merit between the same parties in an 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 II 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 of a judicial decision has no bearing upon the question whether or not it operates as res judicata. (Vide: **Shah Shivraj Gopalji v. ED-. Appakadh Ayiassa Bi & Ors.**, AIR 1949 PC 302; and **Mohanlal Goenka v. 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 v. Devidas Shridhar**, AIR 1955 Bom. 239; **Benaras Ice Factory Ltd. v. Sukhlal Amarchand Vadnagra,** AIR 1961 Cal. 422; **Jasraj Multan Chand & Anr. v. Kamruddin & Ors.,** AIR 1971 MP 184; and **Puthen Veettil Nolliiyodan Devoki Amma & Ors. v. Puthen Veettil Nolliyodan Kunhi Raman Nair & Ors.,** AIR 1980 Ker 230).

In **Laxman Pandya v. State of U.P**., (2011) 14 SCC 94, it was held that dismissal of earlier writ petitions would not affect adjudication of present writ petitions because both were based on different causes. In earlier writ petitions, they neither had the opportunity nor could they claim that acquisition will be deemed to have lapsed due to non-compliance with Section 11-A. Thus, dismissal or writ petitions filed in 1982 for default or otherwise did not operate as bar to the filing of fresh writ petitions in 2000.

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. v. 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 Supreme Court in large number of cases. In **Arjun Singh v. Mohindra Kumar,** AIR 1964 SC 993, the 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 Supreme Court in **Y.B. Patil v. Y.L. Patil,** AIR 1977 SC 392; **Prahalad Singh v. Sukhdev Singh**, AIR 1987 SC 1145; **Bhanu Kumar Jain v. Archana Kumar & Anr.**, AIR 2005 SC 626; **Ishwar Dutt v. Land Acquisition Collector**, AIR 2005 SC 3165; **Ajay Mohan v. H.N. Rai,** (2008) 2 SCC 507; and **Harbans Singh v. Sant Hari Singh**, (2009) 2 SCC 526.

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 v. Shriram Tukaram,** AIR 1999 SC 451).

In certain conditions res judicata also binds the co-defendants (Vide: **M/s. Makhija Construction & Engg (P) Ltd. v. Indore Development Authority & Ors.,** AIR 2005 SC 2499).

The principle of Res judicata has been held to bind co-defendants if the relief given by the earlier decision involved the determination of an issue between co-defendants.

In **Munnibibi v. Triloki Nath**, AIR 1931 PC 114, three conditions were laid down:

1. There must be a conflict of interest between the defendants concerned
2. It must be necessary to decide this conflict to give the plaintiff the relief claimed
3. The question between the defendants must be finally decided

In **Escorts Farms Ltd. v. Commissioner, Kumaon Division, Nainital, U.P. & Ors.,** (2004) 4 SCC 281, the 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". (See: **Swami Atmananda & Ors. v. Sri Ramkrishna Tapovanam & Ors.,** AIR 2005 SC 2392).

In **Forward Construction Co. & Ors. v. Prabhat Mandal, Andheri & Ors.,** AIR 1986 SC 391 the Supreme Court explained the scope of constructive res judicata as envisaged in Explanation IV to Section 11 of CPC and observed that the High Court was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. The Court held as under:

> "Explanation IV to S.11, CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

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. v. Government of India**, AIR 2002 SC 2418; **Arm Group Enterprises Ltd. v. Waldorf Restaurant,** (2003) 6 SCC 423; **Mahila Bajrangi v. Badribhai,** (2003) 2 SCC 464; **Pondicherry Khadi & Village Industries Board v. P. Kulothangan,** AIR 2003 SC 4701; **Kiran Tandon v. Allahabad Development Authority,** AIR 2004 SC 2006; **T.P. Moideen Koya v. Govt. of Kerala**, (2004) 8 SCC 106; **State of Haryana v. State of Punjab**, (2004) 12 SCC 673; **Bhanu Kumar Jain v. Archana Kumar,** (2005) 1 SCC 787; **Sampat Co-operative Sugar Mills Ltd. v. Ajit Singh** (2005) 3 SCC 516; and **Swami Atmananda & Ors. v. Sri Ramkrishna Tapovanam & Ors**. AIR 2005 SC 2392).

The doctrine would not apply if the judgment is by a Court lacking inherent jurisdiction or when the judgment is non-speaking. (Vide Union of India v. Pramod Gupta (Dead) by L.Rs. & Ors., (2005) 12 SCC 1).

In **State of Uttar Pradesh & Anr. v. Jagdish Sharan Agrawal & Ors.**, (2009) 1 SCC 689, the Apex Court held that where the matter has not been decided on merit earlier, the doctrine of res judicata is not applicable.

In **State of Karnataka v. All India Manufactures Organisation & Ors**., AIR 2006 SC 1846, the Court held that doctrine also applies in case of a PIL, provided the earlier case was a genuine and a bona fide litigation as the judgment in the earlier case would be a judgment in rem.

The doctrine of res judicata is not merely a matter of procedure but a doctrine evolved by the Courts in the larger public interest. Section 11 merely recognizes the said doctrine which is basically based on public policy. (Vide: **Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors.,** (2006) 6 SCC 94).

In **Deewan Singh & Ors. v. Rajendra Pd. Ardevi & Ors**., (2007) 10 SCC 528, the Apex Court examined a case where in the first round of litigation the Supreme Court had categorically opined that the disputed property was a Jain temple. In subsequent litigation, the Apex Court held that it was not permissible for the State to contend that it was Hindu temple as the finding in the earlier petition attained finality on this issue.

In **State of Karnataka v. All India Manufacturers Association**, AIR 2006 SC 1846, the Supreme Court explained the principle enshrined in Explanation IV to Section 11 observing that it is for preventing the abuse of the process of the Court through re-agitation of settled issues merely because the petitioners drew semantic distinctions from the earlier case. If the issues that had been raised ought to have been raised in the previous case, it would amount to abuse of process of the Court and, thus, cannot be allowed. A similar view has been reiterated in **Ramadhar Shrivas v. Bhagwan Das**, (2005) 13 SCC 1, observing that the object of Explanation IV is to compel the party to take all the grounds of attack or defence in one and the same suit.

(See also : **Chandrabhai K. Bhoir & Ors. v. Krishna Arjun Bhoir & Ors.**, AIR 1645; and **Harbans Singh & Ors. v. Sant Hari Singh & Ors.**, AIR 2009 SC 1819).

Applicability of Res Judicata

Case: **Williams v. Lourdvasamy** (2008) 5 SCC 647. Supreme Court held that some stray observations by the Trial Judge, in an earlier case on the question which was not directly and substantially in issue – would not bar the subsequent suit.

Dir., Cent. Marine Fisheries Res. Inst. & Ors. v A. Kanakkan & Ors., (2009) 17 SCC 253

Code of Civil Procedure, 1908 - Section 12--Res judicata--Applicability--Principle of res judicata to apply to proceedings before CAT.--However, when fresh cause of action arises--Res judicata would have no application.

(Para 12) Principle of res judicata would apply to proceedings initiated before the Central Administrative Tribunal. If the said principles were applicable, the bar to maintain a fresh application on the self-same cause of action would attract provisions of Section 12 of the Code of civil Procedure or the general principles of res judicata.

Ramchandro Dagdu Sonavane (Dead) by L.Rs. & Ors. v. Vithu Hiro Mahar (Dead) by LRs. & Ors., (2009) 10 SCC 273

(Para 31) Civil - Res-judicata - Application of - Section 11 of Code of Civil Procedure, 1908 Whether the Judgment and Decree passed in the original suit would operate as res-judicata in subsequent proceedings, including the proceedings before the High Court in the second appeal and writ petition filed by the Respondents - Held, a plea decided even in suit for injunction touching the title between the same parties, would operate as res-judicata - In the present case, al1 the issues has been decided in earlier suit and has been confirmed in the regular second appeal and the issue decided therein was binding on the parties - Each one of the conditions necessary to satisfy the test as to the applicability of Section 11 of CPC is satisfied.

(See also: Paras Nath Rai v. State of Bihar AIR 2013 SC 1010; **Kamal Jora v. State of Uttarakhand & Anr.** AIR 2013 SC 2242; **Orissa Power Transmission Corporation Limited & Ors. v. Asian School of Business Management Trust & Ors.,** (2013) 8 SCC 738; **State of Gujarat &Anr. v. Manoharsinhji Pradyumansinhji Jadeja** (2013) 2 SCC 300; **Kalinga Mining Corporation v. Union of India & Ors.,** (2013) 5 SCC 252; **Ramji Gupta v. Gopi Krishna Agrawal,** AIR 2013 SC 3099).

Constructive Res Judicata

Tata Industries Ltd. v. Grasim Industries Ltd. (2008) 10 SCC 187. This case deals with jurisdiction to appoint the arbitrator u/s 11(6) of Arbitration and Conciliation Act, 1996. Supreme Court rejected the argument raised before the High Court and held – Question of locus standi not having been raised before the High Court did not survive – it amounted to an abandonment of the issue and cannot be raised before the Supreme Court.

An issue which ought to have been raised earlier cannot be raised by the party in successive round of litigation. (See: **Ramchandra Dagdu Sonavane** (dead) by Lrs. **& Ors. v. Vithu Hira Mahar** (dead) by Lrs. **& Ors.**, AIR 2010 SC 818; and **Shiv Chandra More & Ors. v. Lt. Governor & Ors.,** (Civil Appeal No. 3352 of 2014 decided on 7.3.2014.

Fatima Bibi Ahmed Patel v. State of Gujarat (2008) 6 SCC 789. Supreme Court held that the principle analogous to Res Judicata or constructive Res judicata does not apply to criminal cases. Where the entire proceedings have been initiated illegally and without jurisdiction, in such a case – even the principle of Res judicata (wherever applicable) would not apply…

Exceptions to Res Judicata.

In **Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar** (2008) 9 SCC 54, the Supreme Court laid down 3 exceptions to the rule of Res Judicata

(i) When judgment is passed without jurisdiction

(ii) When matter involves a pure question of law.

(iii) When judgment has been obtained by committing fraud on the Court.

Jurisdiction and Cause of Action

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 are situated. Section 17 provides that suit shall be instituted for immovable property situate within the jurisdiction of different Courts. Section 18 deals with the place of institution of a 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 property.

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 a court having no jurisdiction passes a decree over the matter, it would amount to a nullity, as the matter by-passes the correct route of 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 parties cannot confer jurisdiction upon a court and an erroneous interpretation equally should not be permitted to perpetuate or perpetrate, defeating the legislative intention. The Court cannot derive jurisdiction apart from the Statute. No amount of waiver or consent can confer jurisdiction on the Court if it inherently lacks it or if none exists. (Vide : **Smt. Nai Bahu v. Lala Ramnarayan & Ors.**, AIR 1978 SC 22; **Natraj Studios Pvt. Ltd. v. Navrang Studio & Anr.**, AIR 1981 SC 537; **Sardar Hasan Siddiqui v. State Transport Appellate Tribunal,** AIR 1986 All.132; **A.R. Antuley v. R.S. Nayak,** AIR 1988 SC 1531; **Union of India v. Deoki Nandan Aggarwal,** AIR 1992 SC 96; **Karnal Improvement Trust v. Prakash Wanti & Anr.,** (1995) 5 SCC 159; **U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd.**, AIR 1996 SC 1373; **State of Gujarat v. Rajesh Kumar Chimanlal Barot & Anr.**, AIR 1996 SC 2664; **Kondiba Dagadu Kadam v.**

Savitribai Sopan Gujar & Ors., AIR 1999 SC 2213; **Collector of Central Excise, Kanpur v. Flock (India) (P) Ltd., Kanpur**, AIR 2000 SC 2484; and **Vithal (P) Ltd. v. Union of India & Ors.,** AIR 2005 SC 1891).

Jurisdiction :

(a) Territorial Jurisdiction: **Dabur India v. K.R. Industries** (2008) 10 SCC 595. Apex Court held that composite suit for passing off & copyright infringement cannot be filed at a place where plaintiff resides or carries on business etc.

(b) Territorial Jurisdiction specified in contract case. **M/s Ass. Rubber Prod. v. M/s Harry & Jenny & Ors.** (2008) AIHC 2754 held that jurisdiction of Court specified in contract can safely be presumed. Absence of words like 'along' 'only' excluded would be irrelevant.

(c) Exclusion of jurisdiction: **United India Ins. v. Ajay Sinha,** (2008) 7 SCC 454 excluding jurisdiction of civil courts & conferring it on authorities or Tribunals should be strictly construed…..

(d) Arbitration clause vis-à-vis Civil Jurisdiction - **Indian Drugs & Pharmaceuticals Ltd. v. Ambika Ent.** (2008) AIHC 619 held that section 8 of the Arbitration Act, 1996 being a special provision, would prevail over Section 9 of CPC.

(See also: **Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.,** (2013) 9 SCC 32).

Decision as to Jurisdiction:

In **AVN Tubes Ltd. v. Shishiu Mehta** (2008) 3 SCC 572, the High Court in revision, held that trial court had no jurisdiction. Apex Court directed trial court to decide the issue without being influenced by the observations made by trial court or High Court in revision.

In **Subodh Kumar Gupta v. Shrikant Gupta & Ors.**, (1993) 4 SCC 1, the Supreme Court considered a case wherein a partnership firm having its 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 CPC, 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 jurisdiction would not be enough to confer jurisdiction or allege that the agreement was void would not be enough unless the agreement was set-aside by the competent court. The court must find out by examining the provisions carefully, as to whether the suit can be entertained by it. Generally, cause of action would arise 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 & Natural Gas Commission v. Utpal Kumar Basu & Ors**., (1994) 4 SCC 711, the 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, the facts must first be decided. It must also be ascertained which facts are true and the other facts must be disregarded, because the facts form integral part of the cause of action. In the said case, facts involved were that ONGC 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 to which tenders or 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 Supreme Court placed reliance upon the judgment in Chand Koer V. 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 v. Vinay Engineering Enterprises Pvt. Ltd.**, (1994) 4 SCC 710, the 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 Supreme Court held that the Court at Calcutta had no jurisdiction, because the respondent company was a Calcutta-based firm.

In **Board of Trustees for the Port of Calcutta v. Bombay Flour Mills Pvt. Ltd. & Anr.,** AIR 1995 SC 577, the 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 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. v. New Delhi Municipal Council & Anr**., AIR 1998 SC 223, the 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. v. Dr. Brojen Gogoi & Ors.,** AIR 1998 SC 143, the 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 Apex Court transferred the case from Bombay High Court to Gauhati High Court to be heard further.

In **C.B.I., Anti-corruption Branch v. Narayan Diwakar**, AIR 1999 SC 2362, the Apex Court considered a case where the respondent was the Incharge/Collector in Daman within the territorial jurisdiction of Bombay High Court and an FIR had been lodged against him in Daman for hatching 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 v. State of Maharashtra & Ors**., AIR 2000 SC 2966, the 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 v. Industrial Credit & Investment Corpn. of India Ltd.,** AIR 2000 SC 579, the 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 v. Union of India & Ors.,** AIR 2001 SC 416, the Supreme Court considered the question of territorial jurisdiction of the Principal Seat of the 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. v. Adani Exports Ltd. & Anr.,** (2002) 1 SCC 567, the Supreme Court considered the scope of Section 20 of CPC and Clause (2) of Article 226 of the Constitution while examining whether in that case the Gujarat High Court had 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, was 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 v. 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 v. 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. v. Mehbul Ali Mian & Ors.,** AIR 1949 PC 78, and by the Supreme Court in

State of Madras v. C.P. Agencies, AIR 1960 SC 1309, **A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies**, **Salem,** AIR 1989 SC 1239, **A.V.M. Sales Corporation v. Auuradha Chemicals Pvt. Ltd.,** (2012) 2 SCC 315.

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 v. Chandrasekhara Rao**, AIR 1966 AP 334; **Ram Awalamb v. Jata Shankar**, AIR 1969 All. 526(FB); and **Salik Ram Adya Prasad v. Ram Lakhan & Ors**., AIR 1973 All. 107).

A similar view has been reiterated by the Supreme Court in **Swami Atmananda & Ors. v. Sri Ramkrishna Tapovanam, & Ors.**, AIR 2005 SC 2392, 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 would 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 v. M/s. Earl Chawla & Co. (P) Ltd.**, AIR 1974 P&H 2).

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

In **Rameshwar Lal Ram Karan & Ors. v. 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 v. Moda,** 1951 R.L.W. 433 and **Abdul Gafoor v. 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 an assignment constitutes the cause of action and is sufficient to give jurisdiction to the Court. (Vide: Kalooram Agarwalla V. Jonistha Lal Chakrabarty & Anr., AIR 1936 Cal. 349; Gopal

Shuriamal V. T.G. S. Narayan & Anr., AIR 1953 Nag. 193; Union of India V. Adon Hajee, AIR 1954 Tra.& Cochin 362; Alliance Assurance Co. V. Union of India, AIR 1959 Cal. 563; Ramarao V. Union of India & Ors., AIR 1961 AP 282; Radhakrishnamurthy (supra); and Barikara Narasayya & Ors. V. 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 jurisdiction. (Vide: Commissioner for the Port of Calcutta V. General Trading Corpn. Ltd., AIR 1964 Cal. 290).

In Kunjan Nair Sivaraman Nair V. Narayanan Nair, AIR 2004 SC 1761, the meaning of 'cause of action' has been explained by the Apex Court compendiously observing that the term 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 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 an 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 V. 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 V. 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 of territorial jurisdiction over the subject matter and to try the suit.

In New Moga Transport Co. V. United India Insurance Co. Ltd. & Ors., AIR 2004 SC 2154, 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 jurisdiction only to one place, 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. V. Union of India & Anr., AIR 2004 SC 2321, the 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.

The Court is bound to determine exclusively jurisdictional issue before granting relief. (Vide Shree Subhlaxmi Fabrics (P) Ltd. V. Chand Mal Baradia & Ors., AIR 2005 SC 2161).

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

It provides for transfer of suit, appeal or other proceedings. **Other proceedings** include the execution proceedings. (Vide: Rajagopala Pandarathar & Ors. V. Tirupathia Pillai & Anr., AIR 1926 Mad. 421; Sarjudei V. Rampati Kunwari, AIR 1962 All. 503; Prabhakara Rao H. Mawle V. Hyderabad State Bank, AIR 1964 AP 101; and Mulraj Doshi V. Gangadhar Singhania, AIR 1982 Ori. 191).

Transfer of the proceedings by the High Court before itself on the ground that a party is abusing the process of the Court or otherwise resorting to the process that other party may not succeed, stands fully fortified by the judgment of the Hon'ble Supreme Court in Abdul Rahman V. Prasony Bai & Anr., AIR 2003 SC 718.

In **Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation**, (2009) 8 SCC 646, the apex court held:

> "Only civil suits are subject matter of inter State transfer from one civil court to another civil court. Sub-section (5) of section 24 of CPC provides that a suit or proceeding may be transferred from a Court which has no jurisdiction to try it. The power to transfer one case from one court to another or from one tribunal to another is to be exercised if exceptional situation arises and not otherwise. Rules of procedures are intended to provide justice and not to defeat it."

Section 25 empowers the Supreme Court to transfer the case from a competent Court in one State to the Court of another State. The transfer should not be made when the proceedings in a case has reached the final stage or are likely to be concluded. (Vide: N.K. Nair & Anr. V. Kavanugalaanattu Radhika, (2005) 13 SCC 439). While considering the application under Section 25, the Court must examine all the facts involved therein and inconvenience of a party cannot be a ground for transfer. (Vide : Madhu Saxena V. Pankaj Saxena, (2005) 13 SCC 158; Sarita Devi V. Manoj Saha, (2005) 13 SCC 413; Anindita Das V. Srijit Das, (2006) 9 SCC 197; and Gyanmati Yadav v. Ram Sagar Yadav, (2013) 14 SCC 621).

Section 26 (2) has been introduced by amendment providing that in every plaint, fact shall be verified by affidavit. In Vidyawati Gupta V. Bhakti Hari Naik & Ors., AIR 2006 SC 1194, the Supreme Court explained the scope of the amended provision observing that the purpose for its introduction was to eliminate the procedural delays in the disposal of the civil matters though, the provisions are directory in nature and non-compliance thereof would not automatically render the plaint non-est.

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 in 1999.

Section 32 requires penalty for default of not appearing in the Court by the witness. Earlier, the Court had a power to impose a fine not exceeding five hundred rupees. By Amendment Act, 1999, the amount had been enhanced to five thousand rupees.

Section 33

(See : State of Haryana v. Kartar Singh, (2013) 11 SCC 375).

Section 34

(See: TVC Skyshop Ltd. v. Reliance Communication & Infrastructure Ltd., (2013) 11 SCC 754; State of Haryana v. Kartar Singh, (2013) 11 SCC 375).

Section 35 provides **Actual realistic costs - meaning.**

Provision of costs have been incorporated in section 35, 35-A, 35-B and section 95 of CPC for the purpose of acting as a deterrence against frivolous. vexatious claims made. But the working of the provision shows that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party.

In **Salem Advocates Bar Association V. Union of India,** 2005 (6) SCC 344. the Supreme court held that the costs have to be actual and reasonable, including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules.

In **Sanjeev Kumar Jain V. Raghubir Saran Charitable Trust & Ors**., (2012)lSCC455, the Apex Court went into the Interpretation of the words "actual realistic costs". It held that even if actual costs have to be awarded, it should be realistic which

means what a "normal" advocate in a "normal" case of such nature would charge normally in such a case." Assuming that costs could be awarded on such basis. The actual realistic cost should have a correlation to costs which are realistic and practical. It cannot obviously refer to fanciful and whimsical expenditure by parties who have the luxury of engaging a battery of high-charging lawyers.

Section 39 deals with transfer of decree for execution to the Court where the 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 47

(See: Land Acquisition Collector v. Surinder Kaur, (2013) 10 SCC 623; and State of Haryana v. Kartar Singh (2013) 11 SCC 375).

Section 51

(See: State of Haryana v. Kartar Singh, (2013) 11 SCC 375).

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.

State is a necessary party

In **Ranjeet Mal V. General Manager, Northern Railway, New Delhi & Anr.,** AIR 1977 SC 1701, the Supreme 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 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. V. Collector & Ors;** AIR 2003 SC 1805, the Apex Court accepted the submission that a writ cannot be entertained without impleading the State if relief is sought against the State. The 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 or 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. (See also: District Collector, Srikakulam & Ors. V. Bagathi Krishna Rao & Anr., AIR 2010 SC 2617)

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 like by general or special order authorise 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 CPC 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 CPC 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.

In the case of **The State of Kerala V. The General Manager, Southern Railway, Madras** AIR 1976 SC 2538, the Supreme Court explained the purpose of requiring the impleadment of the State as a party, as follows:

> "According to Section 79 of the Code, in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be (a) in the case of a suit by or against the Central Government, the Union of India, and (b) in the case of a suit by or against a State Government, the State. This section is in accordance with Article 300 of the Constitution, according to which the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State. It is not disputed that Southern Railway is owned by the Union of India. As such, a suit dealing with the alleged liability of that railway should have been brought against the Union of India."

A Constitution Bench of the Supreme Court in **The State of Punjab V. The Okara Grain Buyers Syndicate Ltd., Okara & Anr.** 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 V. Modern Construction Co. (P) Ltd,** 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.

In **Kali Prasad Agarwala (Dead by L.Rs.) & Ors. V. M/s. Bharat Coking Coal Limited & Ors.** AIR 1989 SC 1530, while considering an issue whether the suit lands had vested, free from encumbrance in the State consequent upon the issuance of Notification

under Section 3 of the Bihar Land Reforms Act, the Supreme Court did not entertain the case observing as under :-

> "In our opinion, it is unnecessary to consider the first question and indeed it is not proper also to consider the question in the absence of the State which is a necessary party for adjudication of that dispute. The State of Bihar is not impleaded as a party to the suit and we, therefore, refrain from expressing any opinion on the first question."

In **Sangamesh Printing Press V. Chief Executive Officer, Taluk Development Board** (1999) 6 SCC 44, the State was not impleaded as a party before the Trial Court in a money recovery suit. The same was dismissed on the ground of non-impleadment of necessary party. During appeal, an application was made under O. 1 R. 10 praying for impleadment of the State, however the High Court decided the matter on merits without considering the same. The Supreme Court observed as under :

> "Keeping in view the facts and circumstances of the case, we are of the opinion that the High Court should have decided the appellant's application under Order 1 Rule 10 C.P.C. and, thereafter, proceeded to hear the appeal in question. Not having disposed of the application under Order 1 Rule 10 has caused serious prejudice to the appellant. We, therefore, set aside the judgment of the High Court and restore Regular First Appeal No 29 of 1987 to its file. The High Court should first deal with the application under Order 1 Rule 10 C.P.C. which is pending before it and then proceed to dispose of the appeal in accordance with law."

(See also: **District collector, Srikakulam & Ors. V. Bagathi Krishna Rao & Anr.** AIR 2010 SC 2617)

Section 80 deals with the notice in case of a Suit against the State. Purpose of giving notice has been explained by the Apex Court in **Salem Advocate Bar Association, Tamil Nadu V. Union of India,** AIR 2005 SC 3353 observing as under:-

> "Section 80 (1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two month's period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period

therefore, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

These provisions cast an implied duty on all concerned Governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned Governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him."

Further, in computing the period of limitation, the period of notice would be mandatorily excluded provided notice s given within limitation period. (Disha Construction & Ors V. State of Goa & Anr., AIR 2012 SC 1769)

In Ram Kumar & Anr. V. State of Rajasthan & Ors., AIR 2009 SC 4, the Apex Court considered a case where a land had been allotted to a person in lieu of his land acquired under the Land Acquisition proceedings and mutation had taken place after exchange of possession. Subsequently the exchange deed was revoked. In such a fact situation, it was held that Section 80 notice served upon the District Collector would not bar the suit merely because the notice had not been served on the District Education Officer, who was involved in earlier proceedings, for the reason that he was not acting in his official capacity and was involved only for the re-delivery of possession. Thus, no

notice under Section 80 CPC is required before filing suit if the act done by public officer is not in discharge of his official duties.

Section 80(2)

(See: State of Kerala v. Sudhir Kumar Sharma, (2013) 4 SCC 706).

Section 89- Civil Procedure Code, 1859 contained Section 89 providing for arbitration by judicial intervention. The Code has repealed the earlier CPC 1882, and it added Section 89 providing for arbitration by judicial intervention. After commencement of the Arbitration Act, 1940, the provisions of Section 89 CPC were repealed considering that there was a duplication, and as special law prevails over general law, the provisions of Section 89 CPC 1908 would not serve any purpose. Subsequently because of the scientific developments, change in the nature of the litigation, globalisation, and industrialization etc., it was felt that neither the Arbitration Act 1940 nor CPC was was able to cope with the problems. Thus, Arbitration Act, 1940 was repealed by Arbitration and Conciliation Act 1996 (hereinafter called the Act 1996), and vide CPC Amendment 1999, Section 89 was re-introduced with amendment, which came into force w.e.f. 1st July, 2002. The newly added Section 89 contains 4 alternative forums of dispute resolution, putting an obligation on the Court that once the issues are framed after considering the contents of the plaint, written statement, explanation and statement of the parties recorded under Order 10 Rule 1; the Court may consider as to whether there is any element of settlement which may be acceptable to the parties. It may formulate those points and give them to the parties for the purpose of their observations and after receiving their observations, the Court may re-assess and re-formulate a term by a possible settlement and refer the same for (a) arbitration, (b) conciliation, (c) judicial settlement including Lok Adalat, or (d) Mediation.

(a) and (b). The arbitration and conciliation referred to in Section 89 must be those other than governed by the agreement of the parties which can be dealt with under the provisions of Act 1996. In case the matters are referred to arbitration and conciliation under Section 89, procedure prescribed under the Act 1996 would apply. Section 5 of the Act 1996 provides for non-intervention by judiciary except as provided under Section 9 for grant of interim relief. Section 8 refers to the power of reference to arbitration. Section 19 provides for non-application of complicated rules of Code of Civil Procedure and Evidence Act. Section 61 deals with scope and application for conciliation. Section 70 puts an embargo not to disclose the information received by the conciliator from either of the parties. In case the proceedings before him fail, Section 81 provides that information or statements made by the parties or their agent during the proceedings of conciliation shall not be admissible in evidence.

So far as procedure governing the Lok Adalat is concerned, it would be as provided under the provisions of Legal Service Authorities Act 1987. Lok Adalat earlier did not have the statutory backing. Section 20 provides for cognizance of causes by Lok Adalat. The decision taken by the Lok Adalat would be deemed to be a decree of the civil court and executable by the court having jurisdiction. As per the provisions of Section 20 of the Act 1987, in case the party is agreed and one of them makes an application to the court and the Court is satisfied that it is a fit case for reference to Lok Adalat, the court would refer the matter to the Lok Adalat which shall decide it and the award so made by

the Lok Adalat would be a decree of civil court, as provided under Section 21 of the Act 1987. Section 22 D provides that Lok Adalat will not follow the complicated procedure prescribed under the Code of Civil Procedure or Evidence Act and it may adopt any fair procedure and observe the principles of natural justice. Section 22 E provides that the Award so made by the Lok Adalat shall be final and executed by the civil court having jurisdiction over the matter.

(See: B.S. Krishna Murthy v. B.S. Nagraj AIR 2011 SC 794; and .Ghulam Nabi Dar v. State of J & K, AIR 2013 SC 2950).

Mediation- It provides for the philosophy that parties must mediate and not litigate. The matter may be referred to a skilled mediator who should be a man of integrity. The mediator shall not record reasons for failure of proceedings nor such reasoning shall be communicated to the Court nor the Court would make an attempt to know the reasons for failure. (See also: Moti Ram v. Ashok Kumar, (2011) 1 SCC 466). Such a requirement is there so that the Court may not become prejudice against a party, due to which the proceedings could not succeed. The Courts have to frame the Rules in this regard.

The remedies prescribed by Section 89 has advantage as the parties are in control of their proceedings. The matter can be settled within short span of period. There will be no strained relations between the parties, and in case the matter is resolved by any of the procedures provided under Section 89 of the Code, the plaintiff shall be entitled for claim of refund of the Court Fees paid by him, as provided under Section 16 of the Court Fees Act,1870. The said provision has been amended recently, and it reads as under:-

> "Where the Court refers the parties to the suit to any one of the code of settlement of disputes referred to in Section 89 of the Code of Civil Procedure 1908, the plaintiff shall be entitled to a certificate from the Court authorising him to receive back from the Collector the full amount of fee paid in respect of such plaint."

In order to facilitate the working of alternative forums, as provided under Section 89 of the Code, the provision contained in Order 10 Rule 1 A provides for a direction of the Court to the party to opt for any one mode of alternative dispute resolution. Order 10 Rule 1 B similarly provides for a procedure for appearance etc. when the matter is referred to the conciliatory forum. Order 10 Rule 1 C provides for the reference back to the Court consequent to failure of efforts of conciliation.

In State of Punjab & Anr. V. Jalour Singh & Ors., (2008) 2 SCC 660, the Hon'ble Court considered the scope of Section 89 and the provisions of Sections 19 to 22 of the Legal Services Authorities Act, 1987 and held that the function of the Lok Adalat relate purely to conciliation and its order must be based on compromise or settlement between the parties. The Lok Adalat cannot enter into an adversarial adjudication akin to a Court of law. Any award of the Lok Adalat not based on a compromise or settlement between the parties would be void.

Similar view has been reiterated in State of Punjab & Ors. V. Phulan Rani, (2004) 7 SCC 555.

(See also: Alok Mishra V. Garima Mishra, (2009) 12 SCC 270; R. Manjula V. V. Raja, (2009) 2 SCC 511; and B.P. Moideen Sevamandir V. A.M. Kutty Hassan, (2009) 2 SCC 198).

Section 89 proceedings at appellate stage:- There is no dispute to the settled legal provision that the pleadings can be amended at any stage. A party can also be impleaded at any stage of the proceedings. In such an eventuality, as the appeal is a continuation of suit, there should be no problem in resorting to the procedure prescribed under Section 89 by the Court at appellate stage.

The scope and application of the provisions of Section 89 has been dealt with by the Apex Court in Salem Bar Association (III) (Supra).

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. Plaintiff does not need to prove that he has suffered any injury. (See: Kachrulal Bhagirath Agrawal & Ors. V. State of Maharashtra & Ors., (2005) 9 SCC 36).

Section 92 deals with the suit relating to the management of trust and properties of trust. As the suit can be filed only with the leave of the Court, it is not permissible to entertain the application under Order VII Rule 11 at the subsequent stage. Such an application should be entertained prior to grant of the leave by the Court. (Vide Sudhir Ji Angur V. M.Sanjeev, AIR 2006 SC 351).

Section 92 CPC (suit relating to management of trust) r/w Section 12 of civil courts act. (Jurisdiction)

In **Sri Jeyarom Educational Trust & Ors. V. A.G. Syed Mohideen & Ors.,** (2010) 2 SCC 513 the Supreme Court held that "District courts will have concurrent jurisdiction to Courts on which jurisdiction have been conferred by the State by a notification under Section 92(1)".

Insofar as the suits under Section 92 are concerned, the District Courts and Subordinate Courts will have concurrent jurisdiction without reference to any pecuniary limits. A suit under Section 92 of the Code, where the value of subject-matter does not exceed Rs. 1 lakh, cannot be filed in any Court as Section 92 confers jurisdiction only on District Court and Subordinate Courts.

Section 94 provides for supplemental proceedings. In order to prevent the ends of justice from being defeated the Court may issue a warrant of arrest against the defendant to bring him before the Court to show cause for giving security for his appearance or 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 can be sent to civil prison and his properties may 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 from defeating 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 had to the nature of the controversy and the issues involved in the main matter. (Vide: Sub-Committee of Judicial Accountability V. Union of India, AIR 1992 SC 63; Meerut Collegiate Association V. Arvind Nath Seth, AIR 1982 All 172; and Ratiram Pundik Cheddar V. Pundik Arjun Khedkar, AIR 1982 Bom 79). The Supreme Court in Rashtriya Ispat Nigam Ltd. V. Verma Transport Company, AIR 2006 SC 2800, placing reliance upon its earlier judgment in Vareed Jacob V. Sosamma Geevarghese, AIR 2004 SC 3992 explained the distinction between incidental and supplemental proceedings explaining that incidental proceedings are those which arise out of the main proceedings.

Section 95- This provision has been amended for providing the maximum amount of compensation in case of malicious prosecution upto fifty thousand rupees for injury to the reputation to the defendant, but the Court does not have competence to award compensation 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 malicious prosecution. (Vide: Basamma V. 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 of 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 V. Surendra Mohan Sharma, AIR 2003 SC 225; Narvada Devi Gupta V. Birendra Kumar Jaiswal, (2003) 8 SCC 745; and Triputi Balaji Developers V. State of Bihar, AIR 2004 SC 235.

In Delhi U.P. Madhya Pradesh Transport Co. V. New India Assurance Co., (2006) 9 SCC 213, the Apex Court held that regular first appeal should not be dismissed summarily without assigning proper reason.

In **H. Siddiqui** (dead) by LRs. **v. A. Ramalingam**, AIR 2011 SC 1492, the apex court held as under:

> "18. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the

appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: **Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr.**, AIR 1963 SC 146; **Girijanandini Devi & Ors. v. Bijendra Narain Choudhary**, AIR 1967 SC 1124; **G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.**, (2006) 3 SCC 224; **Shiv Kumar Sharma v. Santosh Kumari**, AIR 2008 SC 171; and **Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.,** AIR 2007 SC 2380).

In **B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy,** (2010) 10 SCC 55, while dealing with the issue, the Supreme Court held as under:

"The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide: **Santosh Hazari v. Purushottam Tiwari**, AIR 2001 SC 965 and **Madhukar & Ors. v. Sangram & Ors.**, AIR 2001 SC 2171]."

Thus, it is evident that the First Appellate Court must decide the appeal giving adherence to the statutory provisions of Order XLI Rule 31 CPC.

(See also: M/s United Engineers & Contractors v. Secretary to Govt. of A.P. & Ors. AIR 2013 SC 2239; B.M. Narayana v. Shanthamma (D) by Lrs. & Anr., AIR 2012 SC Supp. 264; Kailash Paliwal v. Subhash Chandra Agrawal, AIR 2013 SC 2923; and **Laxmibai (Dead) thr. L.Rs. & Anr. v. Bhagwantbuva (Dead) thr. L.Rs. & Ors.**, AIR 2013 SC 1204).

Section 97

(**See: Paras Nath Rai v. State of Bihar** AIR 2013 SC 1010)

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

In State Bank of India & Ors. V. S.N. Goyal, AIR 2008 SC 2594, the Supreme Court explained the terms "substantial question of law" and observed as under :

> "The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. ………..... any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a question of law, by the apex Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law. It is said that a substantial question of law arises when a question of law, which is not finally settled by the apex Court (or by the High Court concerned so far as the State is concerned), arises for consideration in the case. But this statement has to be understood in the correct perspective. Where there is a clear enunciation of law and the lower court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by the apex Court (or by the High Court concerned), but the lower court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by the apex Court (or the High Court concerned) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by the apex Court (or the High Court concerned) and the same has been followed by the lower court, if the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two viewpoints, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case."

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 V. 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.(Vide: State Bank of India & Ors. v. S.N. Goyal, AIR 2008 SC 2594; Municipal Committee, Hoshiarpur v. Punjab SEB, (2010) 13 SCC 216)

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 V. 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 V. Parwatibai, (1995) 6 SCC 213, the 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 V. 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. V. Union of India & Anr., AIR 1979 SC 798, wherein the 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 V. 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 V. K.M. Krishnaiah, (1998) 3 SCC 331; State of Rajasthan V. Harphool Singh, (2000) 5 SCC 652; Rajapps Hanamantha Ranoji V. Mahadev Channabasappa & Ors., AIR 2000 SC 2108; Santakumari & Ors. V. Lakshmi Amma Janaki Amma (2000) 7 SCC 60; Satyamma V. Basamma (Dead) by LRs, (2000) 8 SCC 567; Santosh Hazari V. Purushottam Tiwari, AIR 2001 SC 965; Kulwant Kaur & Ors. V. Gurdial Singh Mann, AIR 2001 SC 1273; M.S.V. Raja V. Seeni Thevar, (2001) 6 SCC 652; Hafazat Hussain V. Abdul Majeed & Ors., (2001) 7 SCC 189; V. Pechimuthu V. Gowrammal, AIR 2001 SC 2446; Neelakantan & ors. V. Mallika Begum, AIR 2002 SC 827; Md. Mohammad Ali (Dead) by L.Rs. V. Jagdish Kalita & Ors., (2004) 1 SCC 271; Rajeshwari v. Puran Indoria, (2005) 7 SCC 60) and Bharatha Matha & Anr. V.R. Vijaya Renganathan & Ors., AIR 2010 SC 2685).

There may be a question, which may be a "question of fact", "question of law", or "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 V. E.V. @ Balasaheb Vikhe Patil & ors., AIR 1994 SC 678).

In Smt. Bibhabati Devi V. Ramendra Narayan Roy & Ors., AIR 1947 PC 19, the Privy Council has provided guidelines as to what cases the second appeal can be entertained in, 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 V. 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. V. Commissioner of Income Tax, Bombay, AIR 1957 SC 852, the Supreme Court considered a large number of its earlier judgments, including Sree Meenakshi Mills Ltd. V. Commissioner of Income Tax, AIR 1957 SC 49, and held that where the question is whether 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 V. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, the Supreme 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 the apex 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 Supreme Court, in the case of State of J&K V. Thakur Ganga Singh, AIR 1960 SC 356, considered as what may be the substantial question and held that authentic interpretation of 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 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 Apex Court placed reliance upon its earlier judgments in Charanjit Lal Chowdhary V. Union of India & ors., AIR 1951 SC 41; Ram Kishan Dalmia V. Justice Tendolkar, AIR 1958 SC 538; and Mohammed Haneef Quareshi V. State of Bihar, AIR 1958 SC 731. The same view has been reiterated by the Supreme Court in Bhagwan Swaroop V. State of Maharashtra, AIR 1965 SC 682.

In Reserve Bank of India V. Ramakrishna Govind Morey, AIR 1976 SC 830, the Supreme Court held that the question whether the 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.

In Gian Dass V. Gram Panchayat, (2006) 6 SCC 271; and C.A. Sulaiman V. State Bank of Travancore, AIR 2006 SC 2848, the Apex Court held that Clause (5) to Section 100

applies only when a substantial question has already been framed and if the Court forms the opinion that some other substantial question of law also exists, the Court may frame the said issue after recording reasons for the same.

In Jai Singh V. Shakuntala, AIR 2002 SC 1428, the Supreme Court held that it is permissible to interfere even on question of fact but it has to be done only under 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 V. Ammayee Ammal, AIR 2002 SC 2481, the 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 a substantial question of law.

In Transmission Corporation of A.P. V. Ch. Prabhakar & Ors., (2004) 5 SCC 551, the 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. The right of appeal exists as on, and from the date of the commencement of lis 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 Supreme Court placed reliance upon its earlier judgment in Garikapati Veeraya V. 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 V. Bakshi Inderjeet Singh, (2005) 1 SCC 598; Manicka Poosali (Deceased by L.R) & Ors..V. Anjalai Ammal & Anr., AIR 2005 SC 1777; Sugani V. Rameshwar Das, AIR 2006 SC 2172; Hero Vinoth V. Seshammal, AIR 2006 SC 2234; Narayan Chandra Ghosh & Ors. V. Kanailal Ghosh & Ors., AIR 2006 SC 562).

Similar view has been taken in the case of Kashmir Singh V. Harnam Singh & Anr.,AIR 2008 SC 1749.

In P. Chandrasekharan & Ors. V. S. Kanakarajan & Ors., (2007) 5 SCC 669 the Supreme Court reiterated the principle that interference in second appeal is permissible only when the findings are based on misreading of evidence or are so perverse that no person of ordinary prudence could take the said view. More so, the Court must be

conscious that intervention is permissible provided the case involves a substantial question of law which is altogether different from the question of law. Interpretation of a document which goes to the root of title of a party may give rise to substantial question of law.

In Shakuntala Chandrakant Shreshti V. Prabhakar Maruti Garvali & Anr., AIR 2007 SC 248, the Apex Court considered the scope of appeal under Section 30 of the Workmen's Compensation Act, 1923 and held as under:

> "Section 30 of the said Act postulates an appeal directly to the High Court if a substantial question of law is involved in the appeal….. A jurisdictional question will involve a substantial question of law. A finding of fact arrived at without there being any evidence would also give rise to a substantial question of law………… A question of law would arise when the same is not dependent upon examination of evidence, which may not require any fresh investigation of fact. A question of law would, however, arise when the finding is perverse in the sense that no legal evidence was brought on record or jurisdictional facts were not brought on record."

Similar view has been reiterated by the Apex Court in Anathula Sudhakar V. P. Buchi Reddy, AIR 2008 SC 2033.

In Santosh Hazari V. Purushottam Tiwari (2001) 3 SCC 179, the Supreme Court held that:

> "A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

(See also: **Rajeshwari V. Puran Indoria**, (2005) 7 SCC 60 and Vijoy and Talwar V. Commissioner of Income Tax, New Delhi (2011) 1 SCC 673)

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 and findings recorded in the court below are perverse. (Vide: **Jagdish Singh V. Nathu Singh**,

AIR 1992 SC 1604; **Smt. Prativa Devi (Smt.) V. T.V. Krishnan**, (1996) 5 SCC 353; **Satya Gupta** (Smt.) @ Madhu Gupta **V.Brijesh Kumar,** (1998) 6 SCC 423; **Ragavendra Kumar V. Firm Prem Machinary & Co.**, AIR 2000 SC 534; **Molar Mal** (dead) through Lrs. **V.M/s. Kay Iron Works Pvt. Ltd.**, AIR 2000 SC 1261; **Bharatha Matha & Anr. V. R. Vijaya Renganathan & Ors.**, AIR 2010 SC 2685; and **Dinesh Kumar V. Yusuf Ali,** (2010) 12 SCC 740).

Declaration of relief is always discretionary. If the discretion is not exercised by the lower court "in the spirit of the statute or fairly or honestly or according to the rules of reason and justice", the order passed by the lower court can be reversed by the superior court. (See: **Mysore State Road Transport Corporation V. Mirja Khasim Ali Beg & Anr.**, AIR 1977 SC 747).

There may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law and at the time of admission of the appeal the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions, or the court comes to the conclusion that the question(s) framed could not be substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal.
(Vide: **Union of India V. Ibrahim Uddin & Anr**.,(2012) 8 SCC 148).

In **Sheel Chand** V. **Prakash Chand,** AIR 1998 SC 3063, the apex Court held that question of re-appreciation of evidence and framing the substantial question as to whether the findings relating to factual matrix by the court below could vitiate due to irrelevant consideration and not under law, being question of fact cannot be framed.

In **Rajappa Hanamantha Ranoji** V. **MahadevChannabasappa & Ors**. AIR 2000 SC 2108, the Supreme Court held that it is not permissible for the High Court to decide the Second Appeal by re-appreciating the evidence as if it was deciding the First Appeal unless it comes to the conclusion that the findings recorded by the court below were perverse.

In **Kulwant Kaur & Ors**. V. **Gurdial Singh Mann (dead) byL.Rs**. AIR 2001 SC 1273, the apex Court held that the question whether Lower Court's finding is perverse may come within the ambit of substantial question of law. However, there must be a clear finding in the judgment of the High Court as to perversity in order to show compliance with provisions of Section 100 CPC. Thus, the Court rejected the proposition that scrutiny of evidence is totally prohibited in Second Appeal.

Thus, it is evident that High Court can interfere with the finding of fact while deciding the Second Appeal provided the findings recorded by the Courts below are perverse.

(Vide: AIR 2010 SC 2679; Dinesh Kumar v. Yusuf Ali, AIR 2010 SC 2679; Municipal Committee, Hosiarpur v. Punjab State Electricity Board & Ors. , JT 2010 (11) SC 615; and Bharatha Matha & Anr. V. R. Vijaya Renganathan & Ors. AIR 2010 SC 2685).

(See also: Kailash Paliwal v. Subhash Chandra Agrawal, AIR 2013 SC 2923; and Laxmibai (Dead) thr. L.Rs. & Anr. v. Bhagwantbuva (Dead) thr. L.Rs. & Ors., AIR 2013 SC 1204).

Sections 100 & 103 C.P.C.:

These provisions provide for the conditions precedent for entertaining a Second Appeal and the specific manner of its disposal. Section 100 CPC reads as follows:

> "**100. Second Appea**l.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) ……………………………………..
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.
>
> ……………………………………………………"

Section 103 CPC reads as under:

> "**103. Power of High Court to determine issue of fact.**—In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—
>
> (a) which has not been determined by the lower appellate court or both by the court of first instance and the lower appellate court, or

> (b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."

In **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors.**, AIR 1999 SC 2213, the apex Court held as under:-

> "It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no Court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable grounds."

Further, there can be no quarrel that the right of appeal/revision cannot be absolute and the legislature can impose conditions for maintaining the same. In **Vijay Prakash D. Mehta & Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay**, AIR 1988 SC 2010, the apex Court held as under:-

> "Right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial or quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant ..……......The purpose of the Section is to act in terrorem to make the people comply with the provisions of law."

A similar view has been reiterated by the Supreme Court in **Anant Mills Co. Ltd. v. State of Gujarat,** AIR 1975 SC 1234; and **Shyam Kishore & Ors. v. Municipal Corporation of Delhi & Anr.**, AIR 1992 SC 2279. A Constitution Bench of the apex court in **Nandlal & Anr. v. State of Haryana**, AIR 1980 SC 2097, held that the "right of appeal is a creature of statute and there is **no reason why the legislature**, while granting the right, **cannot impose conditions for the exercise of such right** so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory".

In **Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors.**, (1999) 4 SCC 468, the apex Court held that the right of appeal though statutory, can be conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided for under the statute and when a law authorises filing of an appeal, it can impose conditions as well.

Thus, it is evident from the above that the right to appeal is a creation of Statute and it cannot be created by acquiescence of the parties or by the order of the Court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a Court or

Authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance of the conditions mentioned in the provision that creates it. Therefore, the Court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The Court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal, on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine-qua-non for the exercise of jurisdiction under the provisions of Section 100 C.P.C. It is the obligation on the Court to further the clear intent of the Legislature and not to frustrate it by ignoring the same. (Vide: **Santosh Hazari v. Purshottam Tiwari** (dead) by Lrs., AIR 2001 SC 965; **Sarjas Rai & Ors. v. Bakshi Inderjeet Singh**, (2005) 1 SCC 598; **Manicka Poosali** (Deceased by L.Rs.)**& Ors. v. Anjalai Ammal & Anr.**, AIR 2005 SC 1777; **Mst.Sugani v. Rameshwar Das & Anr.**, AIR 2006 SC 2172; **Hero Vinoth** (Minor) **v. Seshammal**, AIR 2006 SC 2234; **P. Chandrasekharan & Ors. v. S. Kanakarajan & Ors.**, (2007) 5 SCC 669; **Kashmir Singh v. Harnam Singh & Anr.**, AIR 2008 SC 1749; **V. Ramaswamy v. Ramachandran & Anr.,** (2009) 14 SCC 216; and **Bhag Singh v. Jaskirat Singh & Ors.,** (2010) 2 SCC 250).

In **Mahindra & Mahindra Ltd. v. Union of India & Anr.**, AIR 1979 SC 798, the apex Court observed:

> “..... 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 **Madamanchi Ramappa & Anr. v. Muthaluru Bojjappa,** AIR 1963 SC 1633, the apex Court observed:

> “………Therefore, whenever the apex Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of the apex Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not

been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

In **Jai Singh v. Shakuntala**, AIR 2002 SC 1428, the apex Court held as under:

"….it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible - it is a rarity rather than a regularity and thus 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."

While dealing with the issue, the apex Court in**Leela Soni & Ors. v. Rajesh Goyal & Ors.**, (2001) 7 SCC 494, observed as under:

"20. There can be no doubt that the jurisdiction of the High Court under Section 100 of the Code of Civil Procedure (CPC) is confined to the framing of substantial questions of law involved in the second appeal and to decide the same. Section 101 CPC provides that no second appeal shall lie except on the grounds mentioned in Section 100 CPC. Thus it is clear that no second appeal can be entertained by the High Court on questions of fact, much less can it interfere in the findings of fact recorded by the lower appellate court. This is so, not only when it is possible for the High Court to take a different view of the matter but also when the High Court finds that conclusions on questions of fact recorded by the first appellate court are erroneous.

21. It will be apt to refer to Section 103 CPC which enables the High Court to determine the issues of fact:

xx xx xx

22. The section, noted above, authorises the High Court to determine any issue which is necessary for the disposal of the second appeal provided the evidence on record is sufficient, in any of the following two situations: (1) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court; or (2) when both the trial court as well as the appellate court or the lower appellate court have wrongly determined any issue on a substantial question of law which can properly be the subject-matter of second appeal under Section 100 CPC."

In **Jadu Gopal Chakravarty v. Pannalal Bhowmick & Ors.,** AIR 1978 SC 1329, the question arose as to whether the compromise decree had been obtained by fraud. The Supreme Court held that though it is a question of fact, but because none of the courts below had pointedly addressed the question of whether the compromise in the case was obtained by perpetrating fraud on the court, the High Court was justified in exercising its powers under Section 103 C.P.C. to go into the question. (See also: **Achintya Kumar Saha v. M/s Nanee Printers & Ors.,** AIR 2004 SC 1591)

In **Shri Bhagwan Sharma v. Smt. Bani Ghosh,** AIR 1993 SC 398, the apex Court held that in case the High Court exercises its jurisdiction under Section 103 C.P.C., in view of the fact that the findings of fact recorded by the courts below stood vitiated on account of non-consideration of additional evidence of a vital nature, the Court may itself finally decide the case in accordance with Section 103(b) C.P.C. and the Court must hear the parties fully with reference to the entire evidence on record with relevance to the question after giving notice to all the parties. The Court further held as under:

> "…..The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law, does not by itself lead to the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a re-appraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be pre-judged, as has been done in the impugned judgment..".

In **Kulwant Kaur & Ors. v. Gurdial Singh Mann** (dead) **by LRs. & Ors.,** AIR 2001 SC 1273, the apex Court observed as under :

> "Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the **issue of perversity vis-à-vis the concept of justice.** Needless to say however, that perversity itself is **a substantial question** worth adjudication — what is required is a categorical finding on the part of the High Court as to **perversity**.
>
> The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 **since the issue of perversity**

will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, **that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."** (Emphasis added)

Powers under Section 103 C.P.C. can be exercised by the High Court only if the core issue involved in the case is not decided by the trial court or the appellate court and the relevant material is available on record to adjudicate upon the said issue. (See: **Haryana State Electronics Development Corporation Ltd. & Ors. v. Seema Sharma & Ors.,** (2009) 7 SCC 311)

Before powers under Section 103 C.P.C. can be exercised by the High Court in a second appeal, the following conditions must be fulfilled:

(i) Determination of an issue must be necessary for the disposal of appeal;

(ii) The evidence on record must be sufficient to decide such issue; and

(iii) (a) Such issue should not have been determined either by the trial court, or by the appellate court or by both; or

(b) such issue should have been wrongly determined either by trial court, or by the appellate court, or by both by reason of a decision on substantial question of law.

If the above conditions are not fulfilled, the High Court cannot exercise its powers under Section 103 CPC.

Thus, it is evident that Section 103 C.P.C. is not an exception to Section 100 C.P.C. nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 C.P.C. in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.

There is no prohibition on entertaining a second appeal even on a question of fact provided the Court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (Vide: **Jagdish Singh v. Natthu Singh**, AIR 1992 SC 1604; **Karnataka Board of Wakf v.**

Anjuman-E-Ismail Madris-Un-Niswan, AIR 1999 SC 3067; and **Dinesh Kumar v. Yusuf Ali**, AIR 2010 SC 2679).

If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide: **Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.**, AIR 2010 SC 2685)

In view of above, the law on the issue can be summarised to the effect that a second appeal lies only on a substantial question of law and it is necessary to formulate a substantial question of law before the second appeal is decided.
(See also: **Biswanath Ghosh** (Dead) by L.Rs. **& Ors. v. Gobinda Ghosh** @ Gobindha Chandra Ghosh **&Ors.** JT 2014 (4) 1 SC 132, **Sebastiao Luis Fernandes** (Dead) Through L.Rs. **& Ors.**
v. K.V.P. Shastri (Dead) Through L.Rs. **&Ors.** 2013 (14) SCALE 761).

The issue of perversity itself is a substantial question of law and, therefore, Section 103 C.P.C. can be held to be supplementary to Section 100 C.P.C., and does not supplant it altogether. Reading it otherwise, would render the provisions of Section 100 C.P.C. redundant. It is only an issue that involves a substantial question of law, that can be adjudicated upon by the High Court itself instead of remanding the case to the court below, provided there is sufficient evidence on record to adjudicate upon the said issue and other conditions mentioned therein stand fulfilled. Thus, the object of the Section is to avoid remand and adjudicate the issue if the finding(s) of fact recorded by the court(s) below are found to be perverse. The court is under an obligation to give notice to all the parties concerned for adjudication of the said issue and decide the same after giving them full opportunity of hearing.
(See also: **Municipal Committee, Hoshiarpur v. Punjab State Electricity Board & Ors.**, JT 2010 (11) SC 615).

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 V. Shanti Lal R. Desai, AIR 1969 SC 239, the 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 repealed, 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 repealed."

In Lalji Raja & Sons V. 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 repealed law which has expressly not been taken away by the amending Act. That a provision to preserve the "right accrued" under a repealed Act was not intended to preserve the abstract rights conferred by the repealed Act. It only applies to a specific right given to an individual upon happening of one or the other events specified in the Statute. While deciding the said case, the Court relied upon the judgments in Hamilton Gell V. White, (1922) 2 KB 422; Abbat V. Minister of For Lands, 1895 AC 425; and G. Ogden Industries P. Ltd. V. Lucus, (1969) 1 All.E.R. 121.

In M.S. Shivananda V. K.S.R.T. Corporation & ors., AIR 1980 SC 77, the 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 repealed Act which has not been taken away expressly by the repealing 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 repealed 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 V. Henry Ah Hoe & Anr., AIR 1983 SC 150, the 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 V. 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 V. M/s. Shah Sadiq & ors., AIR 1987 SC 1217, the Supreme Court held that where the accrued and vested rights under the repealed 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 which survived, the repeal of the statute under which such rights had accrued.

In Ambalal Sarabhai Enterprises Ltd. V. 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 repealed 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 V. Rajendra Kumar, AIR1985 SC 371, the 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 V. Prem Bihari Khare, AIR 1989 SC 1247, the 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 V. 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 V. C. Narainan, AIR 2000 SC 589.

In Gajraj Singh V. State Transport Appellate Tribunal, AIR 1997 SC 412, the Supreme Court, after considering a large number of judgments, including that of Indian Tobacco Co. Ltd. V. 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. V. 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 V. State of Bombay, AIR 1958 SC 915, the 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. V. Union of India & ors., AIR 2000 SC 811, a Constitution Bench of the 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 of a 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 it had not been taken away by the New Act expressly or impliedly while repealing the old provision. "Accrued", as per various dictionaries 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 V. Darshan Ch. Rout & ors., AIR 1970 Ori. 15; and Mahendra Prasad V. 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 of 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. (See: Order 47 Rule 1 CPC).

Section 115 deals with the revisional power of the Court. This provision has been amended vide Act of 1999. While considering the application of revision, the Court must

ensure that the Court below has complied with principles of natural justice as it has always been the essence of fair adjudication deeply rooted in tradition and conscience to be ranked as fundamental. Observance of principles of natural justice prevents miscarriage of justice. More so, it is an inseparable ingredient of fairness and reasonableness. It is to be read as inbuilt in the Statute unless the legislative intent to the contrary has expressly been made. (Vide: Suresh Chandra Manhorya V. Gajendra Rajak, (2006) 7 SCC 800).

It is not permissible for the revisional Court to interfere with the findings of fact unless the Court reaches the conclusion that there was a jurisdiction error by the Court below. (Vide Pothina Narasamma V. Narupilla Ammaji, (2006) 9 SCC 749; and Sajjan Kumar V. Ram Kishan, (2005) 13 SCC 89).

In Vidyodaya Trust V. R. Mohan Prasad, (2006) 7 SCC 452, the Supreme Court held that if the Court comes to the conclusion that the suit was not maintainable, the revision should be entertained for the reason that the result being dismissal of the suit as not maintainable, amounts to final disposal of the suit.

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

Section 132 (Pardanashin Lady) - This section provides protection to a pardanashin lady and she is exempted from personal appearance in court. 'Pardanashin Lady' means 'a woman of rank living in seclusion, closed in Zanana. Such women do not have communication except from behind pardah or screen with any male person save certain relations or dependants. Women, who according to the customs and manners of the country, ought not to be compelled to appear in public, and such a woman is exempted from personal appearance in court.

The customs and manners of the country means the customs and manners of the different communities, classes and sections of the people in the country and not the customs and manners of the country as a whole. Therefore, it would depend upon the facts of a case as to whether a particular woman is protected under the said law. The court may ignore a customs prevalent long back which has become completely obsolete (Vide: Rahuria Ramkali Kuer V. Chhathoo Singh, AIR 1961 Pat. 210).

In Elias Joseph Solomon V. Jyotsna Ghoshal, AIR 1918 Cal. 111, the Calcutta High Court held that if a lady have given up the use of the pardah she is entitled to the benefit of the section, if, having regard to her social position and the feeling of her class, the Court is satisfied that she should not be compelled to appear in the witness-box.

In Ghulam Zuhra V. Habla Begum & Ors., AIR 1985 J&K 22, a Division Bench of the Jammu & Kashmir High Court held that a lady who behaved as a male member in her day to day dealings, who filed suits and complaints in various courts and prosecuted them in a manly manner, who met petition writers, the lawyers and all others coming in her way during the course of litigation could not be deemed to be enjoying the status of a pardanashin lady.

In Dr. K. Malathi V. Dr. S. Rajasekaran, AIR 2003 Mad. 322, the Madras High Court held that in view of the provision of Section 13 of the Family Courts Act, no party to a suit in Family Court can seek dispensation once and for all to avoid personal appearance and claim to have the adjudication through a recognised agent on account of peculiar provisions of law governing adjudication in Family Court.

The exemption from personal appearance under the said section is a right, which court cannot generally refuse. (Vide: Rahuria Ramkali Kuer (supra); and Sm. Sundar Devi V. Dattatraya Narhar Rege & Anr., AIR 1933 All. 551).

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. V. Balmakund Marwary & Anr., AIR 1924 PC 198; Dandapani Goudo V. Khetrabasi Goudo, 1972 (2) Cut W.R. 1428; B. Channabyre Gowda & Ors. V. State of Mysore, AIR 1974 Kar 136; Nareshchandra Chinubhai Patel V. The State of Gujarat & Anr., AIR 1977 Guj 109; Chinnamarkathian @ Muthu Gounder & Anr. V. Ayyavoo @ Periana Gounder & Ors., AIR 1982 SC 137; Jogdhayan V. Babu Ram, AIR 1983 SC 57; Smt. Periyakkal & Ors. V. Smt. Dakshyani, (1983) 2 SCC 127; Pahali Raut V. Khulana Bewa & Ors., AIR 1985 Ori 165; Abdul Gaffar V. Shahid Hussain, 1991 (2) RLW 1; and Mohammed Yousuf V. Bharat Singh, AIR 1999 Raj 185).

In Skipper Tower (P) Ltd. V. 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 V. Sosamma Geevarghese & Ors., 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. Similar view has been reiterated in Salem Advocate Bar Association (III), AIR 2005 SC 3353.

Sections 148/149 – Enlargement of time – P.K. Palanisamy v. N. Arumugham & Anr. (2009) 9 SCC 173.

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 V. Mohindra Kumar, AIR 1964 SC 993; Nain Singh V. Koonwarjee & Ors., AIR 1970 SC 997; and State of West Bengal & Ors. V. 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 have arisen and it will not be a case of misjoinder of parties.

A similar view has been reiterated in Ranjit Kumar Pal Chowdhury V. Murari Mohan Pal Chowdhury, AIR 1958 Cal 710; and Mst. Ramdayee V. 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 cause of actions in the same suit upon consideration of all the facts and circumstances of the case.

In M/s Bokaro & Ramgur Ltd. V. The State of Bihar & Ors., AIR 1973 Pat 340 and in Nani Gopal Bandhyopadhyaya & Ors. V. 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 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 V. 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 be prejudicial to 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. V. 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. V. 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 V. Smt. Sohni Devi & Ors., 1995 DNJ (Raj) 684, the Rajasthan High 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 an issue in the other suit, hence both suits were not identical and no consolidation was permitted. The Allahabad High Court after placing reliance upon its earlier judgment in Pratap Singh V. 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 V. Brahmanand Singh & Ors., AIR 1950 Cal 479; Ranjit Kumar Pal Chowdhury V. Murari Mohan Pal Chowdhury & Ors., AIR 1958 Cal 710; and Hans Raj V. 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 State Bank of India V. Ranjan Chemicals Ltd. & Anr., (2007) 1 SCC 97, the Supreme Court considered the issue of consolidation of suits and observed that the question of joint trial arises when the rival parties claim independent action, but based on same cause of action; for enforcement of rights or obligations springing out of that cause of action. The joint trial should be permitted if it appears that some common question of law or fact arises in both the proceedings or that the right to relief claimed in them are in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order of joint trial. In such a situation, the joint trial will save the expenses of two attendances by the counsel and witnesses and the trial Judge will be enabled to try two actions at the same time and take common evidence in respect of both the claims. It is not necessary that all questions or issues that arise should be common to both actions before a joint trial can be ordered. It would be sufficient if some of the issues are common and some of the evidence to be led in is also common. The joint trial may avoid separate overlapping evidence being taken in the two cases and it will be more convenient to try them together in the interests of parties and in the interest of an effiective trial of the causes. This power inhears in the Court as an inherent power.

In Manohar Lal Chopra V. 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 V. Narasimha Charlu, AIR 1926 Mad 258; Govindarajulu V. Imperial Bank of India, AIR 1932 Mad 180; Karuppayya V. Ponnuswami, AIR 1933 Mad 500; Murugesa Mudali V. Angamuthu Mudali, AIR 1938 Mad 190; and Subramanian V. 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 V. Ghansahyam Dhar, AIR 1940 All 185; Firm Bichchha Ram Baburam V. Firm Baldeo Sahai Surajmal, AIR 1940 All 241; Bhagat Singh V. Jagbir Sawhney, AIR 1941 Cal 670 and Chinese Tannery Owners' Association V. 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 V. Chakrakata Jagannath Khuntia, (1972) 38 Cut LT 217 while considering the scope of Section 151 of 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 the apex Court can exercise jurisdiction under Section 151 of the Code and pass an order of injunction. (Vide Haraparbati Thakurani Bije V. Ramakanta Gupta, AIR 2002 Ori 89).

In Vareed Jacob V. 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. V. Kanhayalal Bhargava, AIR 1966 SC 1899; and Jagjit Singh Khanna V. 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 V. Jaypee Rewa Cement, AIR 2004 SC 1687; Atma Ram Proprietaries (P) Ltd. V. Federal Motors (P) Ltd, (2005) 1 SCC 705; and National Institute of Mental Health and Neuro Sciences V. C. Parameshwara, AIR 2005 SC 242).

The Supreme Court considered a case of recalling the order permitting the withdrawal of the suit without permission to bring a fresh suit and held that the application can be filed only under Section 151 as there is no other provision under which such an application can be filed and it may be so necessary to do substantial justice between the parties. (Vide: Get Plywood Pvt. Ltd. V. Madhukar Mawalakha, AIR 2006 SC 1260).

Inherent powers.—(See: Durgesh Sharma v. Jayshree, (2008) 9 SCC 648; State of Haryana & Ors. v. Babu Singh, (2008) 2 SCC 85; Nahar Industrial Enterprises Ltd. v. H.S.B.C., (2009) 8 SCC 646; and Ram Prakash Agarwal & Anr. v. Gopi Krishan (Dead thr.Lrs.) & Ors., JT 2013 (8) SC 329).

Section 152 provides for correction only when it is necessary to give effect to the judgment, decree or order so that the manifest rights of the parties intended to be

effectuated by the earlier decision of the Court may not be defeated. When decree is not clear as to what was decided and what the Court intended. The Court may amend it so as to carry out its meaning. (VideRai Jatindra Nath Chowdhury v. Uday Kumar Das & Ors., AIR 1931 PC 104 and Seth Manakchand v. Chaube Manoharlal & Anr., AIR 1944 PC 46). This provision cannot be resorted to in order to annul the decree or where there is no clerical or arithmetical mistake or error arising from accidental slip or omission or the power can be used to re-determine the rights of parties already adjudicated upon. In Dwaraka Das v. State of Madhya Pradesh, (1999) 3 SCC 500, the Apex Court held that powers cannot be used to grant some thing which had not been granted earlier as it would not amount to accidental omission or mistake. In I.L. Janakirama Iyer & Ors. v. P.M.. Nilakanta Iyer & Ors., AIR 1962 SC 633 the Apex Court held that as in the decree the mesne profit had been typed as a net profit and it was merely a typographical error in exercise of power under Section 152 C.P.C. the word "net" must be substituted by "mesne". The powers of the Court are limited only to correct this kind of typographical mistakes. In K. Rajamouli v. A.V.K.N. Swamy, (2001) 5 SCC 37 the Supreme Court held that if while deciding a case interest pendente lite had not been granted it cannot be granted while allowing the application under Section 152 C.P.C. In M/s Plasto Pack Mumbai v. Ratnakar Bank Limited AIR 2001 SC 3651 a similar view has been reiterated observing that **power to amend a decree cannot be exercised so as to add to or subtract therefrom any** relief granted earlier.

In Jayalakshmi Coelho v. Oswald Joseph Coelho, AIR 2001 SC 1084 the Supreme Court placed reliance upon its earlier judgment in State of Bihar v. Neelmani Sahu, (1996) 11 SCC 528 and Bai Shakriben v. Special Land Acquisition Officer, (1996) 4 SCC 533 and held that the inherent powers as exemplified in S. 152 C.P.C. generally be available to all Courts and authorities irrespective of the fact whether the provisions contained under S. 152 C.P.C. may or may not strictly apply to any particular proceeding.

(See also Bhikhi Lal & Ors.v. Tribeni & Ors., AIR 1965 SC 1935 and Master Construction Co. (P.) Ltd. v. State of Orissa & Anr., AIR 1966 SC 1047).

But the power to rectification of clerical and arithmetical errors or accidental slips does not empower the Court to have a second thought over the matter and to find a better order or decree could or should be passed. There cannot be reconsideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought the Court may find that it may have committed a mistake in passing an order in certain terms but every such mistake cannot be rectified in exercise of the Court's inherent powers **as contained under Section 152 C.P.C.** It is to be confined to something initially intended to left out or added against such intendment.

Similar view has been reiterated in Lakshmi Ram Bhuyan v. Hari Prasad Bhuyan & Ors., AIR 2003 SC 351 wherein the Apex Court held that such powers can be used limited to the extent that a clerical or arithmetical mistake occurred in the judgment, decree or order or error arising therein from any accidental slip or omission can be corrected subsequently by the Court either on its own motion or on the application of any of the parties. While deciding the said case, the Court placed reliance upon the judgment in re Swire; Mellor v. Swire, (1885) 30 Ch.D 239 wherein it had been held that the said provisions enabled the Court to vary its judgment so as to give effect to its meaning and intention, when the order was passed.

Similar view has also been reiterated by the Apex Court in Grindlays Bank Ltd.v. The Central Government Industrial Tribunal & OrsAIR 1981 SC 606; Satnam Vermav. Union of India & Ors.,AIR 1985 SC 294;State of Bihar v. Nilmani Sahu,(1996) 11 SCC 528; and State of Punjab v. Darshan Singh, (2004) 1 SCC 328)

These are general outlines of the Code, but always remember the dictum of the Supreme Court in cases M/s Ganesh Trading Company v. Mauji Ram, AIR 1978 SC 484; Har Charan v. State of Haryana, AIR 1983 SC 43; and Jai Jai Ram Manohar Lal v. 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.

Amendment of judgment—Tilak Raj v. Bai Kunthi Devi (D) by LRs., AIR 2009 SC 2136.

Order I 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 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 V. Gyan Devi, AIR 1995 SC 724 reiterated the same view. In Iswar B.C. Patel V. Harihar Behera, AIR 1999 SC 1341, the Apex Court observed that question of joinder of parties involves joinder of causes of action.

Objection should be taken before trial court in order to provide opportunity to plaintiff to rectify the defect and only if even then plaintiff persists in not impleading the party, consequences on non-joinder may follow. (See: **Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee** (2012) 8 SCC 706).

Order I, 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. V. State of Madhya Pradesh & Ors, AIR 1984 SC 468).

Order I, 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. A person claiming an independent title and possession adversely to the vendor is not a necessary party as a proper decree can be passed in his absence. (Vide: Kasturi V. Iyyamperumal & Ors., AIR 2005 SC 2813).

In Ranjeet Mal Vs General Manager, Northern Railway, New Delhi & Anr, AIR 1977 SC 1701, the 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. V. Collector & Ors; (2003) 3 SCC 472, the Supreme Court accepted the submission that writ cannot be entertained without impleading the State if relief is sought against the State. The 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.

(See also: Tridip Kumar Dingal & Ors. V. State of West Bengal & Ors., (2009) 1 SCC 768).

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.**" (Emphasis added)

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.

(See also: Tridip Ku. Dingal & Ors. V. State of West Bengal & Ors., (2009) 1 SCC 768.)

In Bal Niketan Nursery School V. Kesari Prasad, AIR 1987 SC 1970; and Amit Kumar Shaw & Anr. V. Farida Khatoon & Anr., (2005) 11 SCC 403, the Supreme Court held that a party can be impleaded at any stage of the proceedings including at the appellate forum.

A Full Bench of Kerala High Court in Kerala State represented by Chief Secretary to Government, Trivandrum V. 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.

In Smt Saila Bala Dassi V. Smt Nirmala Sundari Dassi & Anr., AIR 1958 SC 394 the Constitution Bench of the Supreme Court held that in exercise of the powers under Order 1 Rule 10 CPC or in exercise of its inherent jurisdiction the Court on an application or suo motu, if considered necessary, may implead a party at any stage. While deciding the said case, reliance was placed upon Vanjiappa Goundan V. N.P.V.L.R. Annamalai Chettiar & Ors., AIR 1940 Mad 69.

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

A Constitution Bench of Supreme Court in State of Punjab V. 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 V. 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.

In Bhupendra Narayan Sinha Bahadur V. Rajeswar Prasad Bhakat & Ors., AIR 1931 PC 162 the Privy Council held that the Court has ample power to remove technical objections to remedy the defects under Order 1 Rule 10 CPC by adding the proforma defendant as co-plaintiff. It can be done at the appellate stage also. Such a course should

be adopted where it is necessary for a complete adjudication upon the question involved in the suit and to avoid multiplicity of proceedings.

A similar view has been reiterated in R.S. Maddanappa V. Chandramma & Anr., AIR 1965 SC 1812; Kiran Tandon V. Allahabad Development Authority & Anr., AIR 2004 SC 2006; Dalbir Singh & Ors. V. Lakhi Ram & Ors., AIR 1979 P & H 10; and Nishabar Singh V. Local Gurudwara Committee Manji Sahib, Karnal & Anr., AIR 1986 Pun 402.

In Udit Narain Singh Malpaharia V. Additional Member Board of Revenue, Bihar AIR 1963 SC 786, a Constitution Bench of the Supreme Court considered the issue as to who is a necessary party and held that a person who is directly affected or against whom relief is sought is a necessary party and in case the matter is decided without impleading him the judgment and order shall not be binding on him having been passed in violation of the principles of natural justice. Such a judgment or order cannot be effective one.

While considering the application for impleadment under Order 1, Rule 10, CPC, the Court must keep in mind that plaintiff is the sole architect of his plaint and he has a right to choose his own adversary against whom he seeks relief. Mere apprehension of any party that the plaintiff and defendant of the suit may collusively get their suit decided remains unfounded as whatever may be the judgment and order in a suit it cannot be binding on him as he was not a party in the suit. Such judgment or order shall have no legal effect so far as the person who is not a party in the case is concerned. Impleadment may be necessary to avoid multiplicity of the suit, but it cannot be the sole ground. Facts and circumstances of the case must show that unless a person is impleaded in the suit there is likelihood of further litigation in the same matter on the same issues. The plaintiff being the master of the suit cannot be compelled to file the same against whom he does not wish to fight and against whom he does not claim any relief. It is only in exceptional circumstances where the Court finds that the addition of a new party is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties it will added him as a party. (Vide: Banarsi Dass Durga Prashad V. Panna Lal Ram Richhpal Oswal & Ors., AIR 1969 P & H 57; Arjan Singh & Ors., V. Kartar Singh & Ors, AIR 1975 P & H 184; Harbans Singh & Ors. V. E.R. Srinivasan & Anr., AIR 1979 Delhi 171; and Mohd. Farooq V. District Judge, Allahabad & Ors., AIR 1993 All. 8).

In Jaikaran Singh V. Sita Ram Agarwalla & Ors., AIR 1974 Pat. 364, the Patna High Court examined a case where the landlord filed a suit for eviction of a tenant, the tenant pleaded that the title of the property has subsequently vested with a third party. Therefore, the third party was a necessary party to the suit. The Court rejected the contention observing that the said person who claims title can file a separate suit for declaration of his title, but he cannot be arrayed as a party in a eviction suit.

In M/s. Jayashree Chemicals Ltd. V. K. Venkataratnam & Ors, AIR 1975 Ori. 86, the Court held that it is not permissible that by moving an application under Order 1, Rule 10, CPC the nature of the suit can be changed. Therefore, in case of a plain and simple eviction suit if another person files an application claiming to have title over the suit property, it would amount to converting the simple suit for eviction into a suit for declaration of title. The said course would amount to substitute a new suit in place of old one.

In Chamiar Kunchelan V. Kandan Damodaran, AIR 1960 Ker. 284, the suit was filed for recovery of arrears of rent. Another person filed an application for impleadment on the ground that he was in possession of half of the suit property as owner. The question arose as to whether the applicant was the owner or trespasser. The Court held that the suit had been filed for arrears of rent and it cannot be converted into a complicated title suit by addition of parties and to adjudicate upon title of the parties.

In Pravat Kumar Misra V. Prafulla Chandra Misra & Anr. , AIR 1977 Ori. 183, a suit for eviction of tenant was filed and a person made an application claiming title over the suit property and thus applied for impleadment. The Court rejected the application on the ground that in the suit no relief has been claimed against the applicant nor his rights were to be determined therein and the judgment and order passed in the suit cannot adversely affect him as he was not the party to the suit. Therefore, he was not a necessary party. (See also: Vidhur Impex & Traders (P) Ltd. V. Tosh Investments (P) Ltd., (2012) 8 SCC 384)

In Firm of Mahadeva Rice and Oil Mills & Ors. V. Chennimalai Goundar, AIR 1968 Mad. 287, the Court held that unless the Court comes to the conclusion that the applicant is one for whose presence the question in the suit cannot be completely and effectively adjudicated upon, the question of his addition does not arise. Merely because impleadment would avoid multiplicity of suits and it would be convenient for purpose of trial application cannot be allowed as there are not relevant considerations. The Court has to restrict the case only for determining the real controversy between the parties and when it is found that the third party is necessary only then he may be impleaded.

In Motiram Roshanlal Coal Co.(P) Ltd. V. District Committee, Dhanbad & Ors, AIR 1962 Pat. 357, the Court held that a plaintiff cannot be compelled to add a party against his wishes, and in spite of his protest to litigate against such a person against his choice. Merely because a person is indirectly interested in the suit property, he cannot become a necessary party. The Court must keep two principles in mind while considering such a question, i.e., (1) when the applicant ought to have joined as plaintiff or defendant, and is not so joined, or (2) when without his presence the questions in the suit cannot be completely decided. The plaintiff is a dominus litus of his case. He cannot be forced to add a party against his wishes or a person against whom he had not claim for relief. Therefore, the Court must invariably take into account the wishes of the plaintiff before adding a third person as a defendant to his suit claiming no relief against such third person. A person may be having interest in the property, but the plaintiff does not claim any relief. So he cannot be permitted to add it and the Court must keep in mind the issue as to whether there is anything in the suit which cannot be determined on account of his absence in the party array or whether there will be prejudice by his not being added. Person seeking impleadment should have a direct interest in the suit property. A third party cannot be allowed to enforce himself on the plaintiff to get his title decided when no such question arises between the parties to the litigation.

However, there cannot be any absolute bar to implead a person against the plaintiff’s consent in a fit and proper case where the applicant is found to be a necessary party. (Vide: Naba Kumar Hazra & Anr. V. Radhashyam Mahish & Ors., AIR 1931 PC 229; and Banarsi Dass Durga Prashad V. Panna Lal Ram Richhpal Oswal & Ors., AIR 1969 Punj. 57.)

In J.J. Lal Pvt. Ltd. & Ors. V. M.R. Murali & Anr., AIR 2002 SC 1061, the Supreme Court held as under:

> "Both the sets of applications raise such controversies as are beyond the scope of these proceedings. This is a simple land-lord-tenant suit. The relationship of Municipal Corporation, with the respondents and their mutual rights and obligations are not germane to the present proceedings. Similarly, the question of title between Hemlata Mohan and the respondents cannot be decided in these proceedings. The impleadment of any of the applicants would change the complexion of litigation and raise such controversies as are beyond the scope of this litigation. The presence of either of the applicants is neither necessary for the decision of the question involved in these proceedings nor their presence is necessary to enable the Court effectually and completely to adjudicate upon and settle the questions involved in these proceedings. They are neither necessary nor proper parties. Any decision in these proceedings would govern and bind the parties herein. Each of the two applicants is free to establish its own claims and title whatever it maybe in any independent proceedings before a competent forum…"

In Vijay Lata Sharma V. Rajpal & Anr., (2004) 6 SCC 762, the Supreme Court considered the case where the proceeding for release of the premises under the provisions of Section 21 of U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 were pending and a person filed an application for impleadment on the ground of acquiring title on the basis of a will left by the owner before his death. The Court held that as the release of building had nothing to do with ownership of the suit premises, such a person was neither necessary nor a proper party and application for release would be decided without his presence. More so, the issue of title cannot be decided by the Prescribed Authority in those proceedings.

In Kasturi V. Iyyamperumal & Ors., AIR 2005 SC 2813, during the pendency of the suit for specific performance of contract for sale, a third party claimed independent title and possession over the contracted property, and filed an application for impleadment. The Court held that such an application would enlarge the scope of the suit for specific performance of contract to the suit for title and possession. As the nature of the suit itself would change, the impleadment was not required. To decide the right, title and interest in the suit property of the third party to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be converted into a regular title suit. In case the nature and character of the suit is converted by impleadment, the application has to be rejected. The Court further held as under:-

> "… This addition, if allowed would lead to a complicated litigation by which trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of (applicants) in respect of the contracted property…… ((Plaintiff) is dominus litus and cannot be forced to add parties against whom he does not want to fight unless it is a compulsion of the rule of law. It is well settled that in a suit for specific performance of contract for sale, the lis between the appellant and respondent Nos. 2 and 3 shall only be gone into and it is also not open to

the Court to decide whether the respondent nos. 1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against respondent Nos. 2 and 3 can only be adjudicated upon, and in such a list the Court cannot decide the question of title and possession of the respondent Nos. 1 and 4 to 11 relating to the contracted property."

While deciding the said case, a heavy reliance has been placed by the Court upon its earlier judgment in Vijay Pratap V. Sambhu Saran Sinha, AIR 1996 SC 2755 wherein it was held that the scope of the suit cannot be enlarged by addition of a party and suit for specific performance cannot be converted into a suit for title and possession.

In Sumtibai & Ors. V. Paras Finance Co. Regd. Partnership Firm, AIR 2007 SC 3166, the Apex Court held that if a party can show fair semblance of title and interest, he is entitled to make an application for impleadment.

In Sunil Gupta V. Kiran Girhotra & Ors., (2007) 8 SCC 506, the Apex Court held that a probate can be granted only to an executor appointed by a Will. A transferee of a property during the pendency of such a proceeding is not a necessary party.

Similar view has been reiterated by the Apex Court in Krishna Kumar Birla V. Rajendra Singh Lodha & Ors., (2008) 4 SCC 300; and Babulal Khandelwal & Ors. V. Balkishan D. Sanghvi & Ors., AIR 2009 SC 67.
(See also: District Collector, Srikakulam & Ors. v. Bagathi Krishna Rao & Anr., AIR 2010 SC 2617)

Objection regarding, cannot be permitted to be raised for the first time before Supreme Court when same not resulted in failure of justice, although Supreme Court can implead a party on application wherever necessary. (Vide: **Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee** (2012) 8 SCC 706).

Thus, an application for impleadment can be allowed in case the person is found to be a necessary party. His impleadment is found to be absolutely necessary to enable the Court to adjudicate the issues effectively and completely. Person sought to be impleaded must have direct interest in the suit property. Avoidance of multiplicity of litigation cannot be a sole criterion for deciding the application. Generally a party cannot be impleaded against the wishes of the plaintiff, who is the master of his suit and he is not seeking any relief against such a party.

Order II, 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. (Vide: Mohd Khalil Khan V. Mahbub Ali Mian, AIR 1949 PC 78; and Alka Gupta V. Narendra Kumar Gupta (2010) 10 SCC 141)

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 Supreme Court in Gurubux Singh V. 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 Supreme Court in M/S D. Cawasji & Co. V. State of Mysore, AIR 1975 SC 813; Commissioner of Income Tax V. T.P. Kumaran, (1996) 10 SCC 561; Union of India & Ors. V. Punnilal & Ors., (1996) 11 SCC 112; Kunjan Nair Sivaraman Nair V. Narayanan Nair AIR 2004 SC 1761; and Sapan Sukhdeo Sable V. Assistant Charity Commissioner, AIR 2004 SC 1801).

In Dalip Singh V. Maher Singh Rathee, (2004) 7 SCC 650, the sine qua non for applicability of Order 2 Rule 2 C.P.C. is that a person entitled to more than one relief in respect of the same cause of action has omitted to sue for some relief without the leave of the Court. When an objection regarding bar to filing of suit under Order 2 Rule 2 CPC is taken, it is essential for the court to know what exactly the cause of action is that had been alleged in the previous suit in order that it might be in a position to appreciate whether the cause of action alleged in the previous suit is identical to the present one.

Similar view has been reiterated in Swami Atmananda & Ors. V. Sri Ramkrishna Tapovanam, AIR 2005 SC 2392; N.V. Srinivasa Murthy & Ors. V. Mariyamma (Dead) by proposed L.Rs. & Ors., AIR 2005 SC 2897; and Union of India V. H.K. Dhruv, (2005) 10 SCC 218.

In Sandeep Polymers (P) Limited V. Bajaj Auto Limited & Ors., (2007) 7 SCC 148, the Apex Court held that this provision is directed to secure the exhaustion of the relief in respect of a cause of action and not to inclusion in one and the same action of different causes of action, even though they arise from the same transaction. The fresh suit is permissible to be filed in a court of competent jurisdiction in respect of a cause of action for which the original court did not have jurisdiction.

In Dadu Dayalu Mahasabha, Jaipur (Trust) V. Mahant Ram Niwas & Anr., 2008 AIR SCW 3324, the Apex Court observed that even if the second suit has been filed in view of the observation made by the Supreme Court while dealing with an appeal against the order passed in first appeal, the trial Court has full power to reject the said plaint being barred by Order II Rule 2 or the provisions of Section 11 C.P.C.

Order II Rule 2 – Bar imposed thereunder vis-à-vis winding-up Proceedings

(See: **Raju Jhurani v. Germinda Private Limited,** (2012) 8 SCC 563)**.**

Order III Rules 1 & 2

It is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of Order III, Rules 1 and 2 CPC empower the holder of the power of attorney to "act" on behalf of the principal. The word "acts" employed therein is confined only to "acts" done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term "acts", would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any "acts" in pursuance of the power of attorney, he may depose for

the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him.

Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined. (See: **Vidhyadhar v. Manikrao & Anr.,** AIR 1999 SC 1441; **Janki Vashdeo Bhojwani v. Indusind Bank Ltd.,** AIR2005SC439; **M/S Shankar Finance and Investment v. State of A.P & Ors.,** AIR 2009 SC 422; **Man Kaur v. Hartar Singh Sangha**, (2010) 10 SCC 512; and **S. Kesari Hanuman Goud v. Anjum Jehan & Ors.** JT 2013 (8) SC 200).

Order III Rule 4 provides for filing of Vakalatnama. In Uday Shankar Triyar V. Ram Kalewar Prasad Singh & Anr., AIR 2006 SC 269, the Apex Court explained the importance of a Vakalatnama as it is a species of power-of-attorney which enables and authorizes a lawyer appearing for a litigant to do several acts as an agent, which is binding on the litigant who is the Principal. The Vakalatnama creates a special relationship between the lawyer and his client. It regulates and governs the extent of delegation of authority to a lawyer and the terms and conditions governing such delegation. Therefore, it requires to be filed, attested, accepted with care and caution. It cannot be filed in the case after obtaining the signature of the litigant on blank Vakalatnama. While deciding the said case, reliance had been placed upon its earlier judgment in Shastri Yagnapurushdasji & Ors. V. Muldas Bhundardas Vaishya & Anr., AIR 1966 SC 1119 wherein the Court had held that an irregularity committed by a pleader is curable but the Vakalatnama should be filed with due caution.

In Kodi Lal. V. Ch. Ahmad Hasan & Ors., AIR 1945 Oudh 200, it was held that the counsel must be duly authorized by his client to enable him to sign documents and to represent the position of his client.

Rule 39 (Section IV, Chapter II of Part IV of The Bar Council of India Rules) of the Rules framed under Section 49 (1) (c) of the Advocates Act, 1961 provides as under:-

> "An Advocate shall not enter appearance in any case in which there is already a vakalat or memo or appearance filed by an Advocate engaged for a party except with his **consent**; in case such consent is not produced

> he shall apply to the Court stating reasons why the said consent could not be produced and he shall appear **only** after obtaining the **permission** of the Court." (Emphasis added).

Order IV, 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 IV Rule 2—Registration of Suits—P.K. Palanisamy v. N. Arumugham & Anr., (2009) 9 SCC 173.

Order IV-A - State of U.P. amended the CPC inserting this provision enabling the Civil Court to consolidate the suits. (See Section 151 CPC also).

Order IV-A 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 IV-A - State of U.P. amended the CPC inserting this provision enabling the civil court to consolidate suits. (See: Section 151 CPC also).

Order V Rule 1- Amendments by the Acts of 1999 and 2002 provide that summons be issued and defendants may file their 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 and that it is satisfied that there was a genuine ground for not filing the written statements within time. But the court does not have the power to extend it beyond 90 days. The amendments also provide that summons must be accompanied by a copy of the plaint. (Vide: Smt. Badami (Deceased) by her L.R.'s V. Bhali, AIR 2012 SC 2858)

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

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

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

Substituted service is not permissible unless the Court records 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 V. 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. V. Bindeshwari Tewari & Ors., AIR 1972 Pat 142.

In Ambika Prasad V. 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 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 V. 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 would not arise.

In Great Punjab Agro Industries Ltd. V. Khushian & Ors., (2005) 13 SCC 503, the Supreme Court explained that if a defendant is residing in Bombay, substituted service by publication in the news papers circulated in Punjab is not a valid service. An ex-parte decree so passed was set aside.

In the case of Rabindra Singh V. Financial Commissioner, Cooperation Punjab & Ors, (2008) 7 SCC 663, the notice of proceedings was not served upon to the appellant's address and intentionally sent notice to wrong address. In such a situation, appellant established his case for setting aside ex-parte decree and appeal was allowed and ex-parte decree was set aside.

Order VI 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 V. Vishwa Mohan, AIR 1982 SC 816).

The oral statements so recorded become part of the pleadings. (Vide: M/s Ganga Ram Sat Narain V. 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. V. Shripat Rai & Ors., AIR 1962 All 111; and Balmiki Singh V. 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 the Court and the counsel for the 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 V. Ratan Prakash & Anr., AIR 1974 All 138; and Sher Singh & Ors. V. Pirthi Singh & Ors., AIR 1975 All 259.

In State of Madhya Pradesh v. Narmada Bachao Aandolan, AIR 2011 SC 1989 the Supreme Court held that even while filing a PIL, pleadings play an important role. Further, it was said that pleadings are required to enable the Court to decide the rights of parties at trial by helping to narrow down the controversy.

In Raja Prithwi Chand Lall Choudhary V. 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 V. 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.

Pleadings—Bachhaj Nahar v. Nilima Mandal & Ors., AIR 2009 SC 1103.

Order VI Rule 2 speaks that pleadings must have all material facts. What are the material facts would depend upon the facts and circumstances of each case. Even in a case where material facts have not specifically been pleaded but stand covered by implication and the parties understand it and it was involved in the trial itself, it can be held that there was no suppression of material facts. (Vide: Mayar (H.K.) Ltd. & Ors. V. Owners & Parties, Vessel M.V. Fortune Express & Ors., AIR 2006 SC 1828; and Standard Chartered Bank V. Andhra Bank Financial Services Ltd. & Ors., (2006) 6 SCC 94).

Order VI Rule 4 speaks that allegation as to fraud, intimidation, illegality, want of execution etc. need to be specifically pleaded; Bishundeo Narain & Anr. V. Seogeni Rai & Jagernath, AIR 1951 SC 280 and Virendra Kashinath Ravat and Another v. Vinayak N. Joshi & Others AIR 1999 SC 162.

But, it has also been held that mere lack of details in the pleading cannot be a reason to set aside concurrent finding of facts as details, if any, can be supplemented through evidence; Hari Singh v. Kanhaiyalal, AIR 1999 SC 3325.

Order VI Rule 5 whichprovided for further and better statements or particulars, stands deleted by Amendment in 1999.

Order VI Rule 14 provides that every pleading shall be signed by the party and his pleader, if any. In case, it is not complied with, the defect can be permitted to be cured by the trial Court at any time before the judgment or even by the appellate Court permitting the party to do so by an amendment whenever such a defect is noticed during the hearing. (Vide: Uday Shankar Triyar V. Ram Kalewar Prasad Singh & Anr., AIR 2006 SC 269).

Order VI Rule 15 provides for verification. A Full Bench judgment of the Allahabad High Court in Rajit Ram & Ors. V. 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 was it disclosed which part of the plaint 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 Supreme Court, in Murarka Radhey Shyam Ram Kumar V. Roop Singh Rathore & Anr., AIR 1964 SC 1545, considered the case where in the verification of an Election Petition, it had not been stated whether the advice and information received was believed 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. V. 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 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, would a consequential order be passed in accordance with law.

Verification in Election Cases

In H.D. Revanna V. G. Puttaswamy Gowda & Ors., AIR 1999 SC 768, the 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 V. C.P. Thirunavukkarasu, AIR 2000 SC 694, the 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. V. Ramachandra Dhondo Datar, AIR 1961 Bom 292; Purushottam Umedbhai & Co. V. M/s Manilal and Sons, AIR 1961 SC 325; and Karam Singh V. 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. V. Mst. Bhag Kuer & Ors., AIR 1958 All. 329).

A Constitution Bench of the Supreme Court, in Dinabandhu Sahu V. 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 V. Election Tribunal, Kotah & Anr., AIR 1955 SC 425, the Supreme Court dealt with the provisions of the Code applicable in trial of an 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 Supreme Court, in Ghanshyam Das V. Dominion of India & Ors., AIR1984SC1004, 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." (See also: **Biswanath Ghosh (Dead) by L.Rs. & Ors. v. Gobinda Ghosh @ Gobindha Chandra Ghosh & Ors. JT 2014 (4) 1 SC 132)**

The Constitution Bench of the Supreme Court, in Bhikaji Keshao Joshi & Anr. V. 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 such 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 V. Special Court Bombay, AIR 2003 SC 3039, the Court observed that while making verification, a person is under a 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.

In Baldev Singh V. Shinder Pal Singh & Anr., (2007) 1 SCC 341, the Apex Court held that the provisions of Order VI Rule 15, must be observed strictly and the facts in the personal knowledge of the deponent and upon information received and believed to be true, should be separately specified for the reason that factual statement made in the petition cannot be both, true to the knowledge and belief of the deponent.

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

Order VI Rule 16 provides for deletion/striking off of unjustified, irrelevant and unnecessary averments. The averments made in the plaint, which are not necessary to determine the real controversy or averments made against a person not impleaded as a party must, be struck off being scandalous, frivolous or vexatious. (Vide: Iqbal V. Hakeem Uddin, (2005) 13 SCC 754; and Iqbal V. His Holiness Dr. S.M. Burhanuddin Saheb, (2005) 13 SCC 759).

Amendment of Pleadings

Order VI Rule 17 providesamendment 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 the appellate stage. Introduction of an entirely new case, displacing admissions by a party is not permissible. (Vide: Pirgonda Hongonda Patil V. Kalgonda Shidgonda Patil & Ors., AIR 1957 SC 363; Nanduri Yogananda Laxminarsimhachari & Ors. V. Sri Agasthe Swarswamivaru, AIR 1960 SC 622; M/s Modi Spinning & Weaving Mills Co. Ltd. V. M/s Ladha Ram & Co., AIR 1977 SC 680; Ishwardas V. State of M.P., AIR 1979 SC 551; and Mulk Raj Batra V. District Judge, Dehradun, AIR 1982 SC 24).

A similar view has been reiterated in G. Nagamma & Anr. V. Siromanamma & Anr., and (1996) 2 SCC 25; B.K. Narayana Pillai V. 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 V. Mohindra Kumar & Ors., AIR 1964 SC 993).

A Constitution Bench of the Supreme Court in Municipal Corporation of Greater Bombay V. Lala Pancham & Ors, AIR 1965 SC 1008, observed that even the court itself can suggest 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 an entirely new case.

In L.J. Leach & Co. Ltd. V. Messrs. Jairdine Skinner & Co. AIR 1957 SC 357; Charan Das V. Amir Khan, AIR 1921 Privy Council 50; Prigonda Hongonda Patil V. Kalgonda Shidgonda Patil AIR 1957 SC 363; Nichhalbhai Vallabhai V. Jaswantlal Zinabhai, AIR 1966 SC 997; and M/s Ganesh Trading Co. V. Moji Ram, AIR 1978 SC 484, it has been held that the court can allow a party to amend pleadings at any stage.

In Jagdish Singh V. Natthu Singh, AIR 1992 SC 1604, the Supreme Court held that the Court may to a certain extent allow the conversion of the nature of the Suit, provided it does not give rise to an entire 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 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 were in his knowledge when the plaint was instituted it can be done. However, the plaintiff cannot be allowed to make fresh allegation of facts by way of amendment at a belated stage. (Vide: Gopal Krishanamurthi V. Shreedhara Rao, AIR 1950 Mad. 32; and Gauri Shankar V. M/s Hindustan Trust (Pvt) Ltd., AIR 1972 SC 2091).

In Union of India & Ors. V. 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 a settled legal proposition that if a right accrues 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 V. Bajrangi Singh, AIR 1996 SC 2358; and Dondapati Narayana Reddy V. Duggireddy Venkatanarayana Reddy, (2001) 8 SCC 115).

In G. Nagamma & Ors. V. Siromanamma & Anr., JT 1998 (4) SC 484, the 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 V. Mangal Sain Wadhera, AIR 1985 SC 817, the 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.

The judgment was substantially overruled by the larger bench in Sureshchand V. Gulam Chintuy, AIR 1990 SC 297.

In Fritiz T.M. Clement & Anr. V. Sudhakaran Nadar & Anr., AIR 2002 SC 1148, the Supreme Court held that in case the original plaint is cryptic and amendment sought to incorporate some undisputed facts elaborating the 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 case. More so, if the claim does not challenge the nature of the relief, and the rate of fee is challenged without challenging the total amount claimed, such amendment may be allowed even at a belated stage.

In Gurdial Singh V. Raj Kumar Aneja, (2002) 2 SCC 445, the 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 fact without having necessary details in the 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 an amendment cannot be permitted to achieve the said purpose.

Similarly, in Om Prakash Gupta V. Ranbir B. Goyal, AIR 2002 SC 665, the 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 that 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. V. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235, the apex 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 V. 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 V. The Oriental Fire & General Insurance Co. Ltd., AIR 1996 SC 642, the 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 V. Natthu Singh, AIR 1992 SC 1604.

In State of M.P. V. Kashiram, (2010) 14 SCC 506 adequate consideration must be put in before permission to amend claim, is granted. (Claim to be amended from Rs 4-5 lakh per hectare to Rs 6,17,000 per hectare.

In Smt. Ganga Bai V. Vijay Kumar, AIR 1974 SC 1126, the 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. V. Maoji Ram (Supra), the Supreme Court observed that where an amendment is found to be necessary for promoting the ends of justice and not for defeating the same the application should be allowed. A similar view had been reiterated in B.K.N. Pillai V. P. Pillai & Anr., AIR 2000 SC 614.

In Estrella Rubber V. 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. (See also: Surender Kumar Sharma v. Makkan Singh, (2009) 10 SCC 626.

Similarly, in Siddalingamma & Anr. V. Mamtha Shenoy, (2001) 8 SCC 561, the 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. A similar view has been reiterated in Raghu Thilak D. John V. S. Rayappan & Ors., AIR 2001 SC 699. (See also: Vimal Chand Ghevarchand Jain & Ors. V. Ramakant Eknath Jajoo (2009) 5 SCC 713.

In the case of State of MP v. Union of India, (2011) 12 SCC 268, amendment sought after a delay of 5 years and issues are already framed. Relief sought by virtue of

amendment was not relief that could be granted in the suit concerned. It was held that though courts have ample power to allow amendment of plaint but the said power should be exercised in the interest of justice and for determination of the real question in controversy between the parties. Either party can amend its pleadings in such a manner and on such terms as may be just. However, amendment cannot be claimed as a matter of right and under all circumstances, but the courts while deciding such prayers should not adopt a hyper technical approach- A liberal approach should be the general rule approach- A liberal approach should be the general rule, particularly in cases where the other side can be compensated with costs. Amendments are sought to avoid multiplicity of proceedings and where sought after trial commences, it must be shown that in spite of due diligence, such amendment could not have been sought before. (See also: Revajeelu Builders and Developers V. Narayanaswamy and Sons, (2009) 10 SCC 84.

In Jayanti Roy V. 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 an unduly delayed stage should normally be rejected.

In Sampat Kumar V. Ayyakannu & Anr., (2002) 7 SCC 559, the 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, the 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 Supreme Court held that amendment can be allowed even at an appellate stage in a case where the law of limitation is not involved and the facts and circumstances of the particular case so demand, in order to do justice to the parties. The case involved therein was 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 with respect to filing the claim petition, the amendment at the appellate stage was allowed.

In Hanuwant Singh Rawat V. M/s Rajputana Automobiles, Ajmer, (1993) 1 WLC 625, the 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 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 question(s) 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 Supreme Court specifically held that amendment in pleadings is not permitted if it seeks to "displace the plaintiff completely from the admissions made by the defendant in the written statement."

Similarly, in the case of Peethani Suryanarayana v. Repaka Venkata Ramana Kishore, (2009) 11 SCC 308 it was held that the Courts hold the power to allow such amendment provided:

(a) Application is bonafide

(b) Does not cause injustice to the other side

(c) Does not affect the right(s) already accrued to the other side.

In Heeralal V. Kalyan Mal & Ors., (1998) 1 SCC 278, the 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 a 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 V. Gopal Vinayak Gosavi & Ors., AIR 1960 SC 100, the 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 has been reiterated in K.S. Srinivasan V. Union of India & Ors., AIR 1958 SC 419; Basant Singh V. Janki Singh, AIR 1967 SC 341; Prem Ex-Serviceman Co-operative Tenant Farming Society Ltd. V. State of Haryana, AIR 1974 SC 1121; and Avadh Kishore Dass V. Ram Gopal & Ors., AIR 1979 SC 861.

In Nagubai Ammal & Ors. V. B. Shama Rao & Ors., AIR 1956 SC 593, the Apex Court took the same view, holding that the statements admitting the factual position must be given full effect and while deciding the same, the Supreme Court placed reliance on the decision in Slatterie V. 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 V. 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 bind 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. V. T.N. Electricity Board & Ors., (2004) 3 SCC 392).

In Pankaja & Anr. V. Yellappa (Dead) by L.Rs. & Ors., AIR 2004 SC 4102, the Supreme Curt 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. Similar view has been reiterated in Rajesh Kumar Aggarwal & Ors. V. K.K. Modi & Ors. , AIR 2006 SC 1647).

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 a chance to contest the question in controversy. The Court has a discretion to allow amendment even if it is barred by limitation, if the facts so require.(Vide: Ramnik Vallabh Das Madhwani V. Tara Ben Pravin Lal Madhwani, AIR 2001 SC 1084; T.N. Alloy Foundry Ltd. V. T.N. Electricity Board, (2004) 3 SCC 392; and Pradeep Singhvi V. Heero Dhankani, (2004) 13 SCC 432). The amendment may be permitted to be carried out if it helps to bring real question in controversy between the parties to the fore as refusal thereof would creat complication at the stage of execution in the event of success of the plaintiff in the suit. (Vide: Sajjan Kumar V. Ram Kishan, (2005) 13 SCC 89).

Amendment may also be necessary to bring to light subsequent events and in that situation, the Court cannot examine the truthfulness or merit of the amendment and may allow the amendment application having an extreme liberal view. (Vide: Rajesh Kumar Agrawal V. K.K. Modi, AIR 2006 SC 1647; and Baldev Singh V. Manohar Singh, AIR 2006 SC 2832).

In Baldev Singh (supra), the Court held that it is not permissible for the plaintiff to raise inconsistent pleas but the defendant has a right to raise inconsistent defences for the reason that the amendment of the plaint and that of the written statement are not governed by exactly the same principle. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as altering or substituting a new cause of action. Therefore, while permitting the amendment in the written statement, a more liberal approach is required. The Court further held that the admissions made in the written statement can be withdrawn if the same can be explained satisfactorily. The amendment application must be filed before the trial has commenced otherwise the proviso added to Order VI Rule 17 by amendment with effect from 01.07.2002 would be rendered nugatory.

In State Bank of Hyderabad V. Town Municipal Council, (2007) 1 SCC 765, the Supreme Court held that, if the plaint has been instituted prior to the commencement of the Act and amendment application is filed after the amendment, it shall be governed by the unamended law and the proviso added therein shall not apply.

In Salem Advocate Bar Association, Tamil Nadu V. Union of India & Ors., (2005) 6 SCC 344, the Supreme Court has held that the object of adding the proviso is to prevent frivolous applications which are filed to delay the trial.

In Ajendraprasadji N. Pande & Anr. V. Swami Keshavprakeshdasji N. & Ors., 2007 AIR SCW 513, the Apex Court considered the scope of amendment in Order VI Rule

17 C.P.C. by adding a proviso to the effect that amendment application should be filed prior to commencement of the trial. The Court held that trial commences when the issues are settled and case is set down for recording of evidence. The Apex Court observed that unless the party satisfies the Court that in spite of due diligence, the issue could not be raised in the suit or proceedings before the commencement of trial, the amendment should not be allowed. While deciding the said case, the Apex Court considered a large number of its earlier judgments particularly B.K. Narayana Pillai V. Parmeshwaran Pillai & Anr., (2001) 1 SCC 712; Kailash V. Nankhu & Ors., (2005) 4 SCC 480; & Baldev Singh & Ors. Manohar Singh & Anr., (2006) 6 SCC 498, wherein it had been held that the delay of its own, untouched by fraud is not a ground for rejecting the application for amendment. The provisions are procedural, and therefore, should be construed liberally to advance the case of justice and not to retard or to defeat justice.

In Usha Bala Shaheb Swami & Ors. V. Kiran Appaso Swami & Ors., (2007) 5 SCC 602, the Apex Court held that by moving an application for amendment under Order 6 Rule 17 the party cannot wriggle out of an admission, though an admission can be explained, whilst keeping the admission intact.

In Andhra Bank V. A.B.N. Amro Bank NV & Ors., (2007) 6 SCC 167, the Court held that at the time of considering the application for amendment of the written statement it is not open for the Court to go into the facts regarding whether in fact the suit was maintainable or not. Delay in filing the application cannot be the sole ground to refuse the prayer for amendment.

In Sandeep Polymers (P) Limited V. Bajaj Auto Limited & Ors., (2007) 7 SCC 148, a similar view has been reiterated.

Amendment Application can be moved at any stage of the proceedings, even at the appellate stage. (Vide: Kankarathanammal V. V.S. Longanatha Mudaliar & Anr., AIR 1965 SC 271; and M/s. Ganesh Trading Company V. Mauji Ram, AIR 1978 SC 484).

In Ishwardas V. The State of Madhya Pradesh & Ors., AIR 1979 SC 551 while considering a case of amendment under Order 6 Rule 17 seeking amendment in the written statement at an appellate stage, the Supreme Court held as under:-

> "There is no impediment or bar against an appellate court permitting amendment of pleadings. So as to enable a party to raise a new plea, all that is necessary is that the appellate court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally, one of the circumstances which will be taken into consideration before an amendment is granted, is the delay in making the application, and if amendment is made at appellate stage, the reason why it was not sought in the trial court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an appellate court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court."

In Bongaigaon Refinery and Pehochemicals Ltd. & Ors. V. Girish Chandra Sharma, (2007) 7 SCC 206, the Division Bench of a High Court rejected the claim of a party to agitate the issue which the said party had given up before the Single Judge in the writ Court, the Supreme Court held that the appeal is a continuity of the suit. There can

be no bar for the party to agitate the issue given up by it before the Single Judge, as in such an eventuality, the plea is not barred by estoppel.

In Bollepanda P. Poonacha & Anr. V. K.M. Madapa, 2008 AIR SCW 2895, the Apex Court held, that amendment in the written statement to take additional pleas can be allowed provided it is not in contravention of the interdict in Order VIII Rule 6(A) i.e. the principle for filing the counter claim.

In North Eastern Railway Administration, Gorakhpur V. Bhagwan Das (D) by L.Rs., 2008 AIR SCW 3159, the Court held that amendment of pleadings at an appellate stage is permissible if it does not cause injustice to other party and is necessary to determine the question in contravention.

In Bharat Karsondas Thakkar V. M/s Kiran Construction Co. & Ors., 2008 AIR SCW 3192, the Supreme Court held that amendment is not permissible if it changes the nature of suit.

In Ashutosh Chaturvedi V. Prano Devi & Ors., 2008 AIR SCW 3352, the Court held that amendment of pleadings at a belated stage is not permissible as it could not be permissible by two provisions contained in the proviso to Order VI.

In Chander Kanta Bansal V. Rajinder Singh Anand, AIR 2008 SC 2234, the Apex Court held that amendment may be allowed liberally but it should not cause injustice or prejudice of an irremediable nature to the other party under the pretence of amendment. The proviso edited by amendment to Order VI Rule 17 curtails delay and expedite hearing of the cases. Therefore, the party is bound to explain the delay in filing the application and the due diligence undertaken by him should be such diligence as a prudent man would exercise in the conduct of his own affairs.

Similar view has also been taken in Gautam Sarup v. Leela Jetly & Ors., (2008) 7 SCC 85; Usha Devi v. Rijwan Ahmad & Ors., (2008) 3 SCC 717; and Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626.

In Vidyabai & Ors. V. Padmalatha & Anr., (2009) 2 SCC 409, the Apex Court held that the provisions of Order 6 Rule 17 are caused in mandatory form. Therefore, the Court may not allow the application for amendment after commencement of the trial.
(See also: Ashutosh Chaturvedi V. Prano Devi, (2008) 15 SCC 610; Ravejeetu Builders & Developers V. Narayanswamy & Sons. & Ors. (2009) 10 SCC 84; and South Konkan Distilleries & Anr. V. Prabhakar Gajanan Naik & Ors., AIR 2009 SC 1177).

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 subsequent development as it would be necessary to avoid multiplicity of 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 VI Rule 18 provides that parties are bound to incorporate the amendments or 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, as extended by the court. The provisions are mandatory in nature and amendment is to be carried out within the specified time. (Vide: Union of India V. Pramod Gupta, (2005) 12 SCC 1).

IMPORTANCE OF PLEADINGS:

In **Gajanan Krishnaji Bapat & Anr. v. Dattaji Raghobaji Meghe & Ors.,** AIR 1995 SC 2284; the Supreme Court held that the court cannot consider any fact which is beyond the pleadings of the parties. The parties have to take proper pleadings and establish them by adducing evidence that by virtue of a particular irregularity/illegality, the result of the election has been materially affected.

Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are of more help to the court in narrowing down the controversy involved and it informs the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule, relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties and to narrow the area of conflict and to see just where the two sides differ. (Vide : **Sri Mahant Govind Rao v. Sita Ram Kesho**, (1898) 25 Ind. App. 195; **M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar**, AIR 1953 SC 235; **Raruha Singh v. Achal Singh & Ors.**; AIR 1961 SC 1097; **Om Prakash Gupta v. Ranbir B. Goyal**, AIR 2002 SC 665; **Ishwar Dutt v. Land Acquisition Collector & Anr.**, AIR 2005 SC 3165; **Kores (India) Ltd. v. Bank of Maharashtra**, (2009) 17 SCC 674 and **State of Maharashtra v. Hindustan Construction Company Ltd.**, (2010) 4 SCC 518.)

The Apex Court in **Ram Sarup Gupta** (dead) by L.Rs**. v. Bishun Narain Inter College & Ors.**, AIR 1987 SC 1242 held as under:

> "It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet…….. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question."

(See also: **Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr.** 2014 (2) SCALE 26).

The Supreme Court in **Bachhaj Nahar v. Nilima Mandal & Ors.** AIR 2009 SC 1103, held as under:

> "The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration."

The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue…….. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence led etc." Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. (Vide: **I.T.C. Limited v. Debt Recovery Appellate Tribunal & Ors.**, AIR 1998 SC 634, **T. Arivandandam v. T.V. Satyapal & Anr.** AIR 1977 SC 2421).

In **J.K. Iron & Steel Co. Ltd, Kanpur v. The Iron and Steel Mazdoor Union, Kanpur**, AIR 1956 SC 231, the Apex Court observed:

> "It is not open to the Tribunals to fly off at a tangent and, disregarding the pleadings, to reach any conclusions that they think are just and proper."

(See also: **Kalyan Singh Chouhan v. C.P. Joshi,** AIR 2011 SC 1127)

Order VII

(See: Board of Trustees of Port of Kandla v. Horgovind Jasraj & Anr., (2013) 3 SCC 182).

Order VII Rule 10 provides for return of the plaint for presentation before a competent Court in case the plaint has been presented in a Court having no jurisdiction. When a plaint is returned and it is presented before a Court of competent jurisdiction, the competent Court has to take the proceedings as if they have been filed afresh and start from the stage of presentation of plaint before it. Any action taken by the earlier Court cannot be taken into consideration. (Vide: Harshad Chimanlal Modi V. D.L.F. Universal Ltd., AIR 2006 SC 646).

In **Ramdutt Ramkissen Dass v. E.D. Sassoon & Co.**, AIR 1929 PC 103, a Bench of Privy Council held:

> *"…..It is quite clear that where a suit has been instituted in a court which is found to have no jurisdiction and it is found necessary to raise a second suit in a court of proper jurisdiction, the* ***second suit cannot be regarded as a continuation of the first****, even though the subject matter and the parties to the suits were identical……"*

In **Sri Amar Chand Inani v. Union of India**, AIR 1973 SC 313, the issue involved herein was considered and the apex Court held that in such a fact-situation, where the plaint is returned under Order VII Rule 10 CPC and presented before the court of competent jurisdiction, the plaintiff is entitled to exclude the time during which he prosecuted the suit before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act and by no means it can be held to be continuation of the earlier suit after such presentation.

In **Hanamanthappa & Anr. v. Chandrashekharappa & Ors.**, AIR 1997 SC 1307, the apex Court reiterated a similar view rejecting the contention that once the plaint is returned by the court having no jurisdiction and is presented before a court of competent jurisdiction, it must be treated to be continuation of the earlier suit. The Court held:

> *"In substance, it is a suit filed afresh subject to the limitation, pecuniary jurisdiction and payment of the Court fee. …. At best it can be treated to be a fresh plaint and the matter can be proceeded with according to law."*

In **Joginder Tuli v. S.L. Bhatia & Anr.**, (1997) 1 SCC 502, the apex Court dealt with a case wherein the landlord had terminated the tenancy and filed a suit for possession. An application for amendment of the plaint to recover damages for the use and occupation was also filed. On that basis, the pecuniary jurisdiction of the Trial Court was beyond its jurisdiction and accordingly the plaint was returned for presentation to proper court. On revision, the High Court directed the Court to return the plaint to the District Court with a direction that the matter would be taken up by the District Court and proceeded with from the stage on which it was returned. The Court disposed of the case observing:

> *"Normally, when the plaint is directed to be returned for presentation to the proper court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that stage at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference."*

The apex Court in **Harshad Chimanlal Modi (II) v. D.L.F. Universal Ltd. & Anr.**, AIR 2006 SC 646 has approved and followed its earlier judgment in **Sri Amar Chand Inani** (supra) and distinguished the case in **Joginder Tuli** (supra) observing that:

> *"The suit when filed was within the jurisdiction of the Court and it was properly entertained. In view of amendment in the plaint during the pendency of the suit, however, the plaint was returned for presentation to proper court taking into account the pecuniary jurisdiction of the court. Such is not the situation here."*

Section 14 of the Limitation Act provides protection against the bar of limitation to a person bonafidely presenting his case on merit but fails as the court lacks inherent jurisdiction to try the suit. The protection also applies where the plaintiff brings his suit in the right court, but is nevertheless prevented from getting a trial on merits because of subsequent developments on which a court may loose jurisdiction because of the amendment of the plaint or an amendment in law or in a case where the defect may be analogous to the defect of jurisdiction.

Thus, in view of the above, the law on the issue can be summarised to the effect that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned in view of the provisions of Order VII Rule 10 CPC and the plaintiff can present it before the court having competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fee paid in that court. However, after presentation before the court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted *de novo* even if it stood concluded before the court having no competence to try the same.
(See: **The ONGC v. M/s Modern Construction & Co.** (2014) 1 SCC 648

Order VII Rule 11 empowers the court to reject the plaint in case the 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, the 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. A plaint can be rejected if it is not filed in duplicate or where the provisions of Order 7 Rule 9 have not been complied with. (See also: Pearlite Liners Pvt. Ltd. V. Manorma Sirsi, AIR 2004 SC 1373).

While deciding an 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 V. State of Maharashtra, AIR 2003 SC 759).

Order VII, 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 V. Rakesh Behari Srivastava, AIR 1997 All 323).

(See also: Bhau Ram v. Janak Singh & Ors. (2012) 8 SCC 701; and Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee(2012) 8 SCC 706)

Order VII, Rule 11 (d) applies only where a statement made in the plaint without addition or subtraction shows that the case is barred by any law. Disputed questions cannot be decided at the time of considering an application under Order VII, Rule 11 CPC. (Vide: Popat and Kotecha Property V. State Bank of India Staff Association, (2005) 7 SCC 510; and C. Natrajan V. Ashim Bai, AIR 2008 SC 363).

Further, in Vishnu Dutt Sharma V. Daya Sapra (2009) 13 SCC 729, the Hon'ble Supreme Court has held that Order 7 Rule 11(d) is one of the provisions that provides for rejection of plaint, if it is barred by any law. This being one of the exceptions must be strictly construed.

In Sandeep Polymers (P) Limited V. Bajaj Auto Limited & Ors., (2007) 7 SCC 148, the Court held that while considering an application under Order VII Rule 11 Clause (d), the Court cannot be justified in rejecting a particular portion of the plaint. It can reject the entire plaint, for the reason that in such an eventuality, the provisions of Order 6 Rule 16 are applicable.

In Kamlesh Babu & Ors. V. Lajpat Rai Sharma & Ors., (2008) 12 SCC 577, the Apex Court held that it is the duty of the Court to frame the issue regarding limitation and if it comes to the conclusion that the plaint is time barred, it must reject the plaint. While dealing with the said case, very heavy reliance was placed upon the judgment in Lachhmi Sewak Sahu V. Ram Rup Sahu & Ors., AIR 1944 Privy Council 24 wherein it was held that the issue of limitation is prima facie admissible even in the Court of last resort, and even if it has not been taken up in the lower courts. (See also: Kamala & Ors. V. K.T. Eshwara Sa & Ors, (2008) 12 SCC 661).

Right of defendant to question the valuation in suit :

The issue as to whether a defendant in a suit has a right to question the valuation does arise every day in the Courts. Valuation of the suit is not only for the purpose of paying the Court-fees but it also plays an important role in determining the pecuniary jurisdiction of the Civil Court. Section 15 of the Code of Civil Procedure 1908 (hereinafter called CPC) provides for institution of the suit in the Court of lowest grade, competent to try it. The object for providing such a lowest forum is that the higher Courts are not overburdened. The District Judge and all Judges subordinate to him have jurisdiction to try all suits, yet, a suit has to be instituted in the court competent to try it. (Vide: Mt. Haidari Begum V. Jawad Ali, AIR 1935 All 55; and Ratan Sen @ Ratan Lal V. Suraj Bhan & Ors., AIR 1944 All 1). The allegations in the written statement are irrelevant for determining the existence of jurisdiction. (Vide : Satyanarain V. Birender, AIR 1979 Cal 197; Vasudev Gopalkrishna Tambwekar V. Board of Liquidators, Happy Home Co-operative Housing Society, Ltd. (In Liquidation), AIR 1967 SC 369; and Radha Charan Das V. Th. Mohini Behariji Maharaj & Ors., AIR 1975 All 368) .

Thus, it is evident that Section 15 of the CPC prescribes a rule or procedure and does not debar a Court of higher grade of jurisdiction from entertaining the suit (Bipan Kumar V. Sham Sunder, AIR 1977 HP 90).

Valuation suggested by the plaintiff prima facie determines the jurisdiction (Vide: Jangali Tewari V. Naubat Tewari & Ors., AIR 1934 All 680), though there are certain suits which are not capable of satisfactory valuation, eg., suit for restitution of conjugal rights and removal of a Trustee, and in such a case the valuation suggested by

the plaintiff is generally accepted. Undervaluation of a suit may alter the jurisdiction of the Court altogether and may also cause loss to the revenue of the State.

Order VII Rule 11 CPC mandates for rejection of the plaint in case the relief claimed is undervalued, and once the plaintiff, who is required by the Court to correct the same within the stipulated period, fails to do so.

The issue is required to be decided in view of the provisions of The Court Fees Act, 1870 (hereinafter called the 'Act 1870'), as amended, updated and applied in the State of U.P., read with Section 149 and Order VII Rule 11, C.P.C.

Section 12 of the Court Fee Act, 1870 deals with the question of valuation and provides that such an issue shall be decided by the Court in which the plaint is filed and that such decision shall be final between the parties to the suit. Thus, it is evident from the provisions of Section 12 of the Act 1870 that the decision taken by the Court on such an issue shall be final between the parties, but in case the superior Court while exercising its appellate or revisional jurisdiction comes to the conclusion that the issue has wrongly been decided to the detriment of the revenue, it can direct the party to make the deficiency good for the reason that the object of the Act is not to arm a litigant with a weapon of technicality but to secure revenue. (Vide: Lala Ram Babu V. Lala Ramesh Chandra, 1957 ALJ 53). The finality is, however, with respect to arithmetical calculation and not with respect to classification, i.e. category under which the suit falls. (Vide: Nemi Chand & Anr V. Edward Mills Co. Ltd. & Anr, AIR 1953 SC 28); Smt. Bibbi & Anr V. Shugan Chand & Ors, AIR 1968 All. 216 (F.B.); and Mohd. Ajmal V. Firm Indian Chemical Co. & Ors, AIR 1978 All. 21).

In Bhikamdas Balaram & Ors. V. Motilal Gambhirmal, AIR 1958 Bom. 307, the Bombay High Court held that an erroneous decision to the effect that a suit fell under a particular category for the purpose of court fee, was open to revision for the reason that the jurisdiction of the Court might be affected by the decision.

In Zainabey Razak V. Noor Mohammed Rothan, AIR 1961 Ker.146, a Full Bench of the Kerala High Court held that revision at the behest of the defendant against the order passed by the trial Court deciding that the suit fell under a particular category was valid. The same view was reiterated in Sankaran Nadar Lekshmanan Nadar V. Varathan Nadar Krishnan Nadar & Ors., AIR 1961 Ker.142.

A Full Bench of the Allahabad High Court, however, in Messrs. Gupta & Co. V. Messrs. Kripa Ram Brothers, AIR 1934 All. 620, held that a decision in the trial of a suit as to the amount of Court-fee is not an independent proceeding, and therefore is not open to revision or challenge by the defendants.

Similar view has been reiterated in Lachhmi Narayan V. Secretary of State, AIR 1934 Oudh 396.

In S. Rm. Ar. S. Sp. Sathappa Chettiar V. S. Ar. Rm. Ramanathan Chettiar, AIR 1958 SC 245, the Supreme Court held as under:-

> "Normally the dispute between the litigant and the Registry in respect of court fee, arises at the initial stage of the presentation of the plaint or the appeal and the defendant or the respondent is usually not interested in such a dispute unless the question of payment of court fees involves also the question of jurisdiction of the court to try the suit or to entertain the appeal."

In Sri Rathnavarmaraja V. Smt. Vimla, AIR 1961 SC 1299, the Supreme Court held that whether proper Court-fee has been paid or not, is an issue between the plaintiff and the State and that the defendant has no right to question it in any manner. The said judgment of the Apex Court was re-considered and approved in Shamsher Singh V. Rajinder Prashad & Ors., AIR 1973 SC 2384, observing as under:-

> **"The ratio of that decision was that no revision on a question of court fee lay where no question of jurisdiction was involved."**(See also: P.K. Palanisamy V. N. Arumugham, (2009) 9 SCC 173)

The Supreme Court further approved the judgment of the Kerala High Court in Vasu V. Chakki Mani, AIR 1962 Ker. 84, wherein it was pointed out that no revision would lie against the decision on the question of adequacy of Court fee at the instance of the defendant unless the question of Court fee involves also the question of jurisdiction of the Court.

In G. Krishnamurthy & Ors. V. Sarangapani & Anr., AIR 1996 Mad 440, the Madras High Court held that "primarily the issue regarding Court fee is essentially a matter in between the Court and the suitor and the finding rendered by the Court cannot be said to have caused any prejudice to the defendant....."

Similar view has been reiterated by the Full Bench of the Punjab High Court in M/s. Arjan Motors Malout Partnership Firm V. Girdhara Singh & Ors, AIR 1978 P&H 25; by the Andhra Pradesh High Court in Subhadramma V. Palaksha Reddy & Ors., AIR 1975 AP 165; and M/s. Kamal Engg. Works V. Ashwani Kumar & Ors., AIR 1991 NOC 53 (Raj.)

Deficiency of Court fees is an important issue and has to be decided giving combined effect to the provisions of Section 149 and Order VII Rule 11, C.P.C. and both the said provisions provide that if there is a deficiency of Court fee, the Court must give time to make the deficiency good, and if during that period the amount of Court fee is paid, the plaint takes its effect from the date of its original presentation. (Vide: Brijbhushan & Ors. V. Tota Ram, AIR 1929 All 75). In this respect, the decision has to be based on judicial discretion and cannot be made arbitrarily, as held by the Full Bench of Allahabad High Court in Wajid Ali V. Isar Banu urf Isar Fatma, AIR 1951 All. 59. Section 149, C.P.C. provides that where the whole or any part of the Court fees prescribed for any document by the law for the time being in force relating to Court fees has not been paid, the Court may in its discretion at any stage allow the person by whom such fees is payable to pay the whole or part, as the case may be, of such Court fees, and upon such payment, the document in respect of which fee is payable shall have the same force and effect as if such fees had been paid in the first instance.

Validity of an order is to be tested on the touch-stone of the doctrine of prejudice. (Vide: Jankinath Sarangi V. State of Orissa, (1969) 3 SCC 392; K.L. Tripathi V. State Bank of India & Ors, AIR 1984 SC 273; Sunil Kumar Banerjee V. State of West Bengal & Ors., AIR 1980 SC 1170; Maj. G.S. Sodhi V. Union of India, AIR 1991 SC 1617; Managing Director, ECIL, Hyderabad & Ors. V. B. Karunakar & Ors., AIR 1994 SC 1074; Krishan Lal V. State of J&K, (1994) 4 SCC 422; State Bank of Patiala & Ors. V. S.K. Sharma, AIR 1996 SC 1669; S.K. Singh V. Central Bank of India & Ors., (1996) 6 SCC 415; State of U.P. V. Harendra Arora & Anr., AIR 2001 SC 2319; Oriental Insurance Co. Ltd. V. S. Balakrishnan, AIR 2001 SC 2400; and Debotosh Pal Choudhury V. Punjab National Bank & Ors., (2002) 8 SCC 68).

Thus, in view of the above, the legal position can be summarised that the defendant has a right to raise all objections regarding the valuation and deficiency of Court fees. The matter is to be adjudicated upon and decided by the Court under Section 12 of the Act 1870, and the decision so taken by the trial Court shall be final. The defendant cannot raise a grievance against the said decision unless the valuation suggested by him affects the **jurisdiction** of the Court. However, the appellate or revisional Court can always test the issue suo motu and make the deficiency good as the purpose of the Act is not only fixing the pecuniary jurisdiction of the Court but also collecting revenue for the State. The defendant, unless the issue of change of jurisdiction is involved does not have a right to agitate the issue further and the order passed by the Civil Court under Section 12 of the Act 1870 becomes final.

Order VII 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 V. Union of India, AIR 2003 SC 189).

A similar view has been reiterated in Raj Narayan Sareen V. Lakshmi Devi, (2002) 10 SCC 501; Saleem Bhai V. State of Maharashtra (2003) 1 SCC 557; Ramesh Chandra Ardawatiya V. Anil Punjwani, AIR 2003 SC 2508; Sopan Sukhdeo Sable V. Assistant Charity Commissioner, AIR 2004 SC 1801; and Chandra Uttam Chodanker V. 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. V. Union Bank of India, AIR 2005 SC 1891).

In Mayar (H.K.) Ltd. & Ors. V. Owners & Parties, Vessel M.V. Fortune Express & Ors., AIR 2006 SC 1828. the Apex Court held that if a material fact has been concealed by the plaintiff, the plaint cannot be rejected under Order VII Rule 11 CPC, though plaintiff may be held disentitled for relief for abusing the process of the Court.

(See also: State of Kerala v. Sudhir Kumar Sharma, (2013) 4 SCC 706).

Order VII Rule 14 has been added by amendment as a substitute of Order 13, Rule 2, which stood deleted by an amendment regarding the production of documents, on which a party relies. Its scope has been explained by the Supreme Court in State Bank of India V. K.C. Tharakan & Ors., (2005) 8 SCC 428.

A document not filed along with the plaint or mentioned therein shall not be taken in evidence without the leave of the Court. Order 7, Rule 14 (4) provides that a document can be given to the defendant's witness for cross-examination. There is a typographical error in the provision. It has been printed as documents given to the "witness of the plaintiff". (See: Salem Advocate Bar Association (III), AIR 2005 SC 3353).

Order VIII 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, it is the discretion of the Court to extend the time further. (Vide: Ramesh Chand Ardawatiaya V. Anil Panjwani, AIR 2003 SC 2508; Debjani Mishra V. Uttam Kumar Mishra, (2004) 13 SCC 627; Iridion India Telecom Ltd. V. Motorola Inc, (2005) 2 SCC 145; Kailash V. Nanhku & Ors., AIR 2005 SC 2441; Salem Advocate Bar Association, Tamil Nadu V. Union of India, AIR 2005 SC 3353; Shaikh Salim Haji Abdul Khayumsab V. Kumar & Ors., AIR 2006 SC 396; and Aditya Hotels (P) Ltd. Bombay Swadeshi Stores Ltd. & Ors., AIR 2007 SC 1574 and Sandeep Thapar v. SME Technologies Private Limited (2014) 2 SCC 302).

In R.N. Jadi & Bros. & Ors. V. Subhashchandra, (2007) 6 SCC 420, the Apex Court held that it would be proper to encourage the belief of the litigants that the imperative of Order 8 Rule 1 must be adhered to, and that only in rare and exceptional cases a delay thereof, should be condoned.

In Andhra Bank V. A.B.N. Amro Bank NV & Ors., (2007) 6 SCC 167, the Apex Court held that a few days' delay in filing the written statement should be condoned considering the facts of a particular case.

In Zolba V. Keshao & Ors., AIR 2008 SC 2099, the Court had taken a similar view observing that the provisions are not mandatory.

Written statement—Mohammad Yusuf v. Faij Mohd. & Ors., 2009 (3) SCC 513.

Order VIII Rule 5 provides that, every allegation of fact in the plaint must be specifically and necessarily denied, not admitting any of the pleadings otherwise it will be assumed that the defendant has admitted the allegation(s). (Vide: Tek Bahadur Bhujil V. Debi Singh Bhujil & Ors, 1966 SC 292; Jahuri Sah V. Dwarika Prasad Jhunjhunwala & Ors, AIR 1967 SC 109; M.L.Subbaraya Setty V. M.L.Nagappa Setty, (2002) 4 SCC 743; Rakesh Wadhawan & Ors. V. M/s Jagdamba Industrial Corporation & Ors., AIR 2002 SC 2004; Sushil Kumar V. Rakesh Kumar, (2003) 8 SCC 673; and Seth Ramdayal Jat V. Laxmi Prasad (2009) 11 SCC 545.

In Manager, R.B.I., Bangalore V. S. Mani & Ors., AIR 2005 SC 2179, the Apex Court held that pleadings cannot be a substitute for evidence. Non-denial of or non-response to a plea that is not supported by evidence cannot be enough. Evidence is required to be adduced by the plaintiff to prove the same.

In the case of Food Corp. of India V. Pala Ram, (2008) 14 SCC 32, it was held that there was non rebuttal of court decision affecting jurisdiction. It was held that the decision does not become applicable merely because the opposite party has not rebutted it.

In Zolba V. Keshao & Ors., 2008 AIR SCW 2739, the Court had taken a similar view observing that the provisions are not mandatory.

Counter claim—Order VIII Rule 6-A (See Laxmidas Dayabhai kabrawala v. Nanabhai Chunilal Kabrawala & Ors., AIR 1964 SC 11 ; Mahendra Kumar & Anr.v. State of Madhya Pradesh & Ors., AIR 1987 SC 1395 ; Jag Mohan Chawla & Anr.v. Dera Radha Swami Satsang & Ors., AIR 1996 SC 2222; and Smt. Gowramma v. Nanjappa & Ors., AIR 2002 Kant 76).

Order VIII Rule 9 provides for subsequent pleadings. In Shakoor & Ors. V. 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 the 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 determining the 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 the Court is satisfied that subsequent pleadings should not be permitted, the plaintiff cannot be denied his right to file a rejoinder.

In Veerasekhara Varamarayar V. Amirthavalliammal & Ors., AIR 1975 Mad. 51, a Division Bench of the Madras High Court held that where the defendant brings in new facts in the written statement, the plaintiff must get a chance to file a rejoinder, challenging the truth and the binding nature of the allegations/averments made in the written statement. However, the 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 V. 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 V. 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 can explain certain additional facts which have been made 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 V. 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. V. Steel Authority of India Ltd., Rourkela, AIR 1993 Ori 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 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. V. 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 V. 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. V. 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 does not need 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 VIII Rule 10 prescribes the procedure adopted by the court **when party fails to present written statement called for.**

In case of **Balraj Taneja & Anr.v. Sunil Madan & Anr.**, AIR 1999 SC 3381, held that the court should not act blindly on the averments made in the plaint merely because the written statement has not been filed by the Defendant traversing the facts set out by the Plaintiff therein. Where a written statement has not been filed by the Defendant, the court should be little cautious in proceeding under Order VIII Rule 10, Code of Civil Procedure. Before passing the judgment against the Defendant it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the Plaintiff without requiring him to prove any fact mentioned in the plaint. (See also: Ramesh Chand Ardawatlya v. Anil Panjwani, AIR 2003 SC 2508; Bogidhola Tea & Trading Co. Ltd. & Anr. v. Hira Lal Somani, AIR 2008 SC 911; and Maya Devi v. Lalta Prasad (Civil Appeal No. 2458 of 2014 decided on 19.2.2014)

Order IX Rules 8 & 9

(See: **Bhau Ram v. Janak Singh & Ors.** (2012) 8 SCC 701)

Order IX Rule 9 does notbar a Suit on a 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. In Firdous Omer V. Bankim Chandra Daw, AIR 2006 SC 2759, the Apex Court held that extension of limitation while considering an application for restoration of a suit must be examined considering as to whether sufficient cause was there preventing a party to approach the Court within limitation.

Order IX R.13 CPC

The aforesaid provisions read as under:

> **"Setting aside decree ex-parte against defendant-**
>
> In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he **satisfies** the Court that the **summons was not duly served**, or **that he was prevented by any sufficient cause from appearing** when the suit was called on for hearing, **the Court shall make an order setting aside the decree** as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;
>
> xx xx xx
>
> Provided further that **no Court shall set aside** a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, **if it is satisfied that the defendant had notice of the date of hearing** and had sufficient time to appear and answer the plaintiff's claim.
>
> xx xx xx"

(Emphasis added)

It is evident from the above that an ex-parte decree against a defendant has to be set aside only if the party satisfies 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. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein.

"Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part, in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide: **Ramlal & Ors. V. Rewa Coalfields Ltd.,** AIR 1962 SC 361; **Sarpanch, Lonand Grampanchayat V. Ramgiri Gosavi & Anr.,** AIR 1968 SC 222; **Surinder Singh Sibia V. Vijay Kumar Sood,** AIR 1992 SC 1540; **Oriental Aroma Chemical Industries Limited V. Gujarat Industrial Development Corporation & Another,** (2010) 5 SCC 459; and **Parimal V. Veena@Bharti,**(2011) 3 SCC 545).

In **Arjun Singh V. Mohindra Kumar & Ors.**, AIR 1964 SC 993, the apex Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". (See also: **Brij Indar Singh V. Lala Kanshi Ram & Ors.,** AIR 1917 P.C. 156; **Manindra Land and Building Corporation Ltd. V. Bhutnath Banerjee & Ors**., AIR 1964 SC 1336; and **Mata Din V. A. Narayanan**, AIR 1970 SC 1953).

While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing **substantial justiceto all the parties concerned** and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide: **State of Bihar & Ors. V. Kameshwar Prasad Singh & Anr.,** AIR 2000 SC 2306; **Madanlal V. Shyamlal**, AIR 2002 SC 100; **Davinder Pal Sehgal & Anr. V. M/s. Partap Steel Rolling Mills (P) Ltd. & Ors.,** AIR 2002 SC 451; **Ram Nath Sao** @ Ram Nath Sao**& Ors. V. Gobardhan Sao & Ors.,** AIR 2002 SC 1201; **Kaushalya Devi V. Prem Chand & Anr**. (2005) 10 SCC 127; **Srei International Finance Ltd., V. Fair growth Financial Services Ltd. & Anr.,** (2005) 13 SCC 95; and **Reena Sadh V. Anjana Enterprises**, AIR 2008 SC 2054).

In order to determine the application under Order IX, Rule 13 CPC, the test which has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the

varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application. (Vide: Parimal V. Veena @ Bharti, AIR 2011 SC 1150).

Ex parte decree obtained fraudulently is not sustainable and is liable to be set aside. (Vide: Kaushalya Devi V. Prem Chand & Anr., (2005) 10 SCC 127).

(1) An application under Order 9 Rule 13 C.P.C. itself has all the ingredients of an application for condonation of delay, in making application. Therefore, a separate application under Section 5 of Limitation Act is not necessary. (Vide: Bhagmal & Ors. V. Kunwar Lal & Ors. (2010) 12 SCC 159)

Competence of the Court to impose the condition of pre-deposit of decretal amount while entertaining an application for setting aside ex-parte decree :

Under Order IX Rule 13, C.P.C., the Court has jurisdiction to impose condition, including direction for payment of cost or for deposit of decretal amount or part of it, or to furnish security. The expression 'upon such terms as to costs, payment into Court or otherwise as it thinks fit' in Rule 13 indicates that the Court is empowered to impose terms. Now what are these terms has been specified in the expression 'as to the cost, payment into Court or otherwise. The expression 'as it thinks fit' leaves discretion of the Court quite open. It has not been provided that the Court is not empowered to use its discretion to the extent of direction for deposit of decretal amount or furnishing of security. (Vide: Raj Kumar Soni V. M/s Mohan Meakin Breweries Ltd., AIR 1979 All. 370; B. Madan Mohan V. B. Kanhaiya Lal, AIR 1933 All. 601; Nanak Chand V. Preetam Lal, AIR 1972 All. 166; Gaya Deen V. Lalta Prasad, AIR 1936 All. 142; M/s Jayshree Distribution Piplani Katra & Ors. V. Jayshree Tyres & Rubber Products, AIR 1989 All. 158; Chhagan Raj V. Sugan Mal, AIR 1958 Raj. 237; M/s Northern Carries Pvt. Ltd. V. M/s United India Insurance Co. Ltd., AIR 1986 P&H 175; Life Insurance Corporation of India V. Anjan Kumar Arora & Ors., AIR 1987 Cal. 197; and Jagdamba General Store & Anr. V. IIIrd Additional District Judge, Dehradun & Ors., 1998 (3) AWC 2086).

In V.K. Industries & Ors. V. M.P. Electricity Board, AIR 2002 SC 1151, the Supreme Court held that the money decree is not stayed ordinarily unconditionally and the Court may impose conditions to deposit cost or the decretal amount or part thereof or the party may be asked to furnish security while restoring a case, but such conditions should be reasonable and not harshly excessive.

In view of the above, while entertaining an application for setting aside the ex parte decree, the Court is competent to impose the condition of pre-deposit of decretal amount in full or part or ask to furnish security or impose such other reasonable conditions.

Whether an Ex-parte decree can be filed by a Stranger -

In **Smt. Santosh Chopra V. Teja Singh & Anr.**, AIR 1977 Del 110, the Delhi High Court dealt with the issue with respect to whether a non-party/stranger has any locus standi to move an application under Order IX Rule 13 Code of Civil Procedure, to get an ex-parte decree set aside, he would be adversely affected by such decree. The Delhi High Court came to the conclusion that the **statutory provisions of Order IX Rule 13 Code of Civil Procedure itself, refer to the Defendant in an action, who alone can move an application under Order IX Rule 13 Code of Civil Procedure.** Therefore, a person who is not a party, despite the fact that he might be interested in the suit, is not entitled to move an application under the rule. In fact he had no locus standi to have the order set aside. Such an order could not be passed even under Section 151 Code of Civil Procedure. (**See**

also: Ram Prakash Agarwal & Anr. V. Gopi Krishan (Dead) through L.Rs.) & Ors.,).,JT 2013 (8) SC 329.)

In **Smt. Suraj Kumari V. District Judge, Mirzapur & Ors.** , AIR 1991 All 75, the Allahabad High Court dealt with a similar issue, and rejected the contention that at the instance of a stranger, a decree could be reopened in an application under Order IX Rule 13 read with Section 151 Code of Civil Procedure, even if such decree is based on a compromise, or has been obtained by practising fraud upon the court, to the prejudice of the said stranger.

In view of above cases, its clear that an application under Order IX Rule 13 Code of Civil Procedure cannot be filed by a person who was not initially a party to the proceedings and Inherent powers under Section 151 Code of Civil Procedure can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under the Code of Civil Procedure.

Order IX Rule 1, Order 14 Rule 1(5) and Order 15 Rule 1-First hearing of the suit :

The hearing presupposes the existence of an occasion which enables the parties to be heard by the Court in respect of the cause. Hearing, therefore, should be first in point of time after the issues have been framed. The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the Court proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the "first hearing of the suit" prior to determining the points in controversy between the parties i.e. framing of issues does not arise. The words the "first day of hearing" does not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken. [Vide: **Ved Prakash Wadhwa V. Vishwa Mohan,** AIR 1982 SC 816; **Sham Lal** (dead) **by Lrs. V.Atma Nand Jain Sabha (Regd.) Dal Bazar,** AIR 1987 SC 197; **Siraj Ahmad Siddiqui V. Shri Prem Nath Kapoor,** AIR 1993 SC 2525; **M/s Mangat Singh Trilochan Singh thr. Mangat Singh** (dead) **by Lrs. & Ors. V. Satpal**, AIR 2003 SC 4300; and **Kanwar Singh Saini V. High Court of Delhi,** JT 2011 (11) SC 544].

Order X 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 XI 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, his 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 XII Rule 1 speaks of the admission of a case of the plaintiff by another party. If the case is admitted by the defendant, suit may be decreed though the plaintiff has to stand on his own legs. (Vide: Dudh Nath V. Suresh Chandra, AIR 1986 SC 1509).

In Pushpa Devi Bhagat V. Rajinder Singh, AIR 2006 SC 2628, the Apex Court held that in case the reply is not filed by the defendant in spite of giving opportunities, in such a case the necessary conclusion may be that the defendant has admitted the plaintiff's claim and the suit may be decreed on the basis of evidence and the employed admission made by the defendants.

Order XII Rule 6

The Supreme Court in **Dudh Nath Pandey (dead) by Lrs. V. Suresh Chandra Bhattasali (dead) by Lrs.** AIR 1986 SC 1509 held that in a case of partition, if one party admits the share of any other party in respect of whole of the properties, it can be relied upon and matter can be disposed of by the Trial Court by resorting to the provisions of Order XII Rule 6 CPC. In case admission is not in respect of the whole properties or whole claim, such a provision cannot be resorted to. (See also: **Razia Begum V. Sahebzadi Anwar Begum** AIR 1959 SC 886; and **Uttam Singh Dugal & Co. Ltd. v. Union Bank of India & Ors**. AIR 2000 SC 2740).

Order XIII 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 XIV Rule 1 deals with the settlement of issues and determination of suits on issues of law or on issues agreed upon.

In Transmission Corporation of Andhra Pradesh Ltd. V. Lanco Kondapalli Power Pvt. Ltd., (2006) 1 SCC 540, the Court held that once a triable issue has been raised, the issues require(d) to be framed and decided.

It provides how the issues are to be framed. There may be certain cases where issues though, have not been framed, the parties knew what was the controversy about, 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 V. 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 V. Sampati Subba Rao, AIR 1963 SC 884, the Supreme Court considered a 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."

In Bakshi Lochan Singh & Ors. V. 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 V. State of Orissa, (1969) 3 SCC 392; K.L. Tripathi V. State Bank of India, AIR 1984 SC 273; Maj. G.S. Sodhi V. Union of India, AIR 1991 SC 1617; Managing Director, ECIL, Hyderabad & Ors. V. B. Kanunakar & Ors., (1993) 4 SCC 727; Krishan Lal V. State of J&K, (1994) 4 SCC 422; State Bank of Patiala & Ors. V. S.K. Sharma, (1996) 3 SCC 364; S.K. Singh V. Central Bank of India & Ors., (1996) 6 SCC 415; and State of U.P. V. Harendra Arora & Anr., AIR 2001 SC 2319.

In Smt. Kaniz Fatima V. 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 V. 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. V. Mt. Mohini Bibi & Ors., AIR 1943 Oudh 17; Ganno V. Srideo Sidheshwar, 1902 ILR (2) Bom. 360; and Haridas Mundhra V. 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. V. 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 V. Abdul Ahad, (2003) 7 SCC 52.

<u>Order XIV Rule 1 CPC reads</u>:

> "Issues arise when a material proposition of fact or law is affirmed by the party and denied by the other."

Therefore, it is neither desirable nor required for the court to frame an issue not arising on the pleadings. The Court should not decide a suit on a matter/point on which no issue has been framed. (Vide: **Raja Bommadevara Venkata Narasimha Naidu & Anr. V. Raja Bommadevara Bhashya Karlu Naidu & Ors.**, (1902) 29 Ind. App. 76 (PC); **Sita Ram V. Radha Bai & Ors.,** AIR 1968 SC 535; **Gappulal V. Thakurji Shriji Dwarkadheeshji & Anr.**, AIR 1969 SC 1291; and **Biswanath Agarwalla V. Sabitri Bera, (2009) 15 SCC 693**).

The object of framing issues is to ascertain/shorten the area of dispute and pinpoint the points required to be determined by the court. The issues are framed so that no party at the trial is taken by surprise. It is the issues fixed and not the pleadings that guide the parties in the matter of adducing evidence. [Vide: **Sayad Muhammad. V. Fatteh Muhammad** (1894-95) 22 Ind. App. 4 (PC).]

In **Kashi Nath** (Dead) through L.Rs**. V. Jaganath**, (2003) 8 SCC 740, the Supreme Court held that where the evidence is not in line with the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon. While deciding the said case, the Court placed a very heavy reliance on the judgment of the Privy Council in **Siddik Mohd. Shah V. Saran**, AIR 1930 PC 57.

There may be an exceptional case wherein the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated. (Vide: **Nagubai Ammal & Ors. V. B. Shama Rao & Ors.**, AIR 1956 SC 593; **Nedunuri Kameswaramma V. Sampati Subba Rao**, AIR 1963 SC 884; **Kunju Kesavan V. M.M. Philip & Ors.**, AIR 1964 SC 164; **Kali Prasad Agarwalla (dead) by L.Rs. & Ors. V. M/s. Bharat Coking Coal Ltd. & Ors.**, AIR 1989 SC 1530; **Sayed Akhtar V. Abdul Ahad**, (2003) (7) SCC 52; and **Bhuwan Singh V. Oriental Insurance Co. Ltd.,** AIR 2009 SC 2177).

Therefore, in view of the above, it is evident that the party to the election petition must plead the material fact and substantiate its averment by adducing sufficient evidence. The court cannot travel beyond the pleadings and the issue cannot be framed unless there are pleadings to raise the controversy on a particular fact or law. It is, therefore, not permissible for the court to allow the party to lead evidence which is not in the line of the pleadings. Even if the evidence is led, that is just to be ignored as the same cannot be taken into consideration. (See also: **Kalyan Singh Chouhan V. C.P. Joshi**, AIR 2011 SC 1127).

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

In Smt. Tara Devi V. Sri Thakur Radha Krishna Maharaj, AIR 1987 SC 2085, the 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 Fees 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 Supreme Court placed reliance upon its earlier judgments in Sathappa Chettiar V. Ramanathan Chettiar, AIR 1958 SC 245; and Meenakshisundaram Chettiar V. Venkatachalam Chettiar, AIR 1979 SC 989.

In M/s Commercial Aviation & Travel Company & Ors. V. Mrs. Vimla Pannalal, AIR 1988 SC 1636, reiterating the same view, the 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 Fees 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 V. Abdul Majid, AIR 1988 SC 1150, the 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 V. Radhashyam Marwari & Ors., AIR 1940 Cal. 482; and Patna High Court in Kishori Lal Marwari V. Kumar Chandra Narain Deo, AIR 1939 Pat. 572.

In Smt. Cheina & Ors. V. 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. V. Smt. Sant Kaur, AIR 1976 Del. 147; and Resham Lal & Ors. V. Anand Sarup & Anr., AIR 1974 P&H 97.

In Gauri Shanker V. 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 V. 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 V. 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, valuation 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 V. Brig. F.J. Dillon, AIR 1964 SC 497, the 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 V. 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.

Issue of deficit court-fee is to be decided as a preliminary issue. (Vide: N.R. Govindarajan V. V.K. Rajagopalan & Ors., (2005) 12 SCC 362).

In Ramesh B. Desai V. Bipin Vadi Lal Mehta, (2006) 5 SCC 638; and Balasaria Construction (P) Ltd. V. Hanuman Seva Trust, (2006) 5 SCC 658, the Supreme Court held that the mixed question of fact and law cannot be adjudicated upon under Order 14 Rule 2. In case a plea of limitation is taken, it cannot be decided under the said provision de hors the facts involved therein as in each and every case, the starting point of limitation has to be ascertained unless it is clearly made out that the petition was barred merely by bare perusal of the pleadings.

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

Order XVII Rule 1 empowers the court to adjourn the case from time to time. However, by the 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 V. 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. V. 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. V. Laxmibai Ramchandra Iyer & Ors., 1993 Supp. (2) SCC 174; and Chief General Manager, Telecom & Anr. V. G. Mohan Prasad & Ors.,(1999) 6 SCC 67.

In Om Prakash Sharma & Ors. V. Ram Dutt & 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 V. Kumari Chandra Govindji, (2000) 8 SCC 532, the 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 V. Roy Alvares (2004) 9 SCC 578.

In Nirankar Nath Wahi V. Fifth Additional District Judge, Moradabad, AIR 1984 SC 1268, the Apex Court held that a party should not be permitted to abuse the process of the Court but at the same time, a party should be given a reasonable time, considering the dimensions of the matter bearing in mind that justice must also appears to have been done and **a short adjournment** with a degree of understanding should be granted to make **an alternative arrangement**. However, the case is to be examined in a facts and circumstances involved therein and under no circumstances the process of the Court should be permitted to be abused by any litigant.

In R. Vishwanathan & Ors. V. Abdul Wazid, AIR 1963 SC 1, the Apex Court while dealing with a similar issue held that seeking adjournment either to avoid a particular Bench or to enable a particular lawyer to appear cannot be held to be justified, as such an attempt at the behest of the litigant may be either for Bench hunting or for adopting dilatory tactics and in case the conduct of the litigant shows such an attitude, the refusal of adjournment is justified.

The Apex Court in Bashir Ahmed V. Mehmood Hussain Shah, AIR 1995 SC 1857 while considering the provisions of Order XVII Rule 1(2) proviso (d) C.P.C., which provides that illness of a counsel cannot be a ground for adjournment unless the Court is satisfied that the party applying for adjournment could not have engaged another counsel in time, held as under:-

> "Therefore, the Court is enjoined to satisfy itself in that behalf. If the party engages another counsel as indicated therein, then the need for further adjournment would be obviated. The words "in time" would indicate that at least reasonable time may be given when a counsel **suddenly** becomes unwell. There would be reasonable time for the parties to make alternative arrangement, when sufficient time intervenes between the last date of adjournment and the next date of trial. In such a case, **adjournment on the ground of counsel's ill health could be refused** and the party would bear the responsibility for his failure to make alternative arrangements. (emphasis added)

The Supreme Court in Salem Advocate Bar Association (II) V. Union of India, AIR 2005 SC 3353, while dealing with the issue of adjournments under Order XVII Rule 1 C.P.C., held that the case can be adjourned by the Court, provided the party satisfies the Court that there exists special and extraordinary circumstances. The Court while

considering such a prayer has to keep in mind the legislative intent to restrict the grant of adjournments, as it cannot be claimed in a routine manner. The circumstances seeking adjournment must be shown to be beyond the control of such a party.

Similarly, in Shibanand Mukherjee V. Gopal Chandra De, (2005) 11 SCC 557, the Supreme Court dealt with the similar issue of adjournment, wherein the case was dismissed by the High Court refusing the adjournment and the application for restoration was also rejected. The Apex Court restored the matter with the condition that a sum of Rs. 50,000/- would be paid to the other side as compensation. In the said case also, the lawyer did not appear because of ailment and had sent the illness slip.

In Syed Naseem Ahmed V. Mohd. Abdul Hakeem, (2005) 12 SCC 302, the Apex Court held that inability of lawyer to attend the Court cannot be a ground for adjournment and dismissed the appeal without adjourning the case further.

In Sheela Devi & Ors. V. Narbada Devi, (2005) 13 SCC 432, the Supreme Court held that breach of faith on the part of the counsel falsely claiming illness as ground of inability to attend the Court is a professional misconduct and sending such false illness has been deprecated and further action was directed to be taken against the lawyer.

In the case of Shiv Cotex V. Trigun Auto Plast P.Ltd. & Ors., (2011) 10 SCR 787, it was held that the cap on adjournments to a party during the hearing of the suit provided in the proviso to Order 17 Rule 1 CPC is not mandatory and in suitable case, on justifiable cause, the Court may grant more than three adjournments to ap-arty for its evidence keeping in view the cap provided in proviso to Order 17 Rule 1.

Thus, from the above, the legal proposition emerges that adjournment cannot be sought by a litigant in a routine manner. It must be a bonafide attempt, on behalf of the party. Illness of the counsel cannot be a ground of seeking adjournment. In certain cases, Court can grant short time so that an alternative arrangement be made. It cannot be a means of Bench hunting or dilatory tactics. Where there are more than one counsel, illness of one counsel is no ground to adjourn the case.

Order 18- Examination of Witnesses- Vadiraj Naggappa Vernekar V. Sharad Chand Prabhakar Gogate, AIR 2009 SC 1604.

Order XVIII—Examination of witnesses—Vadiraj Naggappa Vernekar v. Sharad Chand Prabhakar Gogate, AIR 2009 SC 1604.

Order XVIII Rules 3A, 3B, 3C and 3D have been introduced by Amendment Act, 2002 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 XVIII, 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 Supreme Court in Ameer Trading Corporation Limited V. 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. However in a appropriate case examination-in-chief can also be recorded in the Court. (Vide: Salem Advocate Bar Association III V. Union of India, AIR 2005 SC 3353).

Order XVIII Rule 16 deals with the examination of witness immediately where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court, his evidence should be taken immediately.

In the case of **Laxmibai (Dead) thr. Lrs. & Anr. V. Bhagwantbuva (Dead) thr. Lrs. & Ors.,** JT 2013(2) SC 362 the Court rejected the application on lack of showing sufficient cause. The Appellant was just above 70 years of age and hale and hearty. She was not suffering from any serious ailment e.g. cancer or has been on death bed. Thus, there was no occasion for her to file an application under Order XVIII Rule 16 Code of Civil Procedure which provides for taking evidence De Bene Esse for recording statement prior to the commencement of the trial. Mere apprehension of death of a witness cannot be a sufficient cause for immediate examination of a witness. Apprehension of a death applies to each and every witness, he or she, young or old, as nobody knows what will happen at the next moment. More so, it is the discretion of the court to come to a conclusion as to whether there is a sufficient cause or not to examine the witness immediately.

Order XVIII Rule 17-A whichdealt with the production of evidence, not previously known, for which, could not be produced despite due diligence, stood deleted by Amendment Act, 1999.

Order XVIII Rule 19 had been brought by amendment in 1999, conferring the power upon the Court to record evidence on commission.

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

It is a 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 V. J.N. Dhar, AIR 1977 Del 73; Radha Kishan V. Navratan Mal Jain & Anr., AIR 1990 Raj. 127; S. Sukumar V. Spl. Commissioner of Commercial Taxes, Madras, AIR 1991 Mad. 238; and M/s Glorious Plastics Ltd. V. Laghate Enterprises & Ors., AIR 1993 Bom 224.

In Sudha Devi V. M.P. Narayanan & Ors., AIR 1988 SC 1381, the 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 V. 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. V. 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 V. Principal, Rajendra Medical College, AIR 1973 SC 1260, and State of Haryana V. 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. V. Ashok Kumar & Ors., 2000 (1) WLC 499, the Allahabad High Court again reiterated the law laid down in Smt. Sudha Devi & 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 V. Abdul Karim, AIR 1991 Raj. 119, the Rajasthan High 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 V. 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. V. 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 V. 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 & Anr.. Similar view has been reiterated in Shib Sahai V. 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 V. 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 V. 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 V. 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 Supreme Court, in M/s Bareilly Electricity Supply Co. Ltd. V. 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. V. N.I.N.I.H. Ltd. & Ors., AIR 1981 SC 1298, the 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 V. Kesho Ram, AIR 1992 SC 700, the 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."

In Standard Chartered Bank V. Andhra Bank Financial Services Ltd. & Ors., (2006) 6 SCC 94, the Supreme Court held that affidavit has no meaning unless the deponent submits himself to cross-examination.

Order XX, Rule 3 - The Rule requires that the judgment must be pronounced and signed by the Judge and date should also be put therein. The Court in Surendra Singh & Ors. V. The State of Uttar Pradesh, AIR 1954 SC 194 considered a case where a matter was heard by the division bench of Allahabad High Court at Lucknow and judgment was reserved. One of the Hon'ble Judge wrote the judgment, signed it and sent it to another Judge for pronouncement. However, before the judgment could be pronounced, the author of the judgment died. The judgment was pronounced by the said Hon'ble Judge subsequent to the death of author. Thus, the question arose as to whether it was a valid judgment. The court held that a judgment became effective and could be acted upon immediately after its delivery. So far as its authenticity, signatures and sealing etc. are concerned, as per the rules the same are designed to secure certainty about its content and matter which are always curable. In a case where the judgment is pronounced in the Court, however, before signing the same if the Court feels that a particular point has not been considered it may list it for re-hearing after giving the notice to the parties/ their counsel. It is open to the Court to make certain changes in the judgment made in open court before it is signed. But the judgment delivered and not signed amounts to giving liberty to the parties to act upon it as it is the judgment of the Court and signing is a formality to follow. In a case before the judgment is signed if the Court wants to list the matter for re-hearing as some feature is brought to the notice of the Court which requires consideration, the Court must give notice to the counsel of the parties and must pass an order that the judgment

delivered would not be effective and the case shall be further heard. It is so necessary to retain the confidence of the litigants in the judicial process. InVinod Kumar Singh v. Banaras Hindu University & Ors., AIR 1988 SC 371, a similar question arose wherein the Allahabad High Court dictated the judgment in open Court but before signing the same it was directed to be released and placed before another Bench. The another Bench heard the matter and delivered the judgment. In appeal, the Supreme Court held that as the earlier judgment has been dictated in the Court and has not been recalled, the second judgment was of no consequence even though the earlier judgment has not been signed.

Order XX Rule 5 requires finding on each issue making a reference to the pleadings and the evidence. The non-issue cannot be considered at all. (See also: Order 41 Rule 31).

In Umrao Singh V. Punjabi University & Ors., (2005) 13 SCC 365, the Apex Court held that the Court has to address itself on each issue involved therein.

The same view has been reiterated in Mota Mandir rust & Ors. V. State of Maharashtra & Ors. (2006) 9 SCC 379; and Rajendra Saini & Anr. V. State of NCT of Delhi, (2006) 9 SCC 380).

Order XX Rule 6

(See: Paras Nath Rai v. State of Bihar AIR 2013 SC 1010)

Order XX Rule 9

(See: Paras Nath Rai v. State of Bihar AIR 2013 SC 1010)

Order XX Rule 12

(See: Kailash Paliwal v. Subhash Chandra Agrawal, AIR 2013 SC 2923).

Order XX Rule 18

(See: Paras Nath Rai v. State of Bihar AIR 2013 SC 1010)

Order XXI provides that pension and Provident Fund cannot be attached in execution of a decree of the Civil Court- **UOI V. Radha Kissan Agarwal**, AIR 1969 SC 762 = (1969) 1 SCC 225; **UOI V. Jyoti Chitfund & Finance**, AIR 1976 SC 1163 = (1976) 3 SCC 607; **UOI V. Wg. Commander R.R. Hingorani**, AIR 1987 SC 808 = (1972) 1 SCC 9. If the amount of pension or provident fund has been encashed and deposited in post office or bank it can be attached **– P.O. Madhavan Nambiar V. Syndicate Bank**, AIR 1991 Ker 367; and **Ram Kanvar V. M/s Ricchpal Banarasi Das**, AIR 2003 P & H 38).

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

In case of State of Punjab V. Krishan Dayal Sharma, (2011) 11 SCC 212, it was held that in the absence of pleadings and directions in the judgment or decree which was

under execution it's not open for the executing court to award interest. Executing Court is bound by the terms of decree. It cannot add or alter the decree on its notion of fairness or justice.

Order XXI Rule 10
(See: State of Haryana v. Kartar Singh, (2013) 11 SCC 375).

Order XII Rule 30

(See: State of Haryana v. Kartar Singh, (2013) 11 SCC 375).

Order XXI, Rule 32

In case there is a grievance of non-compliance of the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order XXI Rule 32 CPC which provides for elaborate proceedings in which the parties can adduce their evidence and can examine and cross-examine the witnesses as opposed to the proceedings in contempt which are summary in nature.

The provision of Order XXI Rule 32 CPC applies to prohibitory as well as mandatory injunctions. In other words, it applies to cases where the party is directed to do some act and also to the cases where he is abstained from doing an act. Still to put it differently, a person disobeys an order of injunction not only when he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. Execution of an injunction decree is to be made in pursuance of the Order XXI Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible. (See: **Hungerford Investment Trust Ltd.** (In voluntary Liquidation) **v. Haridas Mundhra & Ors.**, AIR 1972 SC 1826)
(See also: **Kanwar Singh Saini v. High Court of Delhi** JT 2011 (11) SC 544).

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

Order XXII Rule 3 provides that in case the application for substitution of the legal representatives of the deceased plaintiff/petitioner is not filed within the limitation prescribed by law, the suit/proceedings shall abate as against the said party.

Order XXII 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.

Generally, a case abates against the person who is dead and substitution of his legal representative is not made. Setting aside abatement requires a specific order under Order 22 Rule 11. (Vide: Madan Nayak V. Mst. Handubal Devi, AIR 1983 SC 676). But in a case where the decree appealed against is joint and inseverable, the entire appeal stands abated. (Vide N. Khosla V. Rajlakshmi, AIR 2006 sc 1249). While deciding the said case, the Apex Court considered and followed its earlier judgment in Sardar Amarjeet Singh Kalra V. Pramod Gupta, (2003) 3 SCC 272 and distinguished its earlier judgment in Badni

V. Sri Chand, AIR 1999 SC 1077; Pandit Srichand V. Jagdish Prasad Kishan Chand, AIR 1966 SC 1427; and Ram Swarup V. Munshi, AIR 1963 SC 553).

Sub-rule (4) thereof provides for exemption for substitution of the legal representatives where the defendants/respondents have not filed the written statement or failed to appear and contest the suit and in such eventuality, the judgment can be pronounced against the said defendant notwithstanding the death of such a defendant and the judgment shall be enforceable, and have effect as if it had been pronounced before the death took place. (Vide: Zahirul Islam V. Mohd. Usman & Ors. (2003) 1 SCC 476; and T. Gnanavel V. T.S. Kanagaraj & Anr. AIR 2009 SC 2367; and Budh Ram & Ors. V. Bansi & Ors., 2010(11) SCC 476)

Sub–rule (5) of Rule 4 of Order 22 provides for condoning the delay in filing the substitution application of legal representatives of the deceased defendants in case the petitioner proves before the Court that he was ignorant about his death. Thus, the purpose is seeking extension of time limit for substitution of legal representatives in such a circumstance.

In Union of India V. Ram Charan, AIR 1964 SC 215, the Apex Court observed as under:-

> "The provisions of the Code are with a view to advance the cause of justice. Of course, the Court in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within the time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merit of the dispute between the parties and because if the abatement is set aside the merits of the dispute can be determined while if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement."

In **State of Punjab** V. **Nathu Ram** AIR 1963 SC 89, while interpreting the provisions of Order XXII Rule 4(3) CPC read with Rule 11 thereof, the Apex Court observed that an appeal abates as against the deceased respondents where within the time limited by law no application is made to bring his heirs or legal representatives on record. However, whether the appeal stands abated against the other respondents also, would depend upon the facts of a case.

In **Sri Chand** V. **M/s Jagdish Pershad Kishan Chand** AIR 1966 SC 1427, the Apex Court held that in case one of the respondents dies and the application for substitution of his heirs or legal representatives is not filed within the limitation prescribed by law, the appeal may abate as a whole in certain circumstances and one of them could be that when the success of the appeal may lead to the courts coming to a decision which may be

in conflict with the decision between the appellant and the deceased respondent and, therefore, it will lead to the court passing a decree which may be contradictory and inconsistent to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent in the same case.

In **Ramagya Prasad Gupta & Ors**. V. **Brahmadeo PrasadGupta & Anr.** AIR 1972 SC 1181, the Supreme Court examined the same issue in a case of dissolution of a partnership firm and accounts and placed reliance upon two judgments referred to immediately hereinabove and held as under:

> "16. ……..The courts will not proceed with an appeal when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a **decree which will be contradictory to the decree which had become final** with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests ……………..are not cumulative tests. **Even if one of them is satisfied, the court may dismiss the appeal".** (Emphasis added**)**

In **Sardar Amarjit Singh Kalra & Ors.** V. **Pramod Gupta & Ors.** AIR 2003 SC 2588, a Constitution Bench of the Apex Court, while dealing with the similar issue, has after considering its large number of judgments reached the following conclusion :-

> "(a) In case of "Joint and indivisible decree", "Joint and inseverable or inseparable decree", the abatement of proceedings in relation to one or more of the appellant(s) or respondent(s) on account of omission or lapse and failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal, and require to be dismissed in toto **as otherwise inconsistent or contradictory decrees would result and proper reliefs could not be granted, conflicting with the one which had already become final with respect to the same subject matter vis-a-vis the others;** (b) the question as to whether the Court can deal with an appeal after it abates against one or the other would depend upon the facts of each case and no exhaustive statement or analysis could be made about all such circumstances wherein it would or would not be possible to proceed with the appeal, despite abatement, partially; (c) existence of a joint right as distinguished from tenancy in common alone is not the criteria but the joint character of the decree, dehors the relationship of the parties inter se and the frame of the appeal, will take colour from the nature of the decree challenged; (d) where the dispute between two groups of parties centered around claims or based on grounds common relating to the respective groups litigating as distinct groups or bodies -- the issue involved for

> consideration in such class of cases would be one and indivisible; and (e) when the issues involved in more than one appeals dealt with as group or batch of appeals, which are common and identical in all such cases, abatement of one or the other of the connected appeals due to the death of one or more of the parties and failure to bring on record the legal representatives of the deceased parties, would result in the abatement of all appeals."
>
> (Emphasis added)

The Court further observed that any relief granted and the decree ultimately passed, would become totally unenforceable and mutually self-destructive and unworkable vis-à-vis the other part, which had become final. The appeal has to be declared abated in toto. It is the duty of the court to preserve and protect the rights of the parties.

In **Shahazada Bi & Ors**. V. **Halimabi** AIR 2004 SC 3942, the Supreme Court considered the same issue and held as under :-

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

Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the defendants/respondents would abate the appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the

judgment/decree passed in the proceedings vis-à-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.

(Vide: **Budh Ram & Ors. V. Bansi & Ors**., 2010 (9) SCR 674)

Order XXII 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 V. Mohindra Kumar, AIR 1964 SC 993; N.P. Thirugnanam (D) by L.Rs. V. Dr. R. Jagan Mohan Rao & Ors., AIR 1996 SC 116; Neki V. Satnarain, AIR 1997 SC 1334).

In N.P. Thirugnanam (D) by L.Rs. V. Dr. R. Jagan Mohan Rao & Ors., AIR 1996 SC 116, the Supreme Court explained the scope of the provisions of Order 22, Rule 6 holding that if the defendant dies after the conclusion of the arguments and the judgment had been reserved, the proceedings shall not abate and the decree against the dead person shall be executed.

Order XXII Rule 10 A This provision was inserted by amendment in 1976 and provided for obligation on the part of the lawyer appearing for a party to inform the Court about the death of his client, and the Court shall thereupon give a notice of such death to the other party. In such a case there may be delay in bringing the application for substitution of L.Rs. and the Court may take lenient view taking into consideration the date of knowledge of the death by the party filing an application for condonation of delay.

In Gangadhar V. Raj Kumar, AIR 1983 SC 1202, the Apex Court held that refusal to set aside abatement without considering Order 22 Rule 10A of the Code is not justified.

A similar view has been reiterated by the Apex Court in Minati Sen @ Smt. D.P. Sen V. Kalipada Ganguly & Ors., AIR 1997 Cal.386.

In P. Jesaya (Dead) by L.Rs. V. Sub Collector & Anr., (2004) 13 SCC 431 the Apex Court considered a case where the pleader of the deceased respondent did not inform the Court about the death of the respondent and conclude the final arguments. The Court rejected the contention that matter stood abated for the reason that there was a serious recklessness on the part of pleader to inform the Court about the death of his client which he failed to discharge. Therefore, his L.Rs. were bound by the judgment and the matter could not stand abated.

In Chaukas Ram V. Duni Chand (Dead) by proposed L.Rs., (2004) 13 SCC 567, the Supreme Court held that application for substitution of L.Rs. can be filed within reasonable time from the date of reporting of the death of the other side to the Court.

Order XXIII 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 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 V. Firm K.B. Bass & Co. , AIR 1968 SC 111, the Apex Court considering the provision of Order XXIII, 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 V. State Transport, AIR 1987 SC 88, the 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.** 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,** 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. V. 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 suit can be granted only in certain contingencies as provided under the said provision.

A Division Bench of the Allahabad High Court in Khacher Singh V. 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 V. Banaras Hindu University & Ors., (1993) 1 UPLBEC 448; and Saheb Lal V. 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.

A Division Bench of Rajasthan High Court in Radhakrishna & anr. V. State of Rajasthan & ors., AIR 1977 Raj 131 has 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. V. 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 straightaway, 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 V. M.G. Kanniah & anr., AIR 1981 SC 1725; and Smt Madhu Jajoo V. 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. V. Suresh Govind Kamath Tarkas & Ors., AIR 1986 SC 1009; Muktanath Tewari & Anr. V. Vidyashanker Dube & Ors., AIR 1943 All 67; and Ramrao Bhagwantrao Inamdar & Anr. V. Babu Appanna Samage & Ors., AIR 1940 Bom. 121 (F.B.)).

In Dankha Devi Agarwal V. Tara Properties (P) Ltd. AIR 2006 SC 3068, the order of withdrawal was obtained by fraud as the plaintiff never authorised the counsel to sign the application/affidavit and it was obtained by forging her signature, the Court held that the order of withdrawal was illegal.

In Kandapazha Nadar V. Chitraganiammal, (2007) 7 SCC 65, the Apex Court held that when Court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree, and it cannot debar the petitioner from taking the defence in 2nd round of litigation. Such order does not constitute a decree under Section 2 (2) of the Code. It is the provision to sub-rule (3) of Rule 1 of Order 23 (like that in Rule 9 of Order 9) and not in principles of res judicata that precludes the plaintiff in such a case from bringing a fresh suit in respect of the same matter.

(See also: Sneh Gupta V. Devi Sarup & Ors., (2009) 6 SCC 194).

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 1 CPC does not apply where a second suit has been filed during the pendency of the first suit. In such a case permission / liberty to file a fresh suit is not required. (Vide: P.A. Muhammed V. The Canara Bank & Anr., AIR 1992 Ker. 85; Hari Basudev V. State of Orissa & Ors., AIR 2000 Ori. 125; and Vimlesh Kumari Kulshrestha V. Sambhajirao & Anr., (2008) 5 SCC 58).

ORDER XXIII RULE 1 CPC – FORUM SHOPPING - not permissible

(See: M/s. Chetak Construction Ltd. v. Om Prakash & Ors. AIR 1998 SC 1855; Rajiv Bhatia etc. v. Government of NCT of Delhi & Ors. AIR 1999 SC 3284; Udyami Evam Khadi Gramodyog Welfare Sanstha & Anr. v. State of U.P. & Ors. (2008) 1 SCC 560; Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Ors. (2009) 2 SCC 784).

Order XXIII Rule 1(5)

The courts have consistently held, that a suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the court may pass such an order. If the court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction. (Vide: **Mt. Ram Dei v. Mt. Bahu Rani,** AIR 1922 Pat. 489; **Mt. Jaimala Kunwar & Anr. v. Collector of Saharanpur & Ors.,** AIR 1934 All. 4; **The Asian Assurance Co. Ltd. v. Madholal Sindhu & Ors.,** AIR 1950 Bom; and **Bhagwati Developers Private Ltd. v. The Peerless General Finance Investment Co. Ltd. & Ors**. AIR 2013 SC 1690).

Order XXIII Rule 3 provides for compromise of a Suit. However, consent decree cannot be passed in contravention of the law.(Vide Nagindas Ramdas V. Dalpatram Iccharam @ Brijram & Ors., AIR 1974 SC 471; C.F. Angadi V. Y.S. Hirannayya, AIR 1972 SC 239; State of Punjab & Ors. V. Amar Singh & Anr., AIR 1974 SC 994; and Smt Nai Bahu V. 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 Chandra Singh V. 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 V. Jagrani, AIR 2003 SC 4596; Rajasthan Financial Corporation V. Man Industrial Corporation Ltd., (2003) 7 SCC 552; Dr. Renuka Datla V. Solboy Pharmaceutical Y.B., (2004) 1 SCC 149; and Jamshed Hormusji Wadia V. Board of Trustees, Port of Mumbai, AIR 2004 SC 1815).

Where the case is decided after considering the rival submissions on issues, the case cannot be of a consent decree. (Vide Manager, RBI V. S. Mani, AIR 2005 SC 2179).

In Dhanakha Devi Agarwal V. Tara Properties Pvt. Ltd., AIR 2006 SC 3068, the Apex Court held that if the proceedings have been withdrawn playing fraud upon the Court, it should be recalled and matter should be reheard and decided on merit.

(See also: Vimlesh Kumari Kulshrestha V. Sambhajirao & Anr., (2008) 5 SCC 58; and Ghulam Nabi Dar v. State of J & K, AIR 2013 SC 2950).

<u>Application for withdrawal of suit - cannot be withdrawn?</u>

In Shiv Prasad V. Durga Prasad & Anr., AIR 1975 SC 957, the Apex Court held that mere filing the application for withdrawal is enough and no formal order is required on the said application. The Court held as under:-

> "12. Even on the interpretation of Rule 89 (2) which we have put we are not prepared to accept the contention put forward on behalf of the appellant that an application under Rule 90 does not stand withdrawn until an order to that effect is recorded by the Court. The applicant merely has to convey to the Court that he is withdrawing his application under Rule 90 which he had filed prior to the making of the application under Rule 89. Thereupon he becomes entitled to make the later application. **Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application.** Respondent no.1 has clearly done so here not only by mentioning in his application under Rule 89 that he was withdrawing his application under Rule 90 but also by filing a separate application to that effect, in which not only the statement as to the withdrawal of the application under Rule 90 was made but a prayer for the refund of Rs. 2,000/- was also made. The steps taken on behalf of the respondent no.1 in Miscellaneous Case No. 3/1967 even after the filing of Miscellaneous Case No. 1/1968 were clearly superfluous and of no effect. The steps taken did not nullify the withdrawal made by respondent no.1 of his application under Rule 90 and did not make the withdrawal merely on that account infective. Even if any ambiguity was created by the taking of such steps, later on 9-3-1968 in clearest language it was intimated on behalf of respondent no.1 that he was not pursuing his application under Rule 90. It was only then that the Court made a formal order recording its dismissal. In our judgment on the facts and in the circumstances of this case, the order of the Court made on 9-3-1968 had the effect of merely recording the withdrawal of the application under Rule 90 which was already effectively made on 1-1-1968. Even without that order, the withdrawal was effective on that date."
>
> (Emphasis added)

The aforesaid decision deals with the right to withdraw an application in execution proceedings while considering the impact of an application moved under Order 21 Rules 89 and 90 C.P.C. The said judgment did not consider or was concerned with the right of withdrawal of a suit as contemplated under Order 23 Rule 1 C.P.C. A learned Single Judge of the Bombay High Court in Anil Dinmani Shankar Joshi & Anr. V. Chief Officer, Panvel Municipal Council, Panvel & Anr., AIR 2003 Bom. 238, however, applying the aforesaid ratio of the Supreme Court, came to the same conclusion in a matter pertaining to withdrawal of a suit where an application had been moved under Order 23 Rule 1. A Division Bench of the Allahabad High Court arrived at the same

conclusion, though on different reasonings, in the case of Smt. Raisa Sultana Begam & Ors. V. Abdul Qadir & Ors., AIR 1966 All. 318.

As against the aforesaid view, the Allahabad High Court in the case of Kedar Nath & Ors. V. Chandra Kiran & Ors., AIR 1962 All. 263, while considering the scope of Order 23 Rule1 at the stage of second appeal, came to the conclusion that a plaintiff had no absolute right to withdraw the suit and the Court has discretion in giving permission. The said decision is by a learned Single Judge which has not been noticed by the Division Bench of the Allahabad High Court in the case of Smt. Raisa Sultana Begam (supra). In a later decision in the case of Vidhyadhar Dube & Ors. V. Har Charan & Ors., AIR 1971 All. 41, another Division Bench of the Allahabad High Court approved of the decision taken in Kedar Nath's case (supra) and held that the right of the plaintiff to withdraw the suit at appellate stage is not an absolute right. It would be appropriate to point out that the said decision does not take notice of the Division Bench judgment rendered earlier in Smt. Raisa Sutlana's case.

The Bombay High Court in yet another decision in the case of Mahadhkar Agency & Anr. V. Padmakar Achanna Shetty, AIR 2003 Bom. 136, followed the decision of the Allahabad High Court in the case of Kedar Nath and Vidhyadhar Dube (supra), and held that a plaintiff does not have an absolute right of withdrawal and before granting any permission for withdrawal of the suit at the stage of second appeal, the plaintiff cannot claim an absolute right to institute a fresh suit and the Court will have discretion to pass an appropriate order in such circumstances. The Bombay High Court in the said decision further relied upon the Supreme Court decisions of Executive Officer, Arthanareswarar Temple V. R. Sathyamoorthy, AIR 1999 SC 958, supplemented by the decision in the case of K.S. Bhoopathy & Ors. V. Kokila & Ors., (2000) 5 SCC 458. The judgment further relies on the decisions of the Punjab and Haryana High Court in Jubedan Begum V. Sekhawat Ali Khan, AIR 1984 P&H 221 and the Rajasthan High Court in Ram Dhan V. Jagat Prasad, AIR 1982 Raj. 235, which have also been referred with approval therein.

Contra:

See: Rajendra Prasad Gupta V. Prakash Chandra Mishra & Ors., (2011) 2 SCC 705; AIR 1973 Kar 140; and AIR 1986 Cal 119.

Where a third party interest has been created or the plaintiff himself has taken the benefit of any interim order passed by the Court during the pendency of the suit, he cannot claim a right to withdraw the suit. (Vide Executive Officer (supra) and Kedar Nath (supra).

There can be no quarrel to the legal proposition that no party can suffer by the action of the Court and when the Court in exercising of its powers grants interim relief; the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised. The institution of litigation by a party should not be permitted to confer an unfair advantage on the party responsible for it. (Vide: Grindlays Bank Ltd. V. Income Tax Officer, Calcutta & ors., AIR 1980 SC 656; Ram Krishna Verma V. State of Uttar Pradesh & ors., AIR 1992 SC 1888; State of Madhya Pradesh V. M.V. Vyavsaya & Co., AIR 1997 SC 993; South Eastern Coalfields Ltd. V. State of M.P. & Ors, (2003) 8 SCC 648; Karnataka Rare Earth & Anr. V. Senior Geologist, Department of Mines & Geology & Anr., (2004) 2 SCC 783; and Smt. Rampati Jayaswal & ors. V. State of Uttar Pradesh & ors., AIR 1997 All 170).

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 writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blaming the Court. If the writ is devoid of any merit then it gives a presumption that the writ is frivolous one. 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 neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. (Vide: Shree Chamundi Mopeds Ltd. V. Church of South India Trust Association, (1992) 3 SCC 1; Dr. A.R. Sircar V. State of Uttar Pradesh & ors., 1993 Suppl. (2) SCC 734; Shiv Shanker & ors. V. Board of Directors, Uttar Pradesh State Road Transport Corporation & Anr., 1995 Suppl (2) SCC 726; the Committee of Management, Arya Inter College V. Sree Kumar Tiwary, AIR 1997 SC 3071; Kanoria Chemicals and Industries Ltd. V. U.P. State Electricity Board & ors., (1997) 5 SCC 772; N. Mohanan V. State of Kerala & Ors., AIR 1997 SC 1896; GTC Industries Ltd. V. Union of India & Ors., (1998) 3 SCC 376; State of U.P. & ors. V. Raj Karan Singh, (1998) 8 SCC 529; Bileshwar Khan Udyog Khedut Shahakari Mandali Ltd. V. Union of India & Anr., AIR 1999 SC 1198; and Jaipur Municipal Corporation V. C.L. Mishra, (2005) 8 SCC 423).

Order XXVI deals with commission and commissions to examine witnesses.

Order XXVI 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 XXXVII 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 V. 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 V. 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 V. 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 V. 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 V. 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 ofO.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) he 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 V. Suresh Kumar Malhotra, AIR 2003 SC 1322, the Apex Court has reiterated the same view explaining the scope of special circumstances.

In Ubsag V. State Bank of Patiala, AIR 2006 SC 2250; and Defiance Knitting Industries (P) Ltd. V. Jay Arts, (2006) 8 SCC 25, the Court held that where there is a triable issue, the defence cannot be struck off and the Court may grant leave to defence conditionally.

Order XXXIX Rules 1 and 2(to be replaced before injunction) deals with power to grant interim relief.

Temporary injunction can be granted to a party on its own risk and responsibility as in case he looses the case, he cannot take any assistance of the interim order granted by the Court. (Vide: Rajasthan Housing Board v. Krishna Kumari, (2005) 13 SCC 151).

In Premji Ratansey Shah v. Union of India & Ors., (1994) 5 SCC 547, the 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. v. Cadbury (India) Ltd., AIR 2000 SC 2114, the 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 v. Tarkeshwar Prasad & Ors., AIR 2001 SC 2367, the 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. v. Hindustan Lever Ltd., AIR 1999 SC 3105, the 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. v. Sri Sriman Narayan & Anr., AIR 2002 SC 2598, the 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. v. Coca Cola Co. & Ors., (1995) 5 SCC 545)."

In Dorab Cawasji Warden v. 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."

In several cases, the Supreme Court has held "public interest" is also a relevant factor in granting injunction. (Vide: Ramniklal N. Bhutta & Anr. v. State of Maharashtra & Ors., AIR 1997 SC 1236).

It is settled law that even if all the necessary ingredients are established, the court may refuse to grant an interim injunction. (See also: Zenit Mataplast P. Ltd. v. State of Maharashtra & Ors., (2009) 10 SCC 388)

In Mahadeo Savalaram Shelke & Ors. v. Pune Municipal Corporation & Anr., (1995) 3 SCC 33, the 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. v. 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 v. Suresh Chandra Jaipuria & Anr., AIR 1976 SC 2621, the 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 v. State of Rajasthan & Ors., 2000 (2) WLC 279, the Rajasthan High 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 Supreme Court in Terene Traders v. Ramesh Chandra Jamnadas & Co., AIR 1987 SC 1492.

In Sree Jain Swetambar Terapanthi Vid (S) v. Phundan Singh & Ors., AIR 1999 SC 2322; and Satyam Infoway Ltd. v. Sifynet Solutions (P) Ltd., (2004) 6 SCC 145, 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. v. Prahlad Singh & Ors., AIR 1993 SC 276, the 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 v. 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. v. K.C. Alexander & Ors., AIR 1968 SC 1165; M. Kallappa Setty v. M.v. Lakshminarayana Rao, AIR 1972 SC 2299; Ratiram Pundlik Khedkar v. Pundlik Arjun Khedkar, AIR 1982 Bom 79; Kayamuddin Shamsuddin Khan Vs State Bank of India, (1998) 8 SCC 676; K. Bhaskaran v. Sankaran Vaidhyan Balen & Anr. (1999) 7 SCC 510; and Hem Chand Jain v. Anil Kumar, AIR 1993 Del 99).

The Supreme Court in Manohar Lal Chopra v. Raj Bahadur Rai Raja Seth Hira Lal, AIR 1962 SC 527 held that the civil court has a power to grant interim injunction in exercise of its inherent jurisdiction even if the case does not fall within the ambit of provisions of Order 39 CPC while delivering the judgment the Apex Court considered the scope of application of the provisions of Section 94 CPC and observed as under:-

> "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' in Sec. 94 is only this that when the rules in Order 39, Civil P.C. prescribe 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 Sec. 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incident of the exercise of the power of the Court to issue temporary injunction that the provisions of Sec. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power."

The said judgment has been followed by this Court in Dileep Kumar v. Ram Saran, 1972 All LJ 379 as well as the Patna High Court in Bhagelu Mian v. Mahboob Chik, AIR 1978 Pat 318.

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 & Ors. v. Aisumma, AIR 1989 Ker 81; Sathyabhama Amma v. Vijaya Amma, AIR 1995 Ker 74; and Shiv Ram Singh v. Mangara, AIR 1989 All 164). The purpose for granting temporary injunction is to maintain status quo.

In Dr. Ashish Ranjan Das v. Rajendra Nath Mullick, AIR 1982 Cal 529 a similar view has been reiterated. However, it was clarified that the defendant can pray for

interim relief only if the cause of action of the defendant is the same as that of the plaintiff, otherwise not.

In Suganda Bai v. Sulu Bai & Ors., AIR 1975 Kar 137, the Division Bench of the Karnataka High Court had taken the same view observing that for granting the relief to the defendant the cause of action of the defendant as well as the plaintiff must be the same.

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. v. Smt Sumitra Chakraborty, AIR 1985 Cal 248, wherein the Court placed a very heavy reliance upon the judgment in Acrow Limited v. 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 Apex Court has consistently and persistently deprecated such a practice. (Vide State of Jammu & Kashmir v. Mohammed Yakoob Khan & Ors., (1992) 4 SCC 167; U.P. Junior Doctors Action Committee & Ors. v. Dr. B. Shital Nandwani, 1992 Suppl (1) SCC 680; Gurunanak Dev University v. Parminder Kumar Bansal & Anr., AIR 1993 SC 2412; Saint John's Teachers Training Institute (for Women) & Ors. v. State of Tamil Nadu & Ors., (1993) 3 SCC 595; Dr. B.S.Kshirsagar v. Abdul Malik Mohammad Musa, 1995 Suppl (2) SCC 593; The Bank of Maharashtra v. Ray's Shopping and Transport Company Pvt. Ltd., AIR 1995 SC 1368; Commissioner/Secretary, Government of Health & Medical Education Department v. Dr. Ashok Kumar Kohli, 1995 Suppl (4) SCC 214; Union of India v. Shri Ganesh Steel Rolling Mills, (1996) 8 SCC 347; State of Madhya Pradesh v. M.v.Vyavsaya & Co., (1997) 1 SCC 156; and Bharat Sanchar Nigam Ltd. v. Prem Chand Premi, (2005) 13 SCC 505).

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 v. Era Educational Trust, (2000) 5 SCC 57, the 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 v. Kartick Das, (1994) 4 SCC 225, the 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. (See also: Competition Commission of India v. Steel Authority of India Ltd. & Anr. (2010) 10 SCC 744)

Similar view has been reiterated in Ajay Mohan & Ors. v. H.N. Rai & Ors., (2008) 2 SCC 507 wherein the Court has observed that interim relief should be granted provided it is established that: (i) there existed a prima facie case, (ii) balance of convenience lay in their favour, and (iii) unless the prayer was granted, they would suffer an irreparable injury.

In Burn Standard Co. Ltd. & ors. v. Dinabandhu Majumdar & Anr., (1995) 4 SCC 172, the 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. 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 v. Govt. of A.P., AIR 1986 SC 1490; State of Jammu & Kashmir v. Mohd Yakoob Khan & ors., 1992 (4) SCC 167; U.P. Junior Doctors Action Committee & Ors. v. Dr. B. Shital Nandwani, 1992 Suppl (1) SCC 680; Guru Nanak Dev University v. Parminder Kumar Bansal & Anr., AIR 1993 SC 2412; Saint John's Teachers Training Institute (for Women) & Ors. v. State of Tamil Nadu & Ors., 1993 (3) SCC 595; Dr. B.S. Kshirsagar v. Abdul Khalik Mohd Musa, 1995 Suppl (2) SCC 593; The Bank of Maharastra v. Race Shipping & Transport Co. (P) Ltd., AIR 1995 SC 1368; Commissioner/Secretary, Government of Health & Medical Education Department v. Dr. Ashok Kumar Kohli, 1995 Suppl (4) SCC 214; Union of India v. Shree Ganesh Steel Rolling Mills Ltd., 1996 (8) SCC 347; State of Madhya Pradesh v. M.v. Vyavsaya & Co., AIR 1997 SC 993; Central Board of Secondary Education v. P. Sunil Kumar, (1998) 5 SCC 377; Union of India v. Era Educational Trust, (2000) 5 SCC 57; Council for Indian School Certificate Examination v. Isha Mittal & Anr., (2000) 7 SCC 521; State of U.P. & Ors. v. Modern Transport Company, Ludhiana &Anr., (2002) 9 SCC 514; State of U.P. & Anr. v. U.P. Rajkiya Nirman Nigam Karmchari Sangharsh Morcha & Ors., JT (2002) 5 SC 322; Union of India & Ors. v. M/s. Modiluft Ltd., AIR 2003 SC 2218; Regional Officer, CBSE v. Km. Sheena Peethambaran & Ors., (2003) 7 SCC 719; State of U.P. v. Ram Sukhi Devi, 2004 AIR SCW 6955 ; and Prem Singh Chaudhary & Ors. v. State of Uttaranchal & Ors., (2005) 11 SCC 567.

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 v. State of Uttar Pradesh & Ors., 1993 Suppl. (2) SCC 734; Shiv Shanker & Ors. v. Board of Directors, Uttar Pradesh State Road Transport Corporation & Anr., 1995 Suppl (2) SCC 726; the Committee of Management, Arya Inter College v. Sree Kumar Tiwary, AIR 1997 SC 3071; GTC Industries Ltd. v. Union of India & Ors., (1998) 3 SCC 376; Jaipur Municipal Corporation v. C.L. Mishra, (2005) 8 SCC 423; Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors., AIR 2010 SC 3745; Zenit Mataplast Pvt. Ltd. v. State of Maharashtra & Ors. (2009) 10 SCC 388; and Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307).

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

Order XXXIX Rule 2-A deals with the power to enforce the order passed by the court and impose the punishment. In Mulraj V. Murti Raghunathji Maharaj, AIR 1967 SC 1386 the 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 actionwould be a nullity.**

Similar view has been reiterated in Surjit Singh & Ors.V. Harbans Singh & Ors., (1995) 6 SCC 50; Govt. of A.P. V. Gudepu Sailoo & Ors., AIR 2000 SC 2297; and Manohar Lal V. Ugra Sen, (2010) 11 SCC 557.

A Constitution Bench of the Supreme Court, in State of Bihar V. 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 Supreme Court in Aligarh Municipal Board & Ors. V. Ekka Tonga Mazdoor Union & Ors., AIR 1970 SC 1767; by the Allahabad High Court in Ratan Narain Mulla V. The Chief Secretary, Govt. of U.P. & Ors.,1975 Cr.L.J. 1283; and by the Delhi High Court in M/s Jyoti Limited V. Smt. Kanwaljit Kaur Bhasin & Anr., 1987 Cri. L.J. 1281.

In Tayabbhai M. Bagasarwalla & Ors. V. Hind Rubber Industries Pvt. Ltd., AIR 1997 SC 1240, the 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. (See also: All Bengal Excise Licensees Association V.Raghabendra Singh & Ors., AIR 2007 SC 1386; Patel Rajanikant Dhulabhai & Anr. V. Patel Chandrakant Dhulabhai & Ors., AIR 2008 SC 3016; and Inderjit Singh Grewal V. State of Punjab & Anr., (2011) 12 SCC 588.)

In Samee Khan V. Bindu Khan, AIR 1998 SC 2765, the 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 V. R.K. Bhargava & Ors., AIR 1971 All. 231; Smt. Indu Tewari V. Ram Bahadur Chaudhari & Ors., AIR 1981 All. 309; and Rudraiah Company V. State of Karnataka & Ors., AIR 1982 Kar. 182).

In Md. Jamal Paramanik & Ors. V. 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 ParshottamdasV. 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 V. 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 Supreme Court in The State of Bihar V. 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 V. Ganesh Das, AIR 1973 All 449, the Court held as under:-

> "The purpose of Order 39, Rule 2-A, C.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, C.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. Sonabati Kumari, AIR 1961 SC 221; while dealing with O. 39, Rule 2(iii), C.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, C.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 V. 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. V. 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. V. 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.

In **Food Corporation of India v. Sukha Deo Prasad**, AIR 2009 SC 2330, the Supreme Court held that the power exercised by a court under Order XXXIX Rule 2A is punitive in nature, akin to the power to punish for civil contempt under the Act 1971. Therefore, such powers should be exercised with great caution and responsibility. Unless there has been an order under Order XXXIX Rule 1 or 2 CPC in a case, the question of entertaining an application under Order XXXIX Rule 2A does not arise. In case there is a final order, the remedy lies in execution and not in an action for contempt or disobedience or breach under Order XXXIX Rule 2A. The contempt jurisdiction cannot be used for enforcement of decree passed in a civil suit.

The proceedings under Order XXXIX Rule 2A are available only during the pendency of the suit and not after conclusion of the trial of the suit. Therefore, any undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been disposed of becomes a part of the decree and breach of such undertaking is to be dealt with in execution proceedings under Order XXI Rule 32 CPC and not by means of contempt proceedings. Even otherwise, it is not desirable for the High Court to initiate criminal contempt proceedings for disobedience of the order of the injunction passed by the subordinate court, for the reason that where a decree is for an injunction, and the party against whom it has been passed has wilfully disobeyed it, the same may be executed by attachment of his property or by detention in civil prison or both. The provision of Order XXI Rule 32 CPC applies to prohibitory as well as mandatory injunctions. In other words, it applies to cases where the party is directed to do some act and also to the cases where he is abstained from doing an act. Still to put it differently, a person disobeys an order of injunction not only when he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. Execution of an injunction decree is to be made in pursuance of the Order XXI Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible. (See: also :**Hungerford Investment Trust Ltd.** (In voluntary Liquidation) **v. Haridas Mundhra & Ors.**, AIR 1972 SC 1826; and **Kanwar Singh Saini v. High Court of Delhi,** JT (2011) 11 SC 544).

Distinction between civil and criminal contempt:

In **Samee Khan v. Bindu Khan**, AIR 1998 SC 2765, the Supreme Court explained the distinction between a civil and criminal contempt observing that enforcement of the order in civil contempt is for the benefit of one party against another, while object of criminal contempt is to uphold the majesty of law and the dignity of the court. The scope of the proceedings under Order XXXIX Rule 2A CPC is entirely different. It is a mode to

compel the opposite party to obey the order of injunction by attaching the property and detaining the disobedient party in civil prison as a mode of punishment for being guilty of such disobedience. Breach of undertaking given to the court amounts to contempt in the same way as a breach of injunction and is liable to be awarded the same punishment for it. (See also: Food Corporation of India V. Sukha Deo Prasad, AIR 2009 SC 2330; **Kanwar Singh Saini v. High Court of Delhi,** JT (2011) 11 SC 544).

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

Order XLI 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 XLI Rule 2

(See: Kailash Paliwal v. Subhash Chandra Agrawal, AIR 2013 SC 2923).

Order XLI Rule 5 Mere filing appeal would not be enough for stay of operation of the order. Stay order is to be passed by the appellate court for "sufficient cause". (Vide Atma Ram Properties (P) Ltd. V. Federal Motors (P) Ltd. (2005) 1 SCC 705).

Order XLI 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 Supreme Court in Arjan Singh V. Kartar Singh & Ors., AIR 1951 SC 193, wherein the 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 Supreme Court placed reliance upon two judgments of the Privy Council in Kessowji V. G.P.P. Railway, 1934 Ind. App. 115; and Parsotim Thakur & Ors. V. Lal Mohar Thakur & Ors., AIR 1931 PC 143.

A Five Judges' Bench of the Supreme Court in K. Venkataramiah V. 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 State of U.P. V. Manbodhan Lal Srivastava, AIR 1957 SC 912, the Constitution Bench of the Supreme Court held that "additional evidence" should not be permitted at the appellate stage in order to enable one of the parties to **remove certain lacuna** in presenting its case at proper stage and to fill in gaps. Of course, the position is different where the appellate court itself requires certain evidence to be adduced in order to enable it to do justice. The Court held that additional evidence should not be permitted to be adduced when there was sufficient opportunity for the party to place the same before the court below.

In Sunder Lal & Son V. Bharat Handicrafts Private Ltd., AIR 1968 SC 406, while dealing with a similar issue, the Supreme Court observed as under:-

> "Where the Appellate Court requires any document to be produced or witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court may allow such document to be produced or witnesses to be examined. We do not require additional evidence to be produced in this case to enable us to pronounce judgment, nor do we think that any substantial cause is made out which would justify an order allowing additional evidence to be led at this stage. The document relied upon was admittedly in the possession of the appellants, but they did not rely upon it before the High Court. It was said at the Bar that the importance of the document was not realized by those in charge of the case. We do not think that the plea would bring the case within the expression "other substantial cause" in O. 41, R. 27 of the Code of Civil Procedure."

In Premier Automobiles Ltd., Bombay V. Kabirunisha & Ors., AIR 1991 SC 91, the Apex Court held that in case the applicant party satisfies the Court regarding the importance of additional evidence it wants to adduce and explain the circumstances, which prevented it from producing before the trial stage, the application may be allowed.

In Billa Jagan Mohan Reddy & Anr. V. Billa Sanjeeva Reddy & Ors., (1994) 4 SCC 659, the Supreme Court held that if the documents are found to be relevant to decide the issue in controversy, and feels that interest of justice requires that the documents be received, as additional evidence, the appellate court may receive the documents and consider their effect.

In Jaipur Development Authority V. Smt Kailashwati Devi, AIR 1997 SC 3243, the Apex Court held:-

> "The intention of the sub-rule, in our view, is that a party who, for the reasons mentioned in the sub-clause, was unable to produce the evidence in the trial court, should be enabled to produce the same in the appellate court. The sub-rule mentions the conditions which must be complied

with by the party producing the additional evidence, namely, that "notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him" in the trial court. It is not one of the conditions that the party seeking to introduce additional evidence must have also been one who has led some evidence in the trial court. Such a view amounts to introducing an additional condition not contemplated by the sub-rule. No distinction was intended by the sub-rule between a party who has produced some evidence in the trial court and one who has adduced no evidence in the trial court. All that is required is that the conditions mentioned in the body of the sub-rule must be proved to exist. It is not permissible to restrict clause (aa) for the benefit of only those who have adduced some evidence in the trial court."

(See also: Eastern Equipment & Sales Ltd. V. ING Yash Kumar Khanna, AIR 2008 SC 2360)

In Jayaramdas & Sons V. Mirza Rafatullah Baig & Ors., AIR 2004 SC 3685, the Court held that it would be better if such grounds are specifically set out in the application so that opposite party may better make the plea and Court may also have the relevant provisions of the specific clause of Rule 27 (1) in its mind while dealing with the application. However, in case the ends of justice demand documents if being material bearing on the crucial issue, arisen for decision between the parties, be allowed.

In Soonda Ram & Anr. V. Rameshwarlal & Anr., AIR 1975 SC 479, the Supreme Court considered the case under the said provisions of the Rajasthan Premises (Control of Rent and Eviction) 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 V. Financial Commissioner Taxation, Punjab, AIR 1976 SC 1053, the 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 V. 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 V. Rami Reddy & Ors., AIR 1979 SC 553, the 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 V. Om Prakash Bhatia & Ors., AIR 1980 SC 446, the 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. (See also: Haryana State Industrial Development Corporation V. Coke Manufacturing Co., AIR 2008 SC 56).

Similarly, in M.M. Quasim V. Manohar Lal Sharma, AIR 1981 SC 1113, the 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 V. 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. V. 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 Supreme Court placed reliance upon a large number of its earlier judgments, including the Municipal Corporation of Greater Bombay V. 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 Mahavir Singh (supra), by the time the Supreme Court decided the case the additional evidences 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.

See also: **Lekhraj Bansalv. State of Rajasthan & Anr. (**Civil Appeal Nos. 2848-2849 of 2014 Decided On: 25.02.2014)

In N. Kamalam (Dead) & Anr. V. Ayyasamy & Anr., (2001) 7 SCC 503, the 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. V. V.K. Elayalwar & Ors., (2001) 8 SCC 133, the 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 V. 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."

Additional evidence in appeal is to be taken strictly in accordance with the statutory provisions of Order 41 Rule 27 Code of Civil Procedure and not otherwise. (Vide: Adil Jamshed Frenchman (D) by L.Rs. V. Sardar Dastur School Trust & Ors., AIR 2005 SC 996; Sanjiv Goel V. Autar S.Sandhu, (2006) 9 SCC 748; and State of Gujarat V. Mahendra Kumar parshottam Bhai Desai, AIR 2006 SC 1846).

In Basayya I. Mathad V. Rudrayya S. Mathad & Ors., (2008) 3 SCC 120, the Apex Court held that additional evidence cannot be produced before the Appellate Court as a matter of right or in a routine manner. In order to adduce additional evidence, the parties are bound to satisfy the conditions stated in Order 41 Rule 47 and the Appellate Court must record reasons for admission of additional evidence.

In North Eastern Railway Administration, Gorakhpur V. Bhagwan Das (D) by L.Rs., AIR 2008 SC 2139, the Court held that additional evidence is permissible at appellate stage if Court requires it to pronounce judgement or is necessary for giving judgment in more satisfactory manner.

The appeal court must take the IA under Order 41 Rule 27 along with the appeal and not independently (vide Jaipur Development Authority V. Kailashwati Devi, (1997) 7 SCC 297 and M/s. Estern Equipment & Sales Ltd. V. ING Yash Kumar Khanna, AIR 2008 SC 2360).

In K.R. Mohan Reddy V. M/s. Net Work Inc. Rep. Tr. M.D., AIR 2008 SC 579, the Supreme Court held that application under Order 41 Rule 27 should not be allowed so as to patch up the weakness of the evidence of the unsuccessful party before the trial Court, rather it will be different if the Court itself require the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the Court. But mere difficulty in pronouncing the judgment is not sufficient to issue such direction.

(See also: Lachhman Singh by LRs & Ors. V. Hazara Singh by LRs & Ors., (2008) 5 SCC 444).

In Anupam Gupta V. Sumeet Gupta, (2009) 1 SCC 254, the Apex Court held that while considering the application for adducing additional evidence the Court may not pass an unreasonable order.

The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: **K. Venkataramiah v. A. Seetharama Reddy & Ors.**, AIR 1963 SC 1526; **The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors.**, AIR 1965 SC 1008; **Soonda Ram & Anr. v. Rameshwaralal & Anr.,** AIR 1975 SC 479; **Syed Abdul Khader v. Rami Reddy & Ors.,** AIR 1979 SC 553; State of Gujarat & Anr. V. Mahendra Kumar Parshottambhai Desai, AIR 2006 SC 1864; and Haryana State Industrial Development Corporation V. Coke Manufacturing Co., AIR 2008 SC 56)**.**

The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: **Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali & Co.,** AIR 1978 SC 798).

Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can

pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: **Lala Pancham & Ors.** (supra)].

It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the **absence of satisfactory reasons for the non-production of the evidence in the trial court**, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: **State of U.P. v. Manbodhan Lal Srivastava,** AIR 1957 SC 912; **S. Rajagopal v. C.M. Armugam & Ors.,** AIR 1969 SC 101; and Union of India V. Ibrahim Uddin & Anr. (2012) 8 SCC 148).

The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

Whenever the appellate Court admits additional evidence it **should record its reasons** for doing so. (Sub-rule 2). It is a statutory provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. **The omission to record the reasons must, therefore, be treated as a serious defect.** But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough compliance with the requirement as to recording of reasons.

Stage of consideration:

An application under Order XLI Rule 27 CPC **isto be considered at the time of hearing of appeal on merits so** as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh V. Kartar Singh & Ors., AIR 1951 SC 193; the Official Liquidator V. Raghawa Desikacha & Ors., AIR 1974 SC 2069; Natha Singh & Ors. V. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053; and Union of India V. Ibrahim Uddin & Anr., (2012) 8 SCC 148).

In **Parsotim Thakur & Ors. V. Lal Mohar Thakur & Ors.,** AIR 1931 PC 143, it was held:

> "The provisions of S.107 as elucidated by O.41, R.27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under R.27, Cl.(1) (b) it is only where the appellate Court "requires" it (i.e. finds it needful). …… **The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent",** it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the **requirement must be the requirement of the court upon its appreciation of evidence as it stands.** Wherever the Court adopts this procedure it is bound by R. 27(2) to record its reasons for so doing, and under R.29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. **The power so conferred** upon the Court by the Code ought **to be very sparingly exercised** and one requirement at least of any new evidence to be adduced should be that it should have a **direct and important bearing on a main issue in the case…**" (Emphasis added)

(See also: **Indirajit Pratab Sahi V. Amar Singh**, AIR 1928 P.C. 128)

In **Arjan Singh V. Kartar Singh & Ors.** (supra), the Supreme Court held:

> "………If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, **it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided**

as if it was non-existent……. The order allowing the appellant to call the additional evidence is dated 17.8.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment" (Emphasis added)

Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.

(See: **Union of India V. Ibrahim Uddin & Anr**., (2012) 8 SCC 148, See also: Lekhraj Bansal v. State of Rajasthan & Anr. (Civil Appeal Nos. 2848-49 of 2014 decided on 25.2.2014

Order XLI 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. V. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526, 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 V. 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 V. 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. (See also: R.N. Jadi and Brothers & Ors. V. Subhashchandra, AIR 2007 SC 2571; A.P. Public Service Commission V. Baloji Badharath & Ors., (2009) 5 SCC 1; Shalimar Chemical Works Ltd. Vsw. Surendra Oil and Dal Mills (Refiniries) & Ors., (2010) 8 SCC 423; and Special Land Acquisition Officer Upper Krishna Project, H. Siddique (dead) by Lrs. V. A. Ramalingam , AIR 2011 SC 1492; and Jharkhand V. Mahadev Govind Gharge & Ors., AIR 2011 SC 2439).

In Girijanandini Devi V. Bijendra Narain Choudhary, AIR 1967 SC 1124, the 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. (See also: **G. Amalorpavam & Ors. V. R.C. Diocese of Madurai & Ors.** (2006) 3 SCC 224; **Shiv Kumar Sharma V. Santosh Kumari** (2007) 8 SCC 600; and **Gannmani Anasuya & Ors. V. Parvatini Amarendra Chowdhary & Ors.** AIR 2007 SC 2380

In Balaji Mohaprabhu & Anr. V. 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. V. 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. V. Lakhinath Kalita & Ors., AIR 1991 Gau 100.

In Samir Kumar Chatterjee V. 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. But, 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 Kuldeep Singh & Anr. V. Chandra Singh, 1999 AIHC 979, it has been 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.

In G. Amalorpavam V. R.C. Diocese of Madurai, (2006) 3 SCC 224, the Supreme Court held that the substantial compliance of the provisions of Order 41 Rule 31 is enough in case, it is made out from a bare reading of the judgment that, while making substantial compliance of the said statutory provisions, justice has not suffered. Where entire evidence has been considered and discussed in detail, the findings are supported by reasons even though it has not been done after framing the points the order is good.

The Court should formulate the points for its consideration in terms of Order 41 Rule 31 CPC and proceed with the disposal of the appeal. (Vide: Shiv Kumar Sharma V. Santosh Kumari, (2007) 8 SCC 600; and Gannmani Anasuya V. Parvatini Amarendra Chowdhary, AIR 2007 SC 2380).

A point not necessary for the disposal of appeal may not be decided (Vide: Mahant Narayangiri Guru Mahant Someshwarigiri V. State of Maharashtra & Ors., AIR 1977 SC 628; and Baljit Singh V. Municipal Committee, Ahmedgarh, 1987 (Supp.) SCC 17).

How regular first appeal is to be disposed of by the appellate Court/High Court has been considered by the apex Court in various decisions. Order XLI of C.P.C. deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) reasons for the decision; and-

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

Order XLI, Rule 31 CPC provides guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: **Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr.,** AIR 1963 SC 146; **Girijanandini Devi & Ors. v. Bijendra Narain Choudhary,** AIR 1967 SC 1124; **G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.**, (2006) 3 SCC 224; **Shiv Kumar Sharma v. Santosh Kumari,** (2007) 8 SCC 600; **Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.,** AIR 2007 SC 2380; **H. Siddique** (dead) **by Lrs.** v. a. **Ramalingam**, AIR 2011 SC 1492; and **M/s. United Engineers & Contractors v. Secretary to Govt. A.P. & Ors.**, AIR 2013 SC 2239).

In **B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy,**(2010) 11 SCR 784, while dealing with the issue, the Supreme Court held as under:

> "The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put- forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a

> valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide: Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 and Madhukar & Ors. v. Sangram & Ors., (2001) 4 SCC 756]"

Order XLI Rule 32-A

(See: Kailash Paliwal v. Subhash Chandra Agrawal, AIR 2013 SC 2923).

Order XLI Rule 33

(See: Laxmibai v. Bhagwantbuva, AIR 2013 SC 1204).

Order XLVII 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 V. 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 V. 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. V. Khelawan & Ors., AIR 1957 All. 67; Mohammad Hasan Khan V. Ahmad Hafiz Ahmad Ali Khan & Anr., AIR 1957 Nag 97; and Lily Thomas etc. etc. V. Union of India, (2000) 6 SCC 224.

In S. Nagraj & Ors. V. State of Karnataka & Anr., 1993 Supp (4) SCC 595, the 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."

(See also: Dr. Saurabh Choudhary & Ors. V. Union of India & Ors., AIR 2004 SC 2212.)

In State of West Bengal & Ors. V. Kamal Sengupta & Anr., (2008) 8 SCC 612, the Apex Court held that review on the ground of discovery of new and important matter or evidence can be taken into consideration if the same is of such a nature that if it had been produced earlier, it would have altered the judgment under review and Court must be satisfied that the party who is adducing the new ground was not having the knowledge of the same even after exercise of due diligence and therefore, it could not be produced before the Court earlier. The error apparent signifies as an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. In case the error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of review. (See also: Haryana State Industrial Development Corporation & Ors. Etc. etc. V. Mansi & Ors etc. etc., (2012) 7 SCC 200; and N. Anantha Reddyv. Anshu Kathuria & Ors. 2013 (14) SCALE 585).

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 Supreme Court placed reliance upon a large number of judgments, including in Raja Prithwi Chand Lal Choudhury V. Sukhraj Rai & Ors., AIR 1941 FC 1; and Rajunder Narain Rae V. Bijai Govind Singh (1836) 1 MOO PC

117. The same view has been reiterated by the Apex Court in Oriental Insurance Co. Ltd. & Anr. V. 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 V. Beli Ram & Ors., AIR 1981 HP 1, considered the scope of review and held that not considering an existing judgment of the 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 V. 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 V. Anath 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 Mt. Jamna Kuer V. Lal Bahadur & Ors., AIR 1950 FC 131, the Federal Court made the following observations:-

> "Whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the Court, is not a circumstance which can affect the exercise of jurisdiction of the Court to review its decision. We have no doubt that the error was apparent on the face of the record and, in our opinion, the question as to how the error occurred is not relevant to this enquiry."

In Thadikulangara Pylee's son Pathrose V. 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. V. Parath Nath & Anr., AIR 1934 PC 213; and on judgments of the Supreme Court in A.C. Estates V. M/s Serajuddin & Co., AIR 1966 SC 935; and Moran Mar Basselies Catholicos & Anr. V. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526.

In Sow. Chandra Kanta & Anr. V. Sheik Habib, AIR 1975 SC 1500, the 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 Supreme Court in Sajjan Singh V. State of Rajasthan, AIR 1965 SC 845; G.L. Gupta V. D.N. Mehta, AIR 1971 SC 2162; M/s Northern India Caterers' (India) Ltd. V. Lt. Governor of Delhi, AIR 1980 SC 674; Col. Avtar Singh Sekhon V. Union of India & Ors., AIR 1980 SC 2041, Aribam Tuleshwar Sharma V. Aribam Pishak Sharma & Ors., AIR 1979 SC 1047; Green View Tea & Industries V. Collector, Golaghat, AIR 2002 SC 180; Krishna Mochi & Ors. V. State of Bihar, AIR 2003 SC 886; and Shankat Hussain Guru V. State (NCT) Delhi & Anr., AIR 2008 SC 2419.

Similarly, in Devaraju Pillai V. Sellayya Pillai, AIR 1987 SC 1160, the Apex Court held that if a party is aggrieved by a judgment of 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. (See also: Inderchand Jain (dead) through Lrs. V. Motilal (dead) through Ltd., (2009) 14 SCC 663).

In Delhi Administration V. Gurdeep Singh Uban, AIR 2000 SC 3737, the 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 by-pass the procedure prescribed for hearing a review application. (See also: Ram Chandra Singh V. Savitri Devi & Ors, AIR 2004 SC 4096; and A.P.S.R.T.C. & Ors. V. Abdul Kareem, (2007) 2 SCC 466).

In Haridas Das V. Smt Usha Rani Banik & Ors., AIR 2006 SC 1634; Harinagar Sugar Mills Ltd. V. State of Bihar & Ors., (2006) 1 SCC 59; and Orissa Hydro Power Corporation Ltd. V. Satwant Singh Gill, (2006) 9 SCC 663, the Apex Court held that review does not lie on the ground that applicant could not highlight all the aspects of the case or could have argued more forcefully or cited binding precedents to get a favourable judgment. (See Also : State of West Bengal & Ors v. kamal Sengupta & Anr (2008) 8 SCC 612; S.N.S (minerals) Ltd. & Anr v. Union of India & Ors. (2007) 12 SCC 132; Haryana State Industrial Development Corporation Ltd. & Ors v. Mawasi & Ors (2012) 7 SCC 200)