LAW COMMISSION OF INDIA

ONE HUNDRED SIXTY THIRD REPORT

ON

THE CODE OF CIVIL PROCEDURE (AMENDMENT) BILL, 1997

NOVEMBER, 1998

USTICE
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18.11.1998

Dear Dr.M.Thambi Durai,

I am forwarding herewith 163rd report on "The Code of Civil Procedure (Amendment) Bill, 1997".

2. The Law Commission was requested by the Government of India (Ministry of Law, Justice and Company Affairs) to undertake comprehensive revision of the Code of Civil Procedure, 1908. In January, 1998, the Commission took up the subject and decided to do the exercise in two phases. In the first phase, the Commission proposed to express its views on the various amendments suggested by the Code of Civil Procedure (Amendment) Bill, 1997 which was introduced as an official Bill in the Rajya Sabha. In the second phase of the work, the Commission intends to take up the revision of the Code in its entirety since a comprehensive revision of the entire Code would take comparatively longer time.

3. The Commission issued a comprehensive questionnaire on the subject to elicit informed opinion on several provisions and proposals contained in the Amendment Bill. The Commission also held three conferences at Delhi, Allahabad and Hyderabad through the assistance of concerned Chief Justices of the High Courts. There was an excellent response in the conferences from the members of the Bar, subordinate judiciary and Judges of the High Courts. The responses received on the various questions have also been considered by the Commission .

4. The Commission is of the opinion that certain changes recommended in the report need to be incorporated in the Code of Civil Procedure (Amendment) Bill, 1997 to attain the objective of speedy and effective justice.

With regards,

Yours sincerely,

(B.P.JEEVAN REDDY)

Dr.M.Thambi Durai,
Hon'ble Minister for Law, Justice
and Company Affairs,
Shastri Bhawan,
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CHAPTER-I

INTRODUCTION

1.1. Scope of the Report:- The Law Commission of India was requested by the Government of India (Ministry of Law, Justice & Company Affairs) to undertake comprehensive revision of the Code of Civil Procedure, 1908. The Commission took up the matter in January, 1998. It decided to do the exercise in two phases. In the first phase, the Commission proposed to express its views on the various amendments suggested by the Code of Civil Procedure (Amendment) Bill, 1997 (Annexure-A) (hereinafter to be called the Amendment Bill) which was introduced as an official bill in the Rajya Sabha. In the second phase of the work, the Commission proposes to take up revision of the Code in its entirety since a comprehensive revision of the entire Code would take comparatively longer time.

1.2. Issuing of Questionnaire and holding conferences:With a view to elicit informed opinion on several provisions and proposals contained in the Amendment Bill, the Commission prepared a questionnaire (Annexure-B) containing as many as 43 questions. Under each question, the Commission mentioned briefly the meaning of the proposed amendment and also indicated the possible responses and interpretations of the proposed amendment. Wherever necessary, relevant case law was also indicated to facilitate clear and informed responses. It

was, however, made clear that the views, if any, expressed in the questionnaire by the Commission did not represent its final views but were only tentative opinions put forward with a view to eliciting effective and informed responses from members of the Bar, Bench and other persons concerned with the subject.

1.3. Besides communicating the questionnaire to all concerned, the Commission also held three conferences at Delhi, Allahabad and Hyderabad. The respective Chief Justices were requested to arrange the conferences which they gracefully did. The conference at Delhi was moderated by Ms. Justice Leila Seth, Member, Law Commission while the conferences at Allahabad and Hyderabad were moderated by the Chairman. There was an excellent response at all the three conferences from the members of the Bar, subordinate judiciary and Judges of the High Court. In many cases, they expressed their views in writing. The Commission prepared a record of the proceedings of all the three conferences, briefly recording the various views expressed by the participants.

1.4. The Commission is grateful to all those who have favoured us with their views in response to the questionnaire or have addressed their views during the conferences organised by the Commission. The replies on the various questions have received our most careful consideration.

1.5. Importance of the subject:- The Commission has been repeatedly voicing concern in its various reports about the quality of the justice delivery system in the country. Thus, in its 127th report on 'Resource Allocation for Infra-Structural Services in Judicial Administration - (A continuum of the report on Manpower Planning in Judiciary: A Blueprint)', the Commission observed as follows:

> "1.1 Ever since men have begun to reflect upon the relations with each other and upon vicissitudes of the human lot, they have been pre-occupied with the meaning of justice and a popular belief has been that justice can only be obtained through court. That itself gives credence, credibility and respectability to the court system. But like any other institution, the system has to constantly justify its existence by rendering the service expected of it. The moment it fails or falters, the credibility and respectability devalues. For a functioning democracy, court system, where justice is obtained even against the State, is a pre-requisite. Therefore, the court system, whenever it is under an unbearable load, requires thorough re-examination and its restructuring with a view to making it efficient, people and result-oriented. (Allen, quoted in the Report of the Labour Laws Review Committee, 4 (Government of Gujarat, 1974))."

"1.2 The Universal Declaration on Human Rights provides that:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law". (Art.18, Universal Declaration of Human Rights approved by the General Assembly of the United Nations).

Expounding the fundamental principles of justice underlying the Declaration, in another report, the Law Commission had observed as under:

> "Equality is the basis of all modern systems of jurisprudence and administration of justice... In so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose. (LCI 14th Report on 'Reform of Judicial Administration', p.587)."

1.5.1. Failure on the front of providing adequate and easily accessible courts of justice is one of the principal causes of popular dissatisfaction with the administration of justice. This was voiced way back in 1906 by Dean Roscoe Pound in his famous speech as follows:

> "The dissatisfaction stems from unmanageable backlog of cases, mounting arrears and inordinate delay in disposal of cases in courts at all levels lowest to the highest coupled with exhorbitant expenses. This has attracted the attention not only of the members of the Bar, consumers of justice (litigants), social activists, legal academics, Parliament, but also the managers of the court." (Quoted in H.T. Rubin, The Courts, Fulcrum of the Justice System, 208).

1.5.2. The Commission in its 127th report also pointed out that the expression "access to justice" had different connotations. The road blocks in the access to justice could be high cost, geographical distance, adverse cost-benefit ratio and the inordinate delay in search of illusory justice. The State was responsible for removing all road blocks in the access to justice. Accordingly, the State should ensure that the system is equally accessible to all and should lead to the results that were individually and socially just.

1.5.3 The concept of access to justice has undergone significant transformation. Earlier, the right to judicial protection meant the aggrieved individual's formal right to litigate or defend a claim. It did not require active State action for this purpose. Their preservation only required that the State did not allow them to be injured by others. Relieving 'legal poverty', that is, incapacity of many to make full use of the law and institutions was not the concern of the State. (M.Capelletti, Access to Justice, 6-7 (Book 1) (vide paragraphs 2.2 and 2.3 of the 127th report of the Law Commission, cited supra).

1.5.4 The procedure is the handmaid to the substantive rights of the parties. [Sukhbir Singh v. Brij Pal Singh, (1997) 2 SCC 200]. Substantive laws determined the rights and obligations of citizens but the procedural laws, which are equally if not less important, prescribe the procedure for the enforcement of such rights and obligations. The efficacy of substantive laws, to a large extent, depends upon the quality of the procedural laws. Unless the procedure is simple, expeditious and inexpensive, the substantive laws, however good are bound to fail in their purpose and object.

1.5.5 Besides, as the Commission observed in its 114th report on Gram Nayayalaya, Chapter V, para 5.3 that -

"5.3 It would be unwise to look at the problem from the point of view of court management only. In other words, it would be very imprecise to examine the matter from the aspect of ever-growing court dockets. Such an endeavour has to be guided by the aspirations proclaimed in the Constitution of India. Article 39A of the Constitution of India directs the State to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This is the constitutional imperative. Denial of justice on the ground of economic and other disabilities is in nutshell referred to what has been known as problematic access to law. The Constitution now commands us to remove impediments to access to justice in a systematic manner. All agencies of the Government are now under a fundamental obligation to enhance access to justice...."

1.5.6. Article 39A casts a positive duty on the State to so structure the legal justice system as to ensure that its operation promotes justice, on a basis of equal opportunity. To attain this object, the State has to pass suitable legislation or frame schemes to ensure that opportunities for securing justices are not denied to any citizen by reason of

economic or other disabilities. Among other disabilities, courts situated at a long distance from the habitat of the citizens in search of justice itself would have a dampening effect on one's search of justice (see para 2.4 of Law Commission of India, 127th report, supra).

Therefore, while bringing about reforms in the Code, it is quintessential to keep in view the above constitutional objectives.

1.5.7. Delay in disposal of cases threatens justice. The lapse of time blurs truth, weakens memory of witnesses and makes presentation of evidence difficult. This leads to loss of public confidence in the judicial process which in itself is a threat to rule of law and consequently to the democracy. The rising cost of litigation can also be said to be attributable to delay which in turn causes the litigants to either abandon meritorious claims or compromise for a lesser unjust settlement out-of-court. Besides, expression of society's moral outrage is essential in an ordered society that asks its members to rely on legal processs rather than self-help to vindicate the wrongs. To avoid anarchy, fairness has to be actually felt by the aggrieved persons and it is the courts which provide the systematic outlet. Obedience to law has been described as the strongst of all the forces making for a nation's peaceful continuity and progress. (S.Shetreet,

"The Limits of Expeditious Justice", Expeditious Justice, 1 at page 15) (vide paras 2.15 and 2.12 of the 127th report of Law Commission of India, supra).

1.6. Attempts made in the past

The Commission has made a number of recommendations in its earlier reports for speedy disposal of cases and with a view to tackling the mounting arrears pending in various courts in the country. The relevant reports are as under:

(i) 14th report on "Reform of Judicial Administration"

(ii) 27th report on "Code of Civil Procedure, 1908"

(iii) 54th report on "Code of Civil Procedure, 1908"

(iv) 55th report on "Rate of interest after decree and interest on costs under Sections 34 and 35 of the Code of Civil Procedure, 1908"

(v) 56th report on "Notice of Suit required under certain Statutory Provisions"

(vi) 58th report on "Structure and Jurisdiction of the Higher Judiciary"

(vii) 77th report on "Delay and arrears in trial Courts"

(viii) 79th report on "Delay and arrears in High Court and Other Appellate Courts"

(ix) 99th report on "Oral and Written arguments in the Higher Courts"

(x) 114th report on "Gram Nyayalaya"

(xi) 124th report on "The High Court Arrears - A Fresh Look"

(xii) 125th report on "The Supreme Court - A Fresh Look"

(xiii) 126th report on "Cost of Litigation"

(xiv) 129th report on "Urban Litigation - Mediation as Alternative to Adjudication"

(xv) 130th report on "Conflicts in High Court Decisions on Central Laws - How to Foreclose and How to Resolve"

(xvi) 139th report on "Urgent Need to Amend Order XXI, Rule 92(2), Code of Civil Procedure to Remove an anomaly which nullifies the Benevolent Intention of the Legislature and occasions injustice to Judgment-Debtors sought to be benefited."

(xvii) 140th report on "Need to amend Order V, rule 19A of the Code of Civil Procedure, 1908, relating to service of summons of registered post with a view to foreclosing likely injustice"

(xviii) 144th report on "Conflicting Judicial Decisions pertaining to the Code of Civil Procedure, 1908"

(xix) 155th report on "Suggesting some amendments to the Code of Civil Procedure (Act No.V of 1908)"

CHAPTER-II

Recommendations and Conclusions Regarding The Code of Civil Procedure (Amendment) Bill, 1997

2.1 The law relating to the procedure in suits and civil proceedings in India (except in the case of State of Jammu and Kashmir, Nagaland and Tribal areas of Assam and certain other areas) is contained in the Code of Civil Procedure, 1908 (hereinafter referred to as the "Code"). The Code has been amended from time to time by various Acts of Central and State Legislatures. 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 are specified in the orders. Under section 122 of the Code, the High Courts have powers to amend, by rules, the procedure laid down in the orders. In exercise of these powers, various amendments have been made in the orders by different High Courts.

2.2 With a view to implementing the recommendations of Justice Malimath Committee, 129th Report of the Law Commission of India and the recommendations of the Committee on Subordinate Legislation (11th Lok Sabha), and the resolution adopted in the Law Ministers' Conference held in New Delhi on 30th June and 1st July, 1997 the Government introduced a Bill called the Code of Civil Procedure (Amendment) Bill, 1997 for amending the Code of Civil Procedure, 1908. The Bill

(Annexure-A) inter-alia, aims at expediting the disposal of civil suits and proceedings so that justice may not be delayed (see para 2 of the Statement of Objects and Reasons annexed with the Amendment Bill). The Bill also seeks to amend certain provisions of the Limitation Act, 1963 and the Court Fees Act, 1870.

2.3 The Amendment Bill seeks to make some of the following important changes in the Code of Civil Procedure, 1908 (as indicated in the Statement of Objects and Reasons annexed with the Bill):-

> "(a) any plaint to be filed shall be in duplicate and shall be accompanied by all the documents on which the plaintiff relies upon in support of his claim. It is also to be supported by an affidavit stating the genuineness of the claim of the plaintiff and of the documents on which he relies upon;
>
> (b) the written statement in duplicate shall be accompanied by all the documents and shall be filed within a period of thirty days from the date of service of summons. Written statement is also to be supported by an affidavit;
>
> (c) in order to obviate delay in service of summons, it is proposed that plaintiff shall take the summons from the court and send it to the parties, within two days of the receipt thereof, by post, fax, e-mail, speed post, courier service or by such other means as may be directed by the court;
>
> (d) with a view to implement the 129th Report of the Law Commission of India and making conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute, after the issues are framed, for settlement either by arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court in which it was filed;

(e) As maximum time is consumed by the courts in recording oral evidence which causes delay in disposal of cases, it is proposed to reduce such delay by making provisions for filing of examination-in-chief of every witness in the form of an affidavit. For the cross-examination and re-examination of witnesses, it is proposed that it shall be recorded by a commissioner to be appointed by the court and the evidence recorded by a Commissioner shall become part of record of the suit;

(f) With a view to implement the recommendations of the Committee on Subordinate Legislation (11th Lok Sabha) relating to steps to reduce unnecessary adjournments, it is proposed to make it obligatory for a judge to record reasons for adjournment of a case as well as award of actual or higher cost and not merely notional cost against the parties seeking adjournment in favour of the opposite party. Further, it is proposed to limit the number of adjournments to three only during the hearing of a case;

(g) As the party in whose favour an injunction has been granted usually causes delay on flimsy and unreasonable grounds, it is proposed that the party who applies for injunction shall also furnish security so that that party may not adopt delaying tactics during the trial of the case;

(h) In matters relating to property disputes, particularly in matter of unauthorised construction on the land of others, it has been found that, under the existing provisions of the Code of Civil Procedure, no application for injunction can be moved unless the suit is filed first in the court having competent jurisdiction. With a view to obviate this hardship, it is proposed that a person may make an application to the court of competent jurisdiction for appointment of a commission to ascertain the factual status of the property so that at the time of filing of regular suit, the report is available to the Commissioner relating to the factual status of the property in dispute;

(i) With a view to implementing recommendations of Justice V.S. Malimath Committee, it is proposed that no further appeal against the judgment of a single judge shall lie even in a petition under article 226 or 227 of the Constitution; and

(j) with a view to reduce delay, it is proposed that the court shall, on the date of pronouncement of judgement, simultaneously provide authenticated copies of the judgment to the parties. Appeal shall be filed

in the court which passes the decree and no notice shall be served on the advocates of the parties in the court of first instance.

3. The Bill seeks to achieve the above objects."

2.4. A perusal of the Amendment Bill shows that there are 36 clauses which contain various amendments, substitutions, omissions and insertions. The Amendment Bill also contains notes on clauses of the Bill which furnish the necessary background for amending the existing provision or for insertion of new provision in the Code. A memorandum regarding delegated legislation points out the provisions under which the Government or the High Courts can frame rules. For facility of comparison with the existing provisions of the Code which are sought to be modified by the Amendment Bill, an extract of such provisions is also appended to the Amendment Bill at internal pages 23 to 38 thereof.

2.5. The Commission intends to specifically deal with and make recommendations on the following clauses in the Amendment Bill, namely, clauses 2, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23,, 24, 26, 27, 28, 30, 31 and 32, which appear to bring about radical changes in the Code. In respect of other clauses of the Bill, the Commission is in agreement with the amendments suggested.

2.6 <u>Clause 2 of the Amendment Bill proposing to insert sub-section (2) in section 26 making it obligatory upon the plaintiff to file an affidavit in support of the facts stated in the plaint</u>:- A similar provision has been proposed in Order

VI. The proposal is to insert sub-rule (4) in Rule 15 of Order VI providing that "The person verifying the pleading shall also furnish an affidavit in support of his pleadings". Obviously, this would cover the written statement also.

2.6.1. The response of members of the Bench as well as the Bar has been uniformly against the above proposals. The general view expressed by them is that such a provision would only add to the delays in disposal of suits. It was submitted that there are enough provisions in the existing law to deal with false and malicious averments in the pleadings and that this additional requirement would not make any difference. By way of example, the participants in several conferences referred to a similar requirement in support of facts stated in the writ petitions and counters and other affidavits filed in the writ proceedings which had in no manner operated as a check upon the tendency to make false statements. It was also observed that the pleadings acquired the character of evidence with the filing of affidavit in support of the pleadings. In such an event, a party could even call the other party to cross-examine him with respect to the facts stated in his pleadings.

2.6.2. The Law Commission is, however, of the opinion that the proposed amendments are salutary and may, at least to some extent, check the tendency to make false averments in the pleadings. In this connection, the Commission recalls the following observation of George Bernard Shaw..." the theory of

legal procedure is, if you set two liars to expose one another, truth will emerge". Probably it was meant as a satire, made in his typical style, on the type of pleadings in courts and to emphasise the tendency to make false averments in the pleadings. This tendency has certainly to be checked. Even if the parties in two to five per cent cases could be dealt with appropriately for making false statements in the pleadings, it would greatly help in arresting this tendency. In any event, the measures proposed may be tried out on an experimental basis and if it is found to cause further delays, as apprehended by many participants in the conferences, the same could be reviewed. It should, however, be clarified that the party swears to the correctness of only the facts stated in the pleadings and not to the questions or propositions of law, if any, stated therein. It should also be open to the party to say in his affidavit which of the facts are true to his knowledge and which of the facts he believes to be true on the basis of information received by him. It may not be inappropriate to refer to observations of the Supreme Court in the following cases:

In Dhananjay Sharma v. State of Haryana, (1995) 3 SCC 757, p.38, it was held:

> "...The swearing of false affidavits in judicial procedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and

interfere with the administration of justice... The due process of law cannot be permitted to be slighted nor the majesty of law be made a mockery by such acts or conduct on the part of the parties to the litigation or even while appearing as witnesses. Anyone who makes an attempt to impede or undermine or obstruct the free flow of the unsoiled stream of justice by resorting to the filing of false evidence commits criminal contempt of the Court and renders himself liable to be dealt with in accordance with the Act. Filing of false affidavits or making false statement on oath in Courts aims at striking a blow at the Rule of Law and no Court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountaion of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statements and fabricating false evidence in a court of law. The stream of justice has to be kept clean and pure and anyone soiling its purity must be dealt with sternly so that the message percolates loud and clear that no one can be permitted to undermine the dignity of the court and interfere with the due course of judicial proceedings or the administration of justice..."

In Mohan Singh v. Late Amar Singh through the LRs, 1998(5) SCALE 115, the Supreme Court stressed the consequences of filing false affidavits in courts, by holding as under:-

> "36...Tampering with the record of judicial proceedings and filing of false affidavit, in a court of law has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of unsoiled stream of justice and aims at striking a blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity. Since, we are prima facie satisfied that the tenant has filed false affidavits and tampered with judicial record, with a view to eradicate the evil of perjury, we consider it appropriate to direct the Registrar of this Court to file a complaint before the appropriate court and set the criminal law in motion..."

In view of these rulings, the Law Commission considers that the suggested amendment is appropriate.

2.7 Clause 7 of the Amendment Bill proposing to insert section 89, enabling and/or obliging the Court to explore the possibility of alternative methods of dispute resolution viz., conciliation, mediation, arbitration, judicial settlement or settlement through Lok Adalat:- Coming to the proposal, it may

be mentioned that there was good amount of debate on the same. Almost a uniform opinion was expressed by both the members of the Bench and the Bar that the Court should not be asked to undertake the exercise contemplated by proposed Section 89. Doing so would invite comments and suspicion upon the neutrality of the court as an impartial arbiter, it was submitted. While formulating the terms of settlement or while reformulating the terms of a possible settlement after receiving the observations of the parties, it may happen that the court may be obliged to express some opinion on a particular aspect of the dispute which may not be liked by one of the parties. Some procedural difficulties (e.g. absence of provision for a reference to arbitration in a pending suit in the present Arbitration Act) were also pointed out. Accordingly, several alternatives were suggested by the participants. One of the alternatives suggested was that instead of inserting proposed section 89, the existing Order XXXII-A may be suitably amended to cover all suits. Another suggestion which appeared to have gathered large amount of support was that after the issues were settled, every suit should be necessarily sent to a committee or board of conciliators comprised of senior lawyers and retired judicial officers enjoying high reputation for integrity and competence. Such a committee or board will decide, after hearing the parties, whether the suit should be referred to any of the alternative modes of dispute resolution mentioned in sub-section (1) of section 89. It was explained that generally speaking, there was good amount of interval between

the framing of the issues and the commencement of the trial and as such a mandatory reference to the committee or the board would not, really result in delaying the trial or the disposal of the suit. Some others, however, expressed an apprehension that while this suggestion may be possible to implement in cities and big towns where a number of senior lawyers and retired judicial officers were available, there may be difficulties in implementing the same in smaller towns where there was only one court and there were not enough senior lawyers or retired judicial officers of high integrity.

2.7.1. The Law Commission is of the opinion that proposed section 89 may be suitably modified to provide as under:
(a) After the settlement of issues in every suit (when both the parties would have also filed their basic documents as required by the proposed provisions relating to filing of documents along with the pleadings), the suit shall be referred to a board of conciliators to explore whether there existed elements of settlement which were acceptable to the parties and if it appeared to the board that such elements of settlement did exist, they shall refer the suit for arbitration, judicial settlement or settlement through Lok Adalat. Method of conciliation could be tried by the Board itself if found feasible. Such reference could be made either after reformulating the terms of possible settlement if the board found the same feasible and advisable or without such reformulation, as the case may be.

(b) The presiding Officer of the principal civil court in every city and town shall constitute, in consultation with his senior colleagues, a Board of conciliators consisting of retired judicial officers and senior lawyers of known integrity and competence.

(c) A time limit should be prescribed within which the board of conciliators shall complete its work i.e., either refer the suit to arbitration/judicial settlement or settlement through Lok Adalat- or bring about a settlement through conciliation -if it finds that such a course was advisable or report to the court that it could not find any elements of settlement which might be acceptable to the parties and that, therefore, any reference of the suit to arbitration/conciliation/judicial settlement or settlement through Lok Adalat was not warranted or advisable. This period could range between 4 months to one year, as may be specified by each court.

(d) To delete the alternative mode of "mediation" mentioned under clause (2) of sub-section (1) of the proposed section 89. Mediation by a court could be resorted to at any stage of the proceedings and it should not be stipulated as a matter of law either at the stage of the issues or at any subsequent stage. Such a course is always open to the court and there is no reason to define or codify it. Accordingly, clause (d) in sub-section (2) of Section 89 might be deleted.

Section 89 may be redrafted in the light of the aforesaid recommendations.

2.8 Clause 10 of the Amendment Bill proposing to substitute existing section 100A:- By virtue of this amendment, the Letters Patent Appeal against the judgement and decree of a single Judge made in an appeal preferred under section 96 of the Code as well as the Letters Patent Appeal preferred against the judgment and order of a single judge in an application made under article 226 or article 227 of the Constitution is sought to be done away with altogether.

2.8.1. So far as the proposal to abolish the Letters Patent Appeal against the judgment and order of a learned single judge made on an application under article 226 is concerned, there was a strong and uniform opposition against the proposal from both the members of the Bench and the Bar. Such a move would only result in adding enormously to the burden of the Supreme Court because the only remedy then available would be to approach the Supreme Court under article 136 of the Constitution.

2.8.2. So far as article 227 is concerned the position is the same. However, the procedure followed by different High Courts in this behalf is not uniform. For example, in the High Court of Andhra Pradesh- and probably in some other southern High Courts too, an application under article 227 of the Constitution is treated and registered as a civil revision

petition. In such a situation, there is no question of any Letters Patent Appeal against the order made on such an application/petition. In some other High Courts,however, an application under article 227 is generally treated on par with an application under article 226. Yet another distinctive practice peculiar to Allahabad High Court appears to be that by virtue of Uttar Pradesh High Court (Abolition of Letters Patent Appeal) Act, 1962. Letters Patent Appeal stands abolished against the orders of single Judge made on a writ petition (a petition under article 226 of the Constitution) preferred against the judgment and orders of tribunals and other quasi-judicial authorities.

2.8.3. The Law Commission is of the opinion that so far as the proposal to abolish Letters Patent Appeal against the judgment and order, whether interim or final of a single Judge made on an application under article 226 or article 227 is concerned, it is neither advisable nor desirable. Quite a few of the writ petitions disposed of by single Judges in various High Courts involve substantial stakes and have serious consequences both for the State as well as the citizens. Very often, the writ petition is an original proceeding. At any rate, it is an original proceeding in a civil court i.e., High Court. There ought to be at least one appeal against the order made by a single Judge on applications preferred under article 226. The proposed move is certainly not in public interest because in many cases the public interest may suffer if such a proposal is given effect to. The Law Commission,

therefore, strongly recommends against the move to abolish the Letters Patent Appeal against the judgment and orders made by a single Judge on an application made under article 226 or article 227, wherever it is available at present. The existing practice prevailing in various High Courts ought to be continued. In fact, by virtue of the aforementioned UP Act of 1962, a large number of appeals are being preferred in the Supreme Court against the judgment and orders of single judges made in writ petitions filed in the Allahabad High Court.

2.8.4. Now coming to the proposal to abolish the Letters Patent Appeal against the judgment and decree of a single Judge made in an appeal against the original decree (i.e., under section 96 of the Code), two strands of opinions can be said to have emerged in the various conferences and in the responses received from the various governments, organisations and individuals. While one view is to continue the existing practice without any change, the other view is to limit this right only to substantial questions of law arising from the judgment of a single judge on the lines of section 100 of the Code. A few participants supported the proposal in its entirety. The opinion ultimately expressed by a majority of the participants/respondents is that the provision of Letters Patent Appeal against the interim/interlocutory orders made by a single Judge in such first appeals should be done away with though the letters patent appeal against the final judgment/decree should be retained in a restricted fashion. It was suggested by some of the Hon'ble Judges of the High

Court that not many Letters Patent Appeals were filed against the judgment and decrees of single Judges in first appeals and that even among those filed, a majority were dismissed at the stage of admission itself.

2.8.5. The law Commission is of the opinion that so far as the final judgment and decrees made in first appeals (appeals preferred against the judgment and decree in an original suit) are concerned, it is both advisable as well as desirable that the Letters Patent Appeal should not be abolished altogether against such judgment and decree. The suggestion to restrict the Letters Patent Appeal in such matters to substantial questions of law only on the lines of section 100 of the Code is laudable and deserves to be accepted. This suggestion is made in view of the fact that according to the law laid down by the Supreme Court and certain High Courts, in such Letters Patent Appeals even questions of fact are open to review, though as a matter of practice, the Letters Patent court ordinarily respects the concurrent findings of fact. Be that as it may, the restriction of the Letters Patent Appeal to substantial questions of law alone would not only restrict and reduce the number of such Letters Patent Appeals but would drastically cut down the admission rate of such appeals. No such appeal should be permitted against interim/interlocutory orders.

2.9 Clause 11 of the Amendment Bill proposing to substitute the existing section 102:- By this amendment, not only the value of subject-matter of the suit is sought to be raised from Rs.3000/- to Rs.25,000/-, even the existing restriction as to the nature and character of the suit is also sought to be done away with. In other words, according to the proposed/substituted section 102, there shall be no second appeal at all where the amount or value of the subject-matter of the original suit does not exceed Rs. 25,000/-.

2.9.1. While some participants/respondents supported this proposal, quite a few of them opposed the removal of restriction as to the nature and character of the suit while welcoming proposed enhancement of value of the subject-matter from Rs. 3000/- to Rs. 25000/-. It was pointed out by several participants that having regard to the provisions contained in section 11 of the Code incorporating the rule of res judicata, many decrees made by the courts in suits the value of the subject-matter whereof is less than Rs.. 25,000/- may operate as res judicata even in matters of far higher value.

2.9.2. The Law Commission is of the opinion that while the amount or value of the subject-matter of the original suit in proposed section 102 be raised from Rs.25,000/ to Rs.50,000/-, the proposed removal of restriction as to the nature and character of the suit may be dropped. (At present, the provision is limited to suits of the nature cognizable by

courts of Small Causes.) It may be remembered that a second appeal is not available on all points but is restricted only to substantial questions of law. In such a situation, abolition of second appeal altogether in all matters the value of subject-matter whereof does not exceed Rs.25,000/- may not be an appropriate step. The reason for the Law Commission recommending the raising of monetary limit from Rs. 25,000/to Rs.50,000/- is that generally speaking, money suits are comparatively simple suits which fact is recognised and affirmed by the fact that the Legislature has thought it fit to enact Order XXXVII-providing for summary procedure in many money suits irrespective of the monetary value thereof. Situation may be different in the case of other types of suits. In this connection, it may be recalled that suits for mere permanent injunction are valued at a low figure unrelated to the value of the subject-matter of the suit. This is indeed permitted by the various court-fees Acts. Therefore, a provision of the nature proposed may result in grave injustice in such cases.

2.10 Clause 12 of the Amendment Bill proposing to delete the existing clause (b) of the proviso to sub-section (1) of Section 115 and the further addition of sub-Section (3) in section 115.:-There was almost uniform opposition to the proposal to delete clause (b) of proviso to sub-section (1) of section 115. It was submitted that such a power should be available to the High Court to correct instances of failure of

justice or of orders causing irreparable injury. It was submitted that deletion of the said clause would only result in more remands by the appellate courts. Only a few members of the subordinate judiciary in the State of Uttar Pradesh supported this provision. So far as the insertion of sub-section (3) is concerned, it was generally welcomed by all.

2.10.1. The Law Commission, while welcoming the insertion of sub-section (3) in section 115, is of the opinion that the proposal to delete clause (b) of the proviso to sub-section (1) is not advisable nor would it serve the purpose of speedy disposal of suits. May be, it is true, that in some States interference under section 115 is being made very liberally and without due regard to the restrictive language of the section. That is certainly a feature to be deprecated and discouraged. The High Courts and the other authorities exercising powers of revision (in the State of Uttar Pradesh, the power of revision has been conferred upon the District Judges) should always bear in mind the significance, the object and the purpose underlying Section 99 of the Code. Section 99 is premised on the supposition that each and every infraction of a procedural provision in the Code does not warrant interference by the appellate court and that interference with a judgment and decree is warranted only where such infraction has resulted in substantial prejudice to the party. This is the spirit behind section 99 which says, "No decree shall be reversed or substantially varied, nor

shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or cause of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court." But the proposal to delete clause (b) of proviso to section 115 (1) on the ground of frequent interference by the courts exercising powers of revision may not be warranted. The remedy lies elsewhere, namely, exercising restraint and self-discipline while exercising power of revision. It may be noted that this clause was inserted on the recommendations of Law Commission of India, 27th report, pr.57 thereof at p.25. In this regard the reason underlying these provisions is quoted under pr.56 of the said report, are quoted below:-

> "56. As regards the second question, the Law Commission after carefully considering the views expressed before it, came to the conclusion that the right of revision against an interlocutory order is a valuable right which should not be abolished. The case for retaining the right of revision against an interlocutory order was fairly put by an experienced Chief Justice who made the following statement before the Law Commission:-
>
> > "It is not unoften that a very wrong order is made. If it be made impossible to challenge the order immediately and have it set aside and if the error is left to be corrected in

the appeal from the final order if and when such an appeal is taken, the intermediate proceedings will necessarily all be on an erroneous basis and it can hardly be just to compel the parties to submit to the order without any chance of instant redress."

The Law Commission in the Fourteenth Report accordingly recommended that the expression "case decided" in section 115 should be so defined as to include an interlocutory order. Necessary amendment is proposed in section 115."

The Commission feels that the reasons assigned for introducing this clause in Section 115 as quoted under pr.56 of 27th report of Law Commission are germane and lead to the conclusion that the said provision should be retained. The Law Commission, therefore, recommends that the proposal to delete clause (b) of proviso to sub-section (1) of section 115 be given up. The addition of sub-section (3) is, however, perfectly in order.

2.11. Clause 13 of the Amendment Bill seeking to substitute the words "not exceeding 30 days in total "in the place of the existing words "such period":- Section 148 provides for enlargement or extension of time fixed or granted under the orders of the court. The proposal to limit the discretion of

the court in this behalf to a total period of 30 days has been uniformly opposed by all the participants as unduly fettering the discretion of the courts.

2.11.1. The Law Commission is also of the opinion that no such restriction should be placed in section 148. Situations may arise where the interests of justice may call for exercise of power under section 148 even beyond the period proposed to be stipulated. Any such restriction of time may in some cases even lead to failure of justice. The proposal may, therefore, be dropped.

Amendment of Orders

2.12. Clause 14 of the Amendment Bill proposing to amend sub-rule (1) of rule 1 of Order IV and proposing to insert sub-rule (3) in rule 1 of Order IV.:- The amendment to sub-rule (1) is formal in nature and is not opposed. But, so far as the proposal to insert sub-rule (3) is concerned, it was apprehended by many of the participants in the various conferences that such a rule may lead to innumerable complications. Sub-rule (1) of Rule 1 of Order IV provides that every suit shall be instituted by presenting plaint to the court or such officer as it appoints in this behalf while sub-rule (2) says that every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable. The proposed sub-rule (3) says that a plaint shall not be deemed to have been duly instituted unless it

complies with the requirements specified in sub-rules (1) and (2). The proposed rule would give room for objection by the defendant that the plaint does not conform to one or the other requirements of Order VI or Order VII, which may contribute to delaying the suits further. Moreover, from the stand point of limitation also, the proposed sub-rule (3) may give rise to considerable difficulty. The existing legal position is that the date of presentation of plaint is treated as date of filing of suit. This rule may become inapplicable, if the proposed sub-rule (3) is inserted. A time-limit could be indicated within which all defects in and objections to presentation of plaint are to be rectified. The Law Commission, therefore, recommends that the proposed sub-rule (3) may be dropped and instead a time-limit may be prescribed within which all defects in and objections to the presentation of plaint have to be rectified. An outer time-limit of 30 days would appear appropriate.

2.13. Clause 15 of the Amendment Bill seeking to amend several Rules in Order V:- We may deal with each of the rules proposed to be amended separately.

(1) Amendments proposed to Rule 1(1):

The existing sub-rule (1) of Rule 1 of Order V provides that "When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified: Provided that no such

summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim: Provided further that where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons". According to the proposed/substituted sub-rule (1) the defendant is required to file his written statement "on such day within thirty days from the day of institution of the suit as may be specified therein" in the summons. Though the first proviso is not proposed to be amended, the second proviso as amended, provides that where the defendant fails to file a written statement on the date prescribed in the main body of sub-rule (1), the defendant shall be allowed to file the same "on such other day which shall not be beyond thirty days from the date of service of summons on the defendant, as the Court may think fit". It is true that the proposed amendment is inspired by a concern for expeditious progress of the suit but at the same time, it is necessary to take into account the practical problems and the realities of the situation while fixing such mandatory time limits. All the suits are not simple in nature. Some of them are complicated, calling for a good amount of preparation by the defendant before he can file a written statement. It may happen that in some cases the defendant may be required to gather good amount of material before he can file his written statement. Some clarifications may also be necessary to be asked for by the defendant with respect to statements in the plaint. All this cannot happen

within the period prescribed in the proposed sub-rule (1). While some participants, particularly the members of the Bar, suggested that there should be no such time limits and that the rule should merely direct the court to call upon the defendant to file his written statement at the earliest, having regard to the facts and circumstances of the case, some other members, particularly members of the Bench, strongly supported mandatory time limits for filing the written statement. However, even the latter class of participants agreed that the time limits proposed in sub-rule(1) were unrealistic and might result in failure of justice in some cases. There was consensus that the words "within thirty days from the day of institution of the suit" in the main body of the proposed sub-rule(1) should be substituted by the words "within sixty days from the day of institution of the suit" and similarly, in the second proviso, the words "thirty days from the date of service of summons on the defendant" should be substituted by the words "ninety days from the date on which the period of sixty days aforesaid expires".

2.13.1. The Law Commission agrees with the view that the time limits proposed in sub-rule(1) in the Amendment Bill are harsh and might result in failure of justice in some cases. This may be particularly true in suits where the Government happens to be the defendant. Experience shows that in cases where Government is the defendant, it is not as prompt as a private party in filing the written statement. Because of the very nature of the working of the government departments and the

requirement of coordination and internal correspondence between one department and the other, it generally requires a longer time for filing the written statement. It is true that in the interest of speedy disposal of the suits, the period for filing the written statement should be curtailed but it should not be done in such a manner as to prove counter-productive. The Law Commission is, therefore, of the opinion that the words "thirty days" in the main body of sub-rule(1) should be made "sixty days" and the period of "thirty days" prescribed in the second proviso to sub-rule(1) should be made ninety days and this period of ninety days should be calculated from the date of expiry of sixty days prescribed in the main body of sub-rule(1).

(ii) Proposed substitution of Rule 9:

2.13.2. The proposed substitution of rule 9 provides for sending the summons to the defendant by other supplementary means presently not specified in sub-rule (1) of Rule 9. The existing sub-rule also places the duty of serving the summons upon the plaintiff. Sub-rule (1) says that "The Court shall issue summons and deliver the same to the plaintiff or his agent for service....." While there was a general welcome to the proposed sub-rule(1), which seeks to take advantage of the new and modern methods of communication like speed post, courier service, fax and E.mail, there was uniform opposition, both from the members of the Bar and Bench, to the proposal to deliver the summons to plaintiff for being served upon the defendant. It was submitted that the summons should be sent

in any of the modes specified in sub-rule (1) to rule 9 by the court itself, though at the expense of the plaintiff. An apprehension was expressed by many participants that delivery of summons to the plaintiff for service upon defendant may provide room for mischief and fraud. The Law Commission agrees with the same and accordingly recommends that while sub-rule (1) of Rule 9, as proposed, may be adopted the words in the said sub-rule which provide for delivering the summons to the plaintiff or his agent for service upon the defendant should be deleted and the service of summons in any of the modes specified by the Code should be by the court itself, no doubt at the expense of the plaintiff.

2.13.3. So far as sub-rule (2) of new Rule 9 is concerned, it also requires to be amended in the same terms. In other words, sending of summons through court in the traditional mode shall be by the Court itself and not through plaintiff. It was suggested that the sub-rule may stipulate that the office/Registry of the Court shall send the summons within seven days of the filing of the summons with requisite charges by the plaintiff .

2.13.4. It was also suggested by some of the respondents/participants that sub-rule(3) must provide further that where endorsement was made by a postal employee or any authorised person that the defendant or his agent had refused to take delivery of the postal article containing the summons or refused to accept the summons by any other modes specified

in sub-rule(1), the Court shall, before declaring that the summons had been duly served upon the defendant or his agent, make an appropriate enquiry and make such declaration only on being satisfied that the endorsement was true. For this purpose, the court should be empowered to summon the postal employee or other authorised person and to record his statement on oath wherever called for. The Commission in its 140th Report pr.6.1 observed that we cannot overlook the fairly large number of reported cases in which injustice might have resulted by reason of a fraud practised with the help of a dishonest postman or lapse in tendering the article to a wrong person. In view of this, the Law Commission agrees with this suggestion.

Proposed new Rule 9-A:

2.13.5. It was suggested by the participants and it is also the opinion of the Law Commission that the opening words in sub-rule(1) of the proposed Rule 9-A should read as follows:

> "The Court shall, in addition to and simultaneously with the issuance of summons in the manner provided in Rule 9....".

In other words, the normal mode of delivery of summons through Court should be mandatory and obligatory and shall be in addition to any modes of service specified in sub-rule(1) of Rule 9. Other amendments proposed in Order V are in order.

2.14 Clause 16 of the Amendment Bill proposing to amend certain rules in Order VI:- (i) Sub-clause (i) of clause 16 of the Amendment Bill proposes to omit Rule 5 of Order VI. The said rule enables the court to direct the parties to furnish better statement of the nature of the claim or defence,or further and better particulars of any matter stated in any pleading. This rule is perhaps sought to be omitted on the ground that it is unnecessary in view of the provisions for serving the interrogatories and the provisions relating to discovery and inspection. (Note on this clause indicates that the omission is being effected consistent with other changes proposed in the Code). Though there was some opposition to this deletion from among some of the participants, the Law Commission is of the opinion that existing Rule 5 can be safely omitted.

(ii) The proposed insertion of sub-rule(4) after sub-rule (3) in Rule 15 providing that the person verifying the pleading shall also furnish an affidavit in support of his pleadings has already been discussed by the Law Commission under paragraph 2.6., supra.

(iii) The proposal to delete Rule 17 (and the consequential provision in Rule 18) of Order VI has been opposed uniformly by all the participants, whether members of the Bar or of the Bench. All the participants pleaded for retaining Rule 17 but there were two different strands of opinion in this regard. According to one view, the present rule should be left

untouched. It was pointed out that in appropriate cases, the Supreme Court had granted the amendment of pleadings at the stage of appeal to the Supreme Court. It was also observed that any number of situations may arise including the subsequent changes in law and the subsequent discovery of new and relevant facts, which may call for amendment of the pleadings. In such a situation, it was suggested, the power of the court to grant amendment on appropriate terms should not be interfered with in any manner. According to the other strand of opinion, this power of amendment should be restricted. Members of the Bench, in particular, suggested that no application for amendment should be entertained once the trial of the suit had begun. In other words, all the amendments should be effected before the trial opened. Once the trial had commenced, no amendment should be granted except where such an amendment was called for by a subsequent change in law or the happening of a subsequent event necessitating such amendment. According to this view, the provision for amendment of pleadings was being misused by parties with a view to delay the trial and to harass the other side. It was submitted that very often application for amendment was filed on the date when the suit was posted for trial only with a view to stopping commencement of the trial because the party was not ready or it was not convenient for it to go on with the trial on that occasion. It was suggested that such attempts and tactics should be discouraged and it was for this reason that the suggestion had been made that no amendment should be allowed to be applied for once the trial opened and

that no such application should be entertained on the date on which the trial was to commence. The Law Commission is of the opinion that this power of amendment of pleadings should not be taken away. At the same time, however, it is necessary to ensure that this provision is not abused and is not used as a means of delaying the commencement or progress of the trial. The Law Commission, accordingly, agrees with the second strand of thought aforementioned. In other words, the Rule should state that no amendment of pleadings shall be granted and no such application for amendment should be entertained, on the date the trial is to commence except where the Court feels that the amendment is necessitated by a change in law effected subsequent to the framing of the issues or on account of any fact coming to the knowledge of the applicant after framing of the issues which he could not have discovered, with due diligence before the framing of the issues. Once the trial commences, no amendments should be allowed except where it is found necessary on account of the subsequent events whether legal or factual as mentioned above. Rule 18 being consequential in nature, does not call for any separate comment.

2.15 Clause 17 of the Amendment Bill:- (i) Clause 17 of the Amendment Bill proposes changes in Rule 9 Order VII dealing with the procedure on admitting plaints. The proposal is to substitute Rule 9 in Order VII. This may be effected

subject to the caveat that the service of summons should not be by the plaintiff but through the court as discussed hereinabove while dealing with Order V.

(ii) The additional grounds on which the plaint can be rejected as proposed in sub-clause (ii) of clause 17 of the Amendment Bill could also be included subject to the rider that it should be clearly indicated that the failure referred to in each of the proposed sub-clauses (e), (f) and (g) in rule 11 of Order VII, should be a repeated failure.

(iii) The proposed substitution of Rule 14 is a step in the right direction but the only thing suggested by the participants - with which the Law Commission agrees - is that the plaintiff should not be compelled to file the original document where he apprehends that it may be tampered with while in the custody of the registry of the Court. It should be open to the plaintiff to file the xerox copies of those documents which he apprehends may be tampered with while in the custody of the registry of the court. But, he shall be under an obligation to produce the same at the trial or as and when called upon by the court.

2.15.1. A number of participants suggested that sub-rule(3) of Rule 14 should be so worded that for special reasons to be recorded, the court should be empowered to allow the plaintiff to produce a document or copy thereof which he has not filed with the plaint. According to the Commission, this is a good

suggestion. Sub-rule 3 of Rule 14 may accordingly be re-cast so as to enable the court to permit the plaintiff to produce a document or a copy thereof which he has not filed along with the plaint.

(iv) The proposal to delete existing Rule 15 of Order VII is in order in view of Rule 14 (2) of Order VII as proposed in the Amendment Bill.

(v) Sub-clause (V) in clause 17 of the Amendment Bill proposes to omit the words "without the leave of the Court" in sub-rule (1) of Rule 18. This proposal is consistent with the formulation in proposed Rule 14.

2.16 Clause 18 of the Amendment Bill:(i) The proposed/substituted rule 1 in Order VIII provides that the defendant shall at or before the first hearing or within such time as the Court may permit, which shall not be beyond 30 days from the date of service of summons on the defendant, present a written statement of his defence. This aspect has been discussed and dealt with when dealing with Order V, hereinabove. For the reasons mentioned earlier, the periods prescribed for filing the written statement should be as suggested by the Law Commission while discussing the proposed amendments in Order V.

(ii) Rule 1A sought to be inserted in Order VIII is on the same lines as the proposed/substituted Rule 14 of Order VII. Therefore, whatever we have said with respect to proposed Rule 14 of Order VII applies in all respects to this proposal as well.

(iii) The proposed deletion of Rule 8A is consistent with proposed Rule 1A and is, therefore, unobjectionable except to the extent that the power of the court to permit the defendant to produce a document, which he did not produce with the written statement, should be retained with the rider that such power could be excercised only for special reasons to be recorded.

(iv) The proposed deletion of Rule 9 appears to be rather inadvisable. It is one thing to say that no pleading subsequent to the written statement of a defendant shall be allowed to be presented and it is a different thing to delete Rule 9 altogether. By deleting Rule 9, the opportunity to file a subsequent pleading by way of defence to a set off or counter-claim would also be taken away which is a very serious thing to do. Such an opportunity available to the defendant ought not to be taken away. Neither the objects and reasons appended to the Bill nor the notes on clauses appended to the Bill furnish any reasons for the deletion of Rule 9. In Smt.Shanti Rani Das Dewanjee v. Dinesh Chandra Day (Dead) By LRS. 1987(6) SCALE 260, it was held while referring to 1987(3) SCC 265:-

"2.... It has been held by this court that right to file a counter-claim under Order VIII Rule 6A of the Code of Civil Procedure is referable to the date of accrual of the cause of action. If the cause of action had arisen before or after the filing of the suit, and such cause of action continued upto the date of filing written statement, or extended date of filing written statement, such counter-claim can be filed even after filing the written statement..."

In Shri Jag Mohan Chawla v. Dera Radha Swami Satsang, 1996(4) SCALE 585, 587, it was observed regarding the limitations under Rule 6A:-

"5... The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the suit..."

The Law Commission is, therefore, of the opinion that either the proposal to delete Rule 9 may be dropped or it should be so worded that a pleading subsequent to the written statement of a defendant shall be permitted only by way of defence to a set off or by way of a counter-claim.

(v) The proposal to delete Rule 10 of Order VIII means that the court is now free to make such order as it thinks fit on the failure of the defendant to file a written statement. Probably, the idea behind the deletion is that Rule 10 is superfluous since it states the obvious. May be, Rule 10 is more in the nature of guidance to the court. On the failure of the defendant to file the written statement, it is open to the court either to pronounce judgment against the defendant or to make such appropriate order as it thinks fit in the facts and circumstances of the case. Indeed, Rule 10 does not contribute in any manner to the delay in disposal of suits. May be, it would be more appropriate to retain the rule than to delete it.

2.17 Clause 19 of the Amendment Bill proposing to substitute Rule 2 and to amend Rule 5 in Order IX:- (i) The proposed Rule 2 as substituted in Order IX says that "Where on the day so fixed it is found that the summons has not been sent within the stipulated period of two days, to the defendant by the plaintiff or his agent or [sic] in consequence of their failure to pay the court-fee or any charges, if any chargeable for such service, the court shall make an order that the suit be dismissed." (It is not necessary to refer to the proviso.) Inasmuch as the Law Commission is recommending that the summons be sent through court (and not by the plaintiff), no doubt at the expense of the plaintiff, this Rule requires to be reworded accordingly.

The penalty should be for not paying the requisite charges, court fee and/or for not taking steps necessary to enable the Court to send the summons.

(ii) The amendment to Rule 5 is designed only to cut down the period for applying for fresh summons from one month to seven days. The amendment is unobjectionable.

2.18 Clause 20 of the Amendment Bill proposing to amend Order X:- Clause 20 of the Amendment Bill proposes to insert rules 1A, 1B and 1C after Rule 1 and also proposes to amend Rule 4 of Order X. So far as proposal to insert Rules 1A, 1B and 1C in Order X is concerned, it may be observed that they are on the same pattern as in proposed section 89 except for the distinction in the language employed in Rule 1A of this Order and the proposed Section 89 which is sought to be inserted by clause 7 of the Bill. Rule 1A reads as if the court is under a mandate to ask the parties to opt for either mode of settlement outside the court as specified in the proposed section 89(1) and that this should be done after recording the admissions and denials. On the other hand, the proposed section 89 is couched in an enabling language. It enables the court to take these specific steps if it appears to it that there exist elements of settlement which may be acceptable to the parties. Be that as it may, the opinion expressed by the Commission with respect to section 89 should as well be relevant in respect of Rules 1A, 1B and 1C as

proposed in Order X. Indeed, Rules 1B and 1C merely state the obvious while Rule 1A, as stated above, is really intended to effectuate the provision in the proposed section 89.

(iii) Amendment to Rule 4(1) is only by way of cutting down the time limit and is a step in the right direction.

2.19 Clause 23 of the Amendment Bill: By this clause, Rules 1 and 2 of Order XIII are sought to be substituted. The amendments are in accord with the provisions contained in proposed Order VII Rule 14 and proposed Order VIII Rule 1A. Indeed, proposed Rule 1 of Order XIII expressly contemplates situations where the original documents are not filed but only copies thereof are filed with the plaint or written statement, a matter referred to by Commission while dealing with amendments in the said Orders. The obligation created by the clause under consideration is to produce the original before the settlement of the issues. It would be more appropriate if the stage at which originals are to be produced is left to the discretion of the court. It can be done even at the time of trial. The matter should be left to the discretion of the court. It would be for the court to direct the parties to produce the original documents at the appropriate stage. With this clarification, the amendments proposed in Order XIII can be said to be in order.

2.20 Clause 24 of the Amendment Bill:- (i) The amendment in Rule 4 of Order XIV is in order. It merely seeks to cut down the time limit.

(ii) The proposal to delete Rule 5 of Order XIV, however, is questionable. It was pointed out by the participants/respondents that the power of amending the issues or framing of additional issues should always be available to the court and that the said power should be available to be exercised at any stage of the suit. The existing Rule 5 also empowers the court to strike out issues which in its opinion are wrongly framed or unnecessary. The Commission is of the opinion that there is no sound reason to delete Rule 5.

2.21 Clause 26 of the Amendment Bill :- This clause of the Amendment Bill seeks to substitute sub-rule (1) of Rule 1 of Order XVII and also to amend sub-rule (2).

(i) Sub-rule (1) of Rule 1 as sought to be substituted requires the court to record reasons in writing for every adjournment of the hearing of a suit. Furthermore, the proviso places a ceiling upon the number of adjournments which can be granted to a party during the hearing of the suit. Evidently, the adjournment contemplated by this sub-rule is an adjournment granted at the request of a party and not an adjournment occasioned on account of the court not being able to take up the case or any other reason for which the court is not able to take up the case. Even so, the members of the Bar

strongly opposed the proposed amendment while the members of the Bench supported the amendment. One of the suggestions put forward by the participants was that no adjournment shall be granted at the oral request of a party and that every request for adjournment should be made by way of an application. The application should either be verified by the advocate concerned or it should be supported by an affidavit of the party. Another suggestion put forward was that instead of placing a ceiling upon the number of adjournments which can be granted to a party at its request, awarding of costs should be made obligatory for each such adjournment and that the costs should ascend steeply with every succeeding adjournment. In other words, if the amount of cost awarded for the first adjournment is Rs.100/- the costs to be awarded for the second adjournment should be three hundred and so on. Yet another suggestion put forward was that where an adjournment was granted with costs, the costs awarded to the other side should be the full costs which are incurred and not an arbitrarily determined figure. By way of example, if in a given case the party brings his witnesses for examination but the other side asks for an adjournment, the full and actual costs incurred by the party for bringing the witnesses and for making all necessary arrangements in that behalf for proceeding with the suit should be reimbursed by the party asking for adjournment. In this connection it was submitted that clause (e) of the proviso to rule 1 of Order XVII should be amended by substituting the words "may, if it thinks fit" occuring therein with the word "shall"; another view expressed in this

behalf was that the words to be substituted ought to be "shall, unless the court records special reasons therefor". The members of the Bench submitted that unless a ceiling is placed upon the number of adjournments which could be granted to a party, prompt disposal of the suits could not be ensured. It was submitted that the members of the Bar bring pressure in several ways upon the courts to grant adjournment. Very often, the opposing counsel does not oppose the request. Sometimes, a request is made by both the parties, even where the suit is posted for trial- and the court feels helpless. Some of the learned trial judges suggested that once the suit was posted for trial and the court was in a position to take it up on that day, no adjournment whatsoever should be granted either at the request of one party or at the joint request of both the parties, unless of course it was a case of a death of a party or some other supervening reason which made the adjournment inevitable.

2.21.1. In this connection, we must mention an interesting discussion which took place at the conference held at Allahabad. In the Allahabad High Court, there is a peculiar practice prevalent over a long number of years according to which a Counsel seeking adjournment on the ground of his illness need not send an application nor is it necessary that the request is made by him or some other counsel on his behalf, in the court. What is being done is that a slip called 'illness slip' is sent to the Court Master/Bench Clerk. On receiving the illness slip the Court Master/Bench Clerk

automatically adjourns the case without even bringing it to the notice of the presiding Judge or the Judges constituting the Bench. The counsel on the other side too is not informed. Admittedly, there have been several instances where an advocate sends such an illness slip in one court of the High Court while he is found arguing or present in another court on the same day. The Judges of the Allahabad High Court strongly pleaded for putting a stop to this unholesome practice which is very often resulting in abuse of process of the court. The members of the Allahabad High Court Bar who were present and participated in the conference tried to justify the said system though they did admit that it was being abused by some advocates. The Law Commission is of the opinion that this insidious practice must be put an end to. The practice may have originated in some distant past. It is not clear in what circumstances and for what reasons such a practice began. The fact, however, remains that not only is it a practice not sanctioned by the Code, it appears to run counter to the very discipline, dignity and decorum of the court. It is high time, it is put an end to. It does not also appear to be prevalent in any other High Court.

2.21.2. In the light of the above discussion, it is obvious that the proposed sub-rule (1) of Rule 1 is a highly desirable and salutory step. The sub-rule must, however, be clarified to indicate that the adjournment contemplated by it meant an adjournment granted or to be granted at the request of a party and not an adjournment caused by other reasons. It should

further be made obligatory that even for the first, second or third adjournment which may be granted to the party at his request, the other side should be compensated in full for the actual costs incurred by it for that date of hearing. Indeed, this aspect can be said to be implicit in the amendment proposed in sub-rule (2) of Rule 1. There must be a further proviso added to sub-rule (1) to the effect that no adjournment shall be granted on an oral request of a party or in terms of a slip or a letter given by the counsel and that an adjournment shall be granted only on the basis of a written application filed by a party which should either be verified by the counsel for the party or should be supported by an affidavit of the party. This should be so even where the other side does not object. In a case where joint request is made by both the sides for adjournment, the court should impose costs upon both parties, which can be remitted to the legal aid body of that district or State, as the case may be. In sum, two more provisos should be added to sub-rule (1). The second proviso as proposed by the Law Commission, should say that no adjournment shall be granted except on the basis of a written application which is verified and signed by the counsel for the party or which is supported by an affidavit of the party, the copy whereof is served before hand on the counsel for the opposing parties. The third proviso should say that an adjournment contemplated by sub-rule is an adjournment granted at the request of the party and not an adjournment granted for other reasons. It is, however,

obvious that even where the suit is adjourned for other reasons, the court has to record the reasons for such adjournment as required by proposed sub-rule (1).

(ii) In the light of the above discussion it must be said that the proposed amendment in sub-rule (2) is a welcome step and the Law Commission agrees with the same.

2.22. Clause 27 of the Amendment Bill:- (i) The proposal to delete sub-rule (4) of Rule 2 of Order XVIII does not appear to be an appropriate one. This was proposed, the Commission believes, in the light of the fundamental change in the manner of recording of evidence proposed by the new Rule 4. Be that as it may, and even if new Rule 4 is given effect to there is no reason why sub-rule (4) of Rule 2 (which enables the court, for reasons to be recorded, to direct or permit any party to examine any witness at any stage) should be deleted. This sub-rule was specifically put in by the Code of Civil Procedure (Amendment) Act, 1976 for sound reasons and there is no reason to undo it now.

(ii) The existing rule 4 is sought to be substituted altogether by a new rule. The said rule states that, "The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the Judge", whereas the proposed rule provides that (a) the examination-in-chief of a witness shall be given by way of an affidavit, copies whereof shall be

supplied to the opposite party by the party who calls him for evidence; (b) the cross-examination and re-examination shall be done before the commissioner to be appointed by the court; (c) power is, however, retained in the court to examine a witness in the court in the presence of and under the personal direction and superintendence of the Judge, for reasons to be recorded in writing; (d) the expenses incurred for examination on commission shall be paid by the court or by the party summoning the witnesses as may be prescribed by the High Court; and (e) where any question put to a witness is objected to by the other side, the commissioner shall allow the same to be put but shall take down the question together with his decision.

2.22.1. With respect to this new method of examination of witnesses, there was a good amount of controversy in all the conferences. While members of the Bar uniformly opposed this method, some members of the Bench welcomed it. The members of the Bench who welcomed the new proposal were of the opinion that this method would greatly help the court in disposing of the suits expeditiously. In fact, it was brought to our notice that in several courts, a peculiar method was being adopted whereunder while the Judge was hearing the arguments in one suit, the examination of witnesses in another suit was simultaneously going on in a corner of the court. Indeed, we were told that sometimes the witnesses in two different suits were being examined in two different corners of the court while the Judge was hearing arguments in a third matter.

Whenever any objection was raised or controversy arose in any one of those suits, the Judge stopped hearing the arguments, we were told, heard the objections and after disposing of the same, resumed hearing the arguments in the third suit. This method was being adopted, we are told, with a view to enabling the Judges to fulfil the quota of disposals prescribed by the High Courts. Be that as it may, we shall deal with the objections put forward to the new method suggested by the proposed Rule 4.

2.22.2. So far as the examination-in-chief of a witness by way of an affidavit is concerned, the objection was that the evidence given in such a fashion would not only be not an evidence given in the court - not even the evidence given before the commissioner appointed by the court - but would be evidence given before an advocate. It was pointed out that very often words were put in the mouth of the witness which he had not uttered. In effect, it was submitted that it would be evidence of an advocate of the party and not of the witness. Yet another objection put forward in this behalf was that if the examination-in-chief was allowed to be tendered by affidavit, the command of the Evidence Act that no leading questions could be put in examination-in-chief, could not be observed and implemented. It was also submitted that very often many documents were marked in the course of examination-in-chief of a witness and if no objection was raised on that occasion itself and the document is marked, the opposite party would be precluded from raising the objection

at a later stage. The example of marking of insufficiently or unstamped documents was given and the bar in Section 36 of the Stamp Act was relied upon.

2.22.3. So far as the cross-examination and re-examination on commission is concerned, the objections were manifold. It was submitted that the solemnity and sanctity of the court would not be there if evidence was recorded in the office of a commissioner or at any other premises. It was submitted that sub-rule (7) of Rule 4, as proposed, only provided for the commissioner taking down the question together with his decision where an objection was raised by a party and the commissioner allowed the said question to be put. The Rule did not provide, it was pointed out, as to what should happen in case the commissioner upheld the objection and did not allow the question to be put. Yet another objection put forward related to the practical aspect of the matter. It was submitted that whenever a witness was examined on commission, the record had to be taken by a clerk of the court to the advocate's office or to such other premises, as the case may be, where the evidence of the witness was being recorded. It was pointed out that the record could not be made over to the commissioner and that it was necessarily to be in the custody of a court officer. It was further pointed out that if the recording of evidence on commission became the general practice, a number of suits may be simultaneously opened where the evidence was being recorded and there would not be sufficient number of clerks available to take the files and

attend the recording of evidence by different commissioners. Some of the participants pointed out that the commissioners generally did not conclude their work expeditiously and that they go on leisurely and very often demanded facilities at high cost hotels involving lunch and other miscellaneous expenses. It was pointed out that many of the parties might not be able to afford the said expenses. Some others objected that only where the witnesses were examined in the court, would the court be able not only to notice the demeanour of the witness but also form an impression about the veracity of his evidence and about his credibility. All these elements would be missing in cases of evidence recorded on commission, they submitted.

2.22.4. On the other hand, it was pointed out by certain members of the judiciary that the aspect of demeanour or for that matter the assessment of the credibility and veracity of a witness by the court was no longer of any real significance because of the large number of suits and the large number of witnesses who were examined by the courts every week/every month. It was pointed that unless the demeanour was recorded by the court even during the course of examination of the witness, it could not be relied upon by the court while disposing of the suit. It was also pointed out that in countries like the United States of America, the entire evidence was recorded not even before the commissioner but in the office of the attorney of the party whose witness was being examined. The said system was functioning successfully,

it was pointed out. It was also suggested that because of the heavy load of work, the presiding officer was obliged to spend most of the early hours of the day in disposing of miscellaneous matters and that if evidence was to be recorded by the Judges themselves, not much time would be left for hearing arguments, for study, for reflection and for preparation of judgments. From this stand point, it was submitted that the proposed Rule 4 was an extremely welcome step. It was submitted that the examination-in-chief should also be required to be recorded before the commissioner instead of being tendered by way of an affidavit.

2.22.5. After considering all the view points carefully, the Law Commission has come to the conclusion that Rule 4 might be redrafted as follows:-

(a) In all suits, the subject-matter whereof is valued at more than Rs.5,00,000/-, the examination-in-chief, cross-examination and re-examination may be done before the commissioner to be appointed by the court except in cases where the court, for reasons to be recorded in writing, considers that the witnesses or some of them as may be specified by the court, shall be examined in court;

(b) Presiding Judge of every principal civil court in a city or town shall prepare a list of commissioners comprising retired judicial officers and other senior

advocates who are prepared to undertake the job. It would be appropriate if the court also specifies the scale of remuneration of such commissioners. The remuneration may be fixed on an hourly basis.

(c) The expenses of commission shall be incurred by the party whose witness is being examined. Ordinarily the evidence shall be recorded at the office of the commissioner (if he is an advocate) or such other place as may be agreed upon by the parties and the commissioner. It may also be considered whether it would not be convenient if the evidence is recorded at some place in the court premises, wherever available. It would also be appropriate if the Commissioner undertakes this work after the court hours or during holidays.

(d) Even in suits the value whereof is less than Rs.5,00,000/-, the examination of witnesses can be done on commission, if the parties agree thereto-subject, of course, to the orders of the court.

(e) The proposal to adduce evidence of a witness in his examination-in-chief by way of an affidavit be dropped.

(f) Where a question put to a witness is objected to by a party or his pleader and the commissioner disallows the same, the commissisoner shall record the question, the objection and his decision thereon. Where he allows the question to be put notwithstanding the objection, even in such a case, the commissioner shall record the question, the objection and his decision thereon along with the answer given by the witness in that behalf.

(iii) The proposal to delete Rule 17A, which was indeed inserted by the 1976 Amendment Act has been strongly opposed by practically all the participants/respondents. The Law Commission is also of the opinion that there is no good reason why this rule which was incorporated by the 1976 Amendment Act after due deliberation should be taken away. The proposal to delete the sub-rule may, therefore, be dropped.

2.23. Clause 28 of the Amendment Bill:- Several amendments suggested in Order XX appear to be actuated by a concern for transparancy and promptness. We shall deal with each of the proposed amendments separately.

(i) The words "but a copy of the whole judgment shall be made available for the perusal of the parties or the pleaders immediately after the judgment is pronounced" in sub-rule (2) of Rule 1 of Order XX are evidently proposed to

be deleted in the light of proposed Rule 6B. Rule 6B says that where the judgment is pronounced (which obviously means where a prepared judgment is pronounced), copies of the judgments shall be made available to the parties immediately after the pronouncement of the judgment for preferring an appeal on payment of appropriate charges. In this sense the deletion of the aforesaid words from sub-rule (2) of Rule 1 is unobjectionable. But what was suggested by some of the members of the judiciary was that the requirement of supplying copies of the judgement immediately after the pronouncement of the judgment was difficult because of several practical difficulties and that the requirement should be to supply copies of the judgment within three days. In other words, the words "immediately after" occurring in Rule 6B ought to be substituted by the words "within three days of". It was submitted that in many cities and towns, the facilities by way of zerox and photocopying were not immediately available or even if available there would be practical difficulties in photocopying and supplying copies of the judgments on the day of their pronouncement. The proposal appears to be based upon experience of the judicial officers and in our opinion ought to be respected and given effect to. The matter can be reviewed at a later stage, if necessary. On many occasions, orders/judgments are dictated in court. In such cases, it is not possible to comply with the requirements of Rule 6B. A clarification with regard to proposed Rule 6B may, therefore, be necessary to indicate that the requirement of this rule would be attracted only after the order/judgment is

transcribed, corrected and signed, in cases where the order/judgment is dictated in the court.

(ii) The provisions contained in the proposed Rule 6A are unexceptionable. Sub-rule (2) of Rule 6A may, however, be clarified by adding a proviso to the effect that where an appeal is preferred on the basis of the judgment on the ground that the decree had not been drafted or made available, the appeal so preferred shall not be treated as defective provided that the copy of the decree is filed within a reasonable period after the preparation of the decree.

2.24 Clause 30 of the Amendment Bill:- There was considerable controversy about the proposed addition of sub-rule (2) in Rule 1 of Order XXXIX. Particularly the members of the Bar felt that the requirement of security as pre-condition for the grant of temporary injunction may adversely affect the interest of indigent and poor plaintiffs like a widow claiming maintenance and asking for temporary injunction against alienation of properties by her husband, plaintiffs suing in forma pauperis but having a good cause, plaintiffs in suits relating to public nuisance and public charities and so on. On the other hand, quite a few participants supported the proposed sub-rule on the ground that it would help discourage plaintiffs asking for temporary injunctions in a flippant or casual manner.

2.24.1. The objectors to the said sub-rule have not apparently given sufficient attention to the wording of the proposed sub-rule (2). The rule requires that the court shall, while granting a temporary injunction of the nature mentioned in the sub-rule, "direct the plaintiff to give security or otherwise as the court thinks fit". In our opinion the sub-rule contains a very salutory principle. However, to make the matter clear it would be appropriate if the words "or otherwise" are substituted by the words "or make such other directions". A proviso may also be added that the said requirement of giving security or making of other appropriate directions as a condition for granting temporary injunction (of the nature specified in the sub-rule) may be dispensed with in appropriate cases for special reasons to be recorded by the court.

2.25. Clause 31 of the Amendment Bill:- Rules 1 and 2 of the proposed order XXXIX-A do not bring out or give effect to the intention behind the said provisions. Paragraph 3(h) of the statement of objects and reasons is as under:

> "In matters relating to property disputes, particularly in matter of unauthorised construction on the land of others, it has been found that, under the existing provisions of the Code of Civil Procedure, no application for injunction can be moved unless the suit is filed first in the court having competent jurisdiction. With a view to obviate this hardship,

it is proposed that a person may make an application to the court of competent jurisdiction for appointment of a commission to ascertain the factual status of the property so that at the time of filing of the regular suit the report is available to the commissioner relating to the factual status of the property in dispute."

However, the language of Rules 1 and 2 does not bring out the said intention and for that reason the rules have been criticised as lacking in direction and as ambiguous. It would be appropriate if these rules are redrafted to reflect the intention clearly so as to be in consonance with the statement of objects and reasons.

2.26 Clause 32 of the Amendment Bill:- The amendments proposed in Order XLI have evoked uniform opposition from both the members of the Bar and the Bench. The main idea behind the amendments proposed in this order is to provide that an appeal can be preferred in the court which has passed the decree to be apealed against and that court is required to remit the same to the appellate court. It was pointed out that very often the parties also asked for interim orders by way of stay or injunction or other appropriate directions on an interlocutory application filed along with the appeal and that if an appeal was to be preferred before the court which passed the decree appealed against, it may not be inclined to make any such orders against its own decree. It was also

pointed out that ordinarily, the parties consulted a lawyer of the appellate court who may very often be located in a different city or town and took his opinion on the advisability of the preferring of the appeal. It was observed that while the lawyer who had lost his client's case in the court generally advised strongly for preferring the appeal, the appellate court lawyer might take a different view. For this and other practical reasons (viz., maintaining separate appeals register in each court apart from the appeals register in the appellate court), it was suggested that the proposal may be dropped.

2.26.1. After considering the views expressed by the participants/respondents, the Law Commission is of the opinion that the measure now suggested is a half-hearted one. Either the old system should continue or if the idea is to facilitate the filing of an appeal in the trial court (or in the court which passed the decree to be appealed against as the case may be), it should be further provided that while filing the appeal, the appellant shall serve copies of the appeal and the accompanying interlocutory applications, if any, upon the counsel for the other side in that court and that such service shall be deemed to be sufficient service upon the other side. Such a practice is in vogue in the High Courts in the matter of preferring Letters Patent Appeals whether in civil matters or in writ petitions. For this purpose, the form of the Vakalatnama prescribed by the appropriate rules has to be modified making it obligatory upon the advocates to receive

the copies of the appeal and other accompanying applications, if served upon them by the other side even after passing of the decree. The court whose decree is being appealed against should also be expressly empowered to pass appropriate interim orders for a limited period within which the appeal papers can be transmitted to the appropriate appellate court and the appellate court can deal with the same. This suggestion has the merit of obviating the necessity of sending summons once again in appeal which normally takes a very long time. The experience shows that serving the respondents in appeals takes years in many cases which also contributes to the delay in disposal of the appeals. All this can be avoided if the service upon the advocate of the respondents (in the appeal) is treated as sufficient service upon the party. The trial court can then fix a day on which both the parties shall appear before the appellate court and from which stage the appellate court takes over the matter. But the provision now proposed merely provides for filing of appeal in the trial court .or in the court whose decree is sought to be appealed against, as the case may be, without anything more. In the opinion of the Law Commission, the proposed measure is likely to prove ineffective. The amendments may need to be reconsidered in the light of the above observations.

2.27 Law Commission has no objection to the other amendaments suggested in the Code of Civil Procedure (Amendment) Bill, 1997.

(MR.JUSTICE B.P.JEEVAN REDDY)(RETD)

CHAIRMAN

(MS.JUSTICE LEILA SETH)(RETD) (DR.N.M.GHATATE) (DR.SUBHASH C.JAIN)

MEMBER MEMBER MEMBER-SECRETARY

DATED: 13, NOVEMBER, 1998

ANNEXURE - A

AS INTRODUCED IN RAJYA SABHA

10 AUG 1997

Bill No. L OF 1997

THE CODE OF CIVIL PROCEDURE (AMENDMENT) BILL, 1997

A

BILL

further to amend the Code of Civil Procedure, 1908, *the Limitation Act*, 1963 *and the Court Fees Act*, 1870.

BE it enacted by Parliament in the Forty-eighth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title and commencement.

1. (*1*) This Act may be called the Code of Civil Procedure (Amendment) Act, 1997.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and for different States or for different parts thereof.

CHAPTER II
AMENDMENT OF SECTIONS

Amendment of section 26.

2. In the Code of Civil Procedure, 1908 (hereinafter referred to as the principal Act), existing section 26 shall be re-numbered as sub-section (1), and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely:— 5 of 1908.

"(2) In every plaint, facts shall be proved by affidavit.".

Amendment of section 27.

3. In section 27 of the principal Act, the following words shall be inserted at the end, namely:—

"on such day not beyond thirty days from date of the institution of the suit".

Amendment of section 32.

4. In section 32 of the principal Act, in clause (*c*), for the words "not exceeding five hundred rupees", the words "not exceeding five thousand rupees" shall be substituted.

Amendment of section 58.

5. In section 58 of the principal Act,—

(*i*) in sub-section (*1*),—

(*a*) in clause (*a*), for the words "one thousand rupees", the words "five thousand rupees" shall be substituted;

(*b*) for clause (*b*), the following clause shall be substituted, namely:—

"(*b*) where the decree is for the payment of a sum of money exceeding two thousand rupees, but not exceeding five thousand rupees, for a period not exceeding six weeks:";

(*ii*) in sub-section (*1A*), for the words "five hundred rupees", the words "two thousand rupees" shall be substituted.

Amendment of section 60.

6. In section 60 of the principal Act, in the first proviso to sub-section (*1*), in clause (*i*), for the words "four hundred rupees", the words "one thousand rupees" shall be substituted.

Insertion of new section 89.

7. In the principal Act, after section 88, the following section shall be inserted, namely:—

Settlement of disputes outside the Court.

"89. (*1*) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for—

(*a*) arbitration;

(*b*) conciliation;

(*c*) judicial settlement including settlement through Lok Adalat; or

(*d*) mediation.

(2) Where a dispute has been referred—

(*a*) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act; 26 of 1996.

(*b*) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (*1*) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat; 39 of 1987.

(*c*) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act; 39 of 1987.

(*d*) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.".

Amendment of section 95.

8. In section 95 of the principal Act, in sub-section (*1*), for the words "not exceeding one thousand rupees", the words "not exceeding fifty thousand rupees" shall be substituted.

Amendment of section 96.

9. In section 96 of the principal Act, in sub-section (*4*), for the words "three thousand rupees", the words "twenty-five thousand rupees" shall be substituted.

Substitution of new section for section 100A.

10. For section 100A of the principal Act, the following section shall be substituted, namely:—

No further appeal in certain cases.

"100A. Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force,—

(*a*) where any appeal from an original or appellate decree or order is heard and decided,

(*b*) where any writ, direction or order is issued or made on an application under article 226 or article 227 of the Constitution,

by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such Single Judge.".

Substitution of new section for section 102.

11. For section 102 of the principal Act, the following shall be substituted, namely:—

No second appeal in certain cases.

"102. No second appeal shall lie from any decree, when the amount or value of the subject-matter of the original suit does not exceed twenty-five thousand rupees.".

Amendment of section 115.

12. In section 115 of the principal Act, in sub-section (*1*),—

(*i*) for the proviso, the following proviso shall be substituted, namely:—

"Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.";

(*ii*) after sub-section (*2*), but before the *Explanation*, the following sub-section shall be inserted, namely:—

"(*3*) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.".

Amendment of section 148.

13. In section 148 of the principal Act, after the words "such period", the words "not exceeding thirty days in total," shall be inserted.

CHAPTER III

AMENDMENTS OF CERTAIN

Amendment of Order IV.

14. In the First Schedule to the principal Act (hereinafter referred to as the First Schedule), in Order IV, in rule 1,—

(*i*) in sub-rule (*1*), for the words "plaint to the Court", the words "plaint in duplicate to the Court" shall be substituted;

(*ii*) after sub-rule (*2*), the following sub-rule shall be inserted, namely:—

"(*3*) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (*1*) and (*2*).".

Amendment of Order V.

15. In the First Schedule, in Order V,

(*i*) in rule 1, for sub-rule (*1*), the following shall be substituted, namely:—

"(*1*) When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, on such day within thirty days from the day of institution of the suit as may be specified therein:

Provided that no such summons shall be issued when a defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim:

Provided further that where the defendant fails to file the written statement on the said day, he shall be allowed to file the same on such other day which shall not be beyond thirty days from the date of service of summons on the defendant, as the court may think fit.";

(*ii*) for rule 2, the following shall be substituted, namely:—

"2. Every summon shall be accompanied by a copy of the plaint."; Copy of plaint annexed to summons.

(*iii*) in rule 6, for the words "for the appearance of the defendant", the words "under sub-rule (*1*) of rule 1" shall be substituted;

(*iv*) in rule 7, for the words "all documents", the words and figures "all documents or copies thereof specified in rule 1A of Order VIII" shall be substituted;

(*v*) for rule 9, the following rules shall be substituted, namely:—

"9. (*1*) The court shall issue summons and deliver the same to the plaintiff or his agent, for service, and direct the summons to be served by registered post acknowledgment due or by speed post or by such courier service as may be approved by the High Court or by fax message or by Electronic Mail Service or by such other means as the High Court may prescribe by rules, addressed to the defendant to accept the service at the place where the defendant or his agent actually and voluntarily resides or carries on business or personally works for gain. Delivery of summons to the plaintiff or his agent.

(*2*) The plaintiff or his agent shall send the summons by any means as directed by the court under sub-rule (*1*) within two days from the delivery of summons to the plaintiff by the court under that sub-rule.

(*3*) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent received by the court or postal article containing the summons is received back by the court with an endorsement purporting to have been made by a postal employee or by any authorised person to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or refused to accept the summons by any other means specified in sub-rule (*1*), when tendered or transmitted to him the court issuing the summon shall declare that the summons had been duly served on the defendant:

Provided that summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or misled or for any other reasons has not been received by the court as the date fixed by it.

9A. (*1*) The court may, in addition to, and simultaneously with the delivery of summons for service to the plaintiff as provided in the manner provided in rule 9, may also direct that summons to be served on the defendant or his agent empowered to accept the service at the place where the defendant or his agent actually and voluntarily resides or carries on business or personally works for gain. Simultaneous issue of summons for service by the court controlled process.

(2) The summons shall, unless the court otherwise direct, be delivered or sent to the proper officer in such manner as may be prescribed by the High Court to be served by him or one of his subordinates.

(*3*) The proper officer may be an officer of the court other than that in which the suit is instituted, and where he is such an officer, the summon may be sent to him in such manner as the court may direct.

(*4*) The proper officer may serve the summons by registered post acknowledgment due, by speed post, by such courier service as may be approved by the High Court, by fax message, by Electronic Mail service or by such other means as may be provided by the rules made by the High Court.";

(*vi*) rule 19A shall be omitted;

(*vii*) in rule 21, for the words "or by post", the words "or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Court" shall be substituted;

(*viii*) in rule 24, for the words "by post or otherwise", the words "or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Court" shall be substituted;

(*ix*) in rule 25, for the words "by post", the words "or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Court" shall be substituted.

Amendment of Order VI.

16. In the First Schedule, in Order VI,—

(*i*) rule 5 shall be omitted;

(*ii*) in rule 15, after sub-rule (*3*), the following sub-rule shall be inserted, namely:—

"(*4*) The person verifying the pleading shall also furnish an affidavit in support of his pleadings.";

(*iii*) rules 17 and 18 shall be omitted.

Amendment of Order VII.

17. In the First Schedule, in Order VII,—

(*i*) for rule 9, the following rule shall be substituted, namely:—

Procedure on admitting plaint.

"9. (*1*) Where the plaint is admitted, the court shall give to the plaintiff summons in the name of all the defendants to be served upon or get served in the manner provided under Order V.

(2) Within two days of the receipt of summons under sub-rule (*1*), the plaintiff shall send or cause to send the summons to the defendants alongwith the copy of the plaint in the manner provided under Order V.

(*3*) Where the court orders that the summons be served on the defendants in the manner provided in rule 9A of Order V, it will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants within two days from the date of such order alongwith requisite fee for service of summons on the defendants.".

(*ii*) in rule 11, after sub-clause (*d*), the following sub-clauses shall be inserted, namely:—

"(*e*) where it is not filed in duplicate;

(*f*) where the plaintiff fails to comply sub-rule (2) of rule 9;

(*g*) where the plaintiff fails to comply sub-rule (*3*), of rule 9A.".

(*iii*) for rule 14, the following rule shall be substituted, namely:—

Production of document on which plaintiff sues or relies.

"14. (*1*) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(*3*) Where a document or a copy thereof is not filed with the plaint under this rule, it shall not be allowed to be received in evidence on behalf of the plaintiff at the hearing of the suit.

(*4*) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.";

(*iv*) rule 15 shall be omitted.

(*v*) in rule 18, in sub-rule (*1*), the words "without the leave of the court" shall be omitted.

Amendment of Order VIII.

18. In the First Schedule, in Order VIII,—

(*i*) for rule 1, the following rule shall be substituted, namely:—

Written statement.

"1. The defendant shall at or before the first hearing or within such time as the court may permit, which shall not be beyond thirty days from the date of service of summons on the defendant, present a written statement of his defence.";

(*ii*) after rule 1 so inserted, the following rule shall be inserted, namely:—

Duty of defendant to produce documents upon which relief is claimed or relied upon by him.

"1A. (*1*) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(*3*) Where a document or a copy thereof is not filed with the written statement under this rule, it shall not be allowed to be received in evidence on behalf of the defendant at the hearing of the suit.

(*4*) Nothing in this rule shall apply to documents—

(*a*) produced for the cross examination of the plaintiff's witnesses, or

(*b*) handed over to a witness merely to refresh his memory;

(*iii*) rules 8A, 9 and 10 shall be omitted.

Amendment of Order IX.

19. In the First Schedule, in Order IX,—

(*i*) for rule 2, the following rule shall be substituted, namely:—

Dismissal of suit where summons not served by the plaintiff or his agent or in consequences failure to cost.

"2. Where on the day so fixed it is found that the summons has not been sent within stipulated period of two days, to the defendant by the plaintiff or his agent or consequence of their failure to pay the court-fee or any charges, if any chargeable for such service, the court shall make an order that the suit be dismissed:

Provided that no such order shall be made if, notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent on the day fixed for him to appear and answer.";

(*ii*) in rule 5, for the words "one month", the words "seven days" shall be substituted.

Amendment of Order X.

20. In the First Schedule, in Order X,—

(*i*) after rule 1, the following rules shall be inserted, namely:—

Direction of the court to opt for any one mode of alternative dispute resolution.

"1A. After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (*1*) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Appearance before the conciliatory forum or authority.

1B. Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Appearance before the court consequent to the failure of efforts of conciliation.

1C. Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.";

(*ii*) in rule 4, in sub-rule (*1*), for the words "may postpone the hearing of the suit to a future day", the words "may postpone the hearing of the suit to a day not later than seven days from the date of first hearing" shall be substituted.

21. In the First Schedule, in Order XI,— Amendment of Order XI.

(i) in rule 2, after the words "submitted to the court", the words "and that court shall decide within seven days from the day of filing of the said application," shall be inserted;

(*ii*) in rule 15, for the words "at any time", the words "at or before the settlement of issues" shall be substituted.

22. In the First Schedule, in Order XII,— Amendment of Order XII.

(*i*) in rule 2, for the word "fifteen", the word "seven" shall be substituted;

(*ii*) in rule 4, second proviso shall be omitted.

23. In the First Schedule, in Order XIII, for rules 1 and 2, the following rule shall be substituted, namely:— Amendment of Order XIII.

"1. (*1*) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement. Original documents to be produced at or before the settlement of issues.

(*2*) The court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(*3*) Nothing in sub-rule (*1*) shall apply to documents—

(*a*) produced for the cross-examination of the witnesses of the other party; or

(*b*) handed over to a witness merely to refresh his memory.".

24. In the First Schedule, in Order XIV,— Amendment of Order XIV.

(*i*) in rule 4, for the words "may adjourn the framing of the issues to a future day", the words "may adjourn the framing of issues to a day not later than seven days" shall be substituted.

(*ii*) rule 5 shall be omitted.

25. In the First Schedule, in Order XVI,— Amendment of Order XVI.

(*i*) in rule 1, in sub-rule (*4*), for the words "court in this behalf", occurring at the end, the words, brackets and figure "court in this behalf within five days of presenting the list of witnesses under sub-rule (*1*)" shall be substituted;

(*ii*) in rule 2, in sub-rule (*1*), after the words "within a period to be fixed", the words, brackets and figures "which shall not be later than seven days from the date of making application under sub-rule (*4*) of rule 1" shall be inserted.

Amendment of Order XVII.

26. In the First Schedule, In Order XVII, in rule 1,—

(*i*) for sub-rule (*1*), the following shall be substituted, namely:—

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

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

(*ii*) in sub-rule (2), for the words "may make such order as it thinks fit with respect to the costs occassioned by the adjournment", the words "shall make such orders as to costs occassioned by the adjournment or such higher costs as the court deems fit" shall be substituted.

Amendment of Order XVIII.

27. In the First Schedule, in Order XVIII,—

(*i*) sub-rule (*4*) of rule 2 shall be omitted;

(*ii*) for rule 4, the following rule shall be substituted, namely:—

Recording of evidence by commissioner.

"4. (*1*) In every case, the evidence of a witness of his examination-in-chief shall be given by affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the court shall be taken orally by a commissioner to be appointed by the court from amongst the panel of commissioners prepared for this purpose on the same day:

Provided that, in the interest of justice and for the reasons to be recorded in writing, the court may direct that the evidence of any witness shall be recorded by the court in the presence and under the personal direction and superintendence of the judge.

(*3*) The commissioner shall be paid such sum for recording of evidence as may be prescribed by the High Court.

(*4*) The amount payable to the commissioner under sub-rule (*3*) shall be paid by the Court or by the parties summoning the witness as may be prescribed by the High Court.

(*5*) The District Judge shall prepare a panel of commissioners to record the evidence under this rule.

(*6*) The commissioner shall record evidence either in writing or mechanically in his presence and shall make a memorandum which shall be signed by him and the witnesses and submit the same to the court appointing such commissioner.

(*7*) Where any question put to a witness is objected by a party or his pleader and the commissioner allows the same to be put, the commissioner shall take down the question together with his decision.";

(*iii*) rule 17A shall be omitted;

(*iv*) after rule 18, the following rule shall be inserted, namely:—

"19. Notwithstanding anything contained in these rules, the court may, instead of examining witnesses in open court, direct their statements to be recorded on commission under rule 4A of Order XXVI.". Power to get statements recorded on commission.

28. In the First Schedule, in Order XX,— Amendment of Order XX.

(*i*) in rule 1, in sub-rule (2), the words "but a copy of the whole judgment shall be made available for the perusal of the parties or the pleaders immediately after the judgment is pronounced" shall be omitted;

(*ii*) for rules 6A and 6B, the following rules shall be substituted, namely:—

"6A. (*1*) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible and, in any case, within fifteen days from the date on which the judgment is pronounced. Preparation of decree.

(2) An appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the court shall for the purposes of rule 1 of Order XLI be treated as the decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose.

6B. Where the judgment is pronounced, copies of the judgment shall be made available to the parties immediately after the pronouncement of the judgment for preferring an appeal on payment of such charges as may be specified in the rule made by the High Court.". Copies of judgments when to be made available.

29. In the First Schedule, in Order XXVI, after rule 4, the following rule shall be inserted, namely:— Amendment of Order XXVI.

"4A. Notwithstanding anything contained in these rules, any court may, in the interest of justice or for the expeditious disposal of the case or for any other reason, issue commission in any suit for the examination, on interrogatories or otherwise, of any person resident within the local limits of its jurisdiction, and the evidence so recorded shall be read in evidence. Commission for examination of any person resident within the court local limits.

30. In the First Schedule, in Order XXXIX, rule 1 shall be renumbered as sub-rule (*1*) of that rule and after sub-rule (*1*) as so renumbered, the following sub-rule shall be inserted, namely:— Amendment of Order XXXIX.

"(2) The court shall, while granting a temporary injunction to restrain such act or to make such other order for the purposes of staying and preventing the wasting,

damaging, alienation, sale, removal or disposition of property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property under disposition in the suit under sub-rule (*1*), direct the plaintiff to give security or otherwise as the court thinks fit.".

Insertion of new Order XXXIXA.

31. In the First Schedule, after Order XXXIX, the following Order shall be inserted, namely:—

"ORDER XXXIXA

INSPECTION BEFORE INSTITUTION OF SUIT

Filing of application for inspection by legal representative.

1. In a case where a person competent to file a suit for grant of relief is not available to file such a suit for injunction, the legal representative of that person may make an application to the competent court of jurisdiction for the appointment of a commission to make local investigation of the property for the purpose of elucidating any matter in dispute and such commission shall be deemed to be appointed under Order XXVI.

Filing of the suit.

2. Within seven days from the date of the filing of the application under rule 1, the person competent to file suit, shall file the suit.".

Amendment of Order XLI.

32. In the First Schedule, in Order XLI,—

(*i*) in sub-rule (*1*) of rule 1, for the words and brackets "decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded", the word "judgment" shall be substituted;

(*ii*) for rule 9, the following rule shall be substituted, namely:—

Registry of memorandum of appeal.

"9. (*1*) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.

(2) Such book shall be called the register of appeal.";

(*iii*) in rule 11, for sub-rule (*1*), the following sub-rule shall be substituted, namely:—

"(*1*) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal.";

(*iv*) in rule 12, for sub-rule (2), the following sub-rule shall be substituted, namely:—

"(2) Such day shall be fixed with reference to the current business of the court.";

(*v*) rules 13, 15 and 18 shall be omitted;

(*vi*) in rule 19, the words and figures "or rule 18" shall be omitted;

(*vii*) in rule 22, sub-rule (3) shall be omitted.

CHAPTER V

REPEAL AND SAVINGS

Repeal and savings.

33. (*1*) Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court before the commencement of this Act shall, except in so far as such amendment or provisions is consistent with the provisions of the principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or repeal 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,— 10 of 1897.

(*a*) the provisions of section 26 of the principal Act and of Order IV of the First Schedule, as amended by sections 2 and 14 of this Act, shall not apply to or affect any suit pending immediately before the commencement of sections 2 and 14; and every such suit shall be tried as if sections 2 and 14 had not come into force;

(*b*) the provisions of section 27 of the principal Act, as amended by section 3 of this Act, shall not apply to or affect any suit pending immediately before the commencement of section 3 and every such suit shall be tried as if section 3 had not come into force;

(*c*) the provisions of section 58 of the principal Act, as amended by section 5 of this Act, shall not apply to or affect any person detained in the civil prison in execution of a decree before the commencement of section 5;

(*d*) the provisions of section 60 of the principal Act, as amended by section 6 of this Act, shall not exempt salary from attachment to the extent mentioned in clause (*i*) of the first proviso to sub-section (*1*) of section 60 before the commencement of section 6;

(*e*) section 89 and rules 1A, 1B and 1C of Order X of the First Schedule, as inserted in the principal Act by sections 7 and 20 of this Act, shall not affect any suit in which issues have been settled before the commencement of section 7; and every such suit shall be dealt with as if sections 7 and 20 had not come into force;

(*f*) the provisions of section 96 of the principal Act, as amended by section 9 of this Act, shall not apply to or affect any appeal from original decree which had been admitted before the commencement of section 9; and every admitted appeal shall be dealt with as if section 9 had not come into force;

(*g*) the provisions of section 100A of the principal Act, as substituted by section 10 of this Act, shall not apply to or affect any appeal against the decision of a Single Judge of a High Court under article 226 or article 227 of the Constitution which had been admitted before the commencement of section 10; and every such admitted appeal shall be disposed of as if section 10 had not come into force;

(*h*) the provisions of section 102 of the principal Act, as substituted by section 11 of this Act, shall not apply to or affect any appeal which had been admitted before the commencement of section 11; and every such appeal shall be disposed of as if section 11 had not come into force;

(*i*) the provisions of section 115 of the principal Act, as amended by section 12 of this Act, shall not apply to or affect any proceeding for revision which had been finally disposed of;

(*j*) the provisions of rules 1, 2, 6, 7, 9, 9A, 19A, 21, 24 and 25 of Order V of the First Schedule as amended or, as the case may be, inserted or omitted by section 15 of this Act shall not apply to any summons issued immediately before the commencement of section 15;

(*k*) the provisions of rules 9, 11, 14, 15 and 18 of Order VII of the First Schedule, as amended or, as the case may be, substituted or amended by section 17 of this Act, shall not apply to in respect of any proceedings pending before the commencement of section 17;

(*l*) the provisions of rules 1 and 1A of Order VIII of the First Schedule, as substituted or inserted by section 18 of this Act, shall not apply to a written statement filed and presented before the court immediately before the commencement of section 18;

(*m*) the provisions of rules 2 and 5 of Order IX of the First Schedule, as amended by section 19 of this Act, shall not apply in respect of summons before the commencement of section 19;

(*n*) the provisions of rules 2 and 15 of Order XI of the First Schedule, as amended by section 21 of this Act, shall not apply to or affect any order passed by the court or any application submitted for inspection to the court before the commencement of section 21 of this Act;

(*o*) the provisions of rules 2 and 4 of Order XII of the First Schedule, as amended and omitted, as the case may be, by section 22 of this Act, shall not affect any notice given by the party or any order made by the court before the commencement of section 22 of this Act;

(*p*) the provisions of rules 1 and 2 of Order XIII of the First Schedule, as substituted by section 23 of this Act, shall not affect the documents produced by the parties or ordered by the court to be produced before the commencement of section 23 of this Act;

(*q*) the provisions of rule 4 and 5 of Order XIV of the First Schedule, as amended and omitted by section 24 of this Act, shall not affect any order made by the court adjourning the framing of the issues and to amend and strike out issues before the commencement of section 24 of this Act;

(*r*) the provisions of rules 1 and 2 of Order XVI of the First Schedule, as amended by section 25 of this Act, shall not affect any application made for summoning of witnesses and time granted to a party to deposit amount for summoning witnesses made by the court before the commencement of section 25;

(*s*) the provisions of rule 1 of Order XVII of the First Schedule, as amended by section 25 of this Act, shall not affect any adjournment granted by the court and any cost occasioned by the adjournment granted by the court before the commencement of section 25 and the number of adjournments granted earlier shall not be counted for such purpose;

(*t*) the provisions of rules 1, 6A and 6B of Order XX of the First Schedule, as amended and substituted by section 28 of this Act, shall not affect any application for obtaining copy of decree for filing of appeal made by a party and any appeal filed before the commencement of section 28 of this Act; and every application made and every appeal filed before the commencement of section 28 shall be dealt with as if section 28 had not come into force;

(*u*) in sub-rule (2) of rule 1 of Order XXXIX of the First Schedule, as inserted by section 30 of this Act, shall not affect any temporary injunction granted before the commencement of section 30 of this Act.

(*v*) the provisions of rules 1, 9, 11, 12, 13, 15, 18, 19 and 22 of Order XLI of the First Schedule, as amended, substituted and omitted, as the case may be, by clause 32 of the Bill shall not affect any appeal filed before the commencement of section 32; and every appeal pending before the commencement of section 32 shall be disposed of as if section 32 of this Bill had not come into force.

CHAPTER VI

AMENDMENT OF THE LIMITATION ACT, 1963

36 of 1963.

34. In the Limitation Act, 1963, in section 12, in sub-section (*3*), the words "on which the decree or order is founded" at the end shall be omitted. **Amendment of section 12.**

CHAPTER VII

AMENDMENT OF THE COURT FEES' ACT, 1870

7 of 187015

35. In the Court Fees' Act, 1870 (hereafter in this Chapter referred to as the Court Fees' Act), after section 15, the following section shall be inserted, namely:— **Insertion of new section 16.**

"16. Where the court refers the parties to the suit to any one of the mode of settlement of dispute referred to in section 89 of the Code of Civil Procedure, the plaintiff shall be entitled to a certificate from the court authorising him to receive back from the collector, the full amount of the fee paid in respect of such plaint.". **Refund of Fee.**

5 of 1908.

36. In the Court Fees' Act, in the Second Schedule after serial number 1A and entries relating thereto, the following serial number and entries thereof shall be inserted, namely:— **Amendment of the Second Schedule.**

"1B.	Application to any Civil Court for local inspection under Order XXXIXA of the Code of Civil Procedure, 1908.".	When presented to Civil Court	Rs.50/-

5 of 1908.

STATEMENT OF OBJECTS AND REASONS

The law relating to the procedure in suits and civil proceedings in India (except those in the State of Jammu and Kashmir and Nagaland and Tribal Areas of Assam and certain other areas) is contained in the Code of Civil Procedure, 1908. The Code has been amended from time to time by various Acts of Central and State Legislatures. 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 regards to the matters dealt with by the Sections are specified in the Orders. Under section 122, the High Courts have powers to amend, by rules, the procedure laid down in the Orders. In exercise of these powers, various amendments have been made in the Orders by the different High Courts.

2. In terms of the Common Minimum Programme of the United Front Government, it was envisaged that a Bill on judicial reforms and disposal of pending cases within a period of three years may be introduced in the Parliament. With a view to keep the commitment given to the people of India so that a speedy disposal of cases may take place within the fixed time frame and with a view to implement the report of Justice V.S.Malimath, it was thought necessary to obtain the views of the State Governments on the subject also. In the Law Minister's Conference held in New Delhi on 30th June and 1st July, 1997, the working paper on the proposed amendments to the Code of Civil Procedure, 1908 was discussed. On the basis of resolution adopted in the said Conference and with a view to implement the recommendations of Justice Malimath Committee, 129th Report of the Law Commission of India and the recommendations of the Committee on Subordinate Legislations (11th Lok Sabha), it is proposed to introduce a Bill for the amendments of Code of Civil Procedure, 1908 keeping in view, among others, that every effort should be made to expedite the disposal of civil suits and proceedings so that justice may not be delayed.

3. Some of the more important changes proposed to be made are as follows:—

(a) any plaint to be filed shall be in duplicate and shall be accompanied by all the documents on which the plaintiff relies upon in support of his claim. It is also to be supported by an affidavit stating the genuineness of the claim of the plaintiff and of the documents on which he relies upon;

(b) the written statement in duplicate shall be accompanied by all the documents and shall be filed within a period of thirty days from the date of service of summons. Written statement is also to be supported by an affidavit;

(c) in order to obviate delay in service of summons, it is proposed that plaintiff shall take the summons from the court and send it to the parties, within two days of the receipt thereof, by post, fax, e mail, speed post, courier service or by such other means as may be directed by the court;

(d) with a view to implement the 129th Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court in which it was filed;

(e) as the maximum time is consumed in recording oral evidence by the courts which causes delay in disposal of cases, it is proposed to reduce such delay by making provisions for filing of examination-in-chief of every witness in the form of an affidavit. For the cross-examination and re-examination of witnesses it is proposed that it shall be recorded by a commissioner to be appointed by the court and the evidence recorded by a commissioner shall become part of the record of the suit;

(f) with a view to implement the recommendations of the Committee on Subordinate Legislations (11th Lok Sabha) relating to steps to reduce unnecessary adjournments, it is proposed to make it obligatory for a judge to record reasons for adjournment of a case as well as award of actual or higher cost and not merely notional cost against the parties seeking adjournment in favour of the opposite party. Further, it is proposed to limit the number of adjournments to three only during the hearing of a case;

(g) as the party in whose favour an injunction has been granted usually causes delay on flimsy and unreasonable grounds, it is proposed that the party who applies for injunction shall also furnish security so that that party may not adopt delaying tactics during the trial of the case;

(h) in matters relating to property disputes, particularly in matter of unauthorised construction on the land of others, it has been found that, under the existing provisions of the Code of Civil Procedure, no application for injunction can be moved unless the suit is filed first in the court having competent jurisdiction. With a view to obviate this hardship, it is proposed that a person may make an application to the court of competent jurisdiction for appointment of a commission to ascertain the factual status of the property so that at the time of the filing of the regular suit the report is available to the commissioner relating to the factual status of the property in dispute;

(i) with a view to implement the recommendations of Justice V.S. Malimath Committee, it is proposed that no further appeal against the judgment of a single judge shall lie even in a petition under article 226 or 227 of the Constitution; and

(j) with a view to reduce delay, it is proposed that the court shall on the date of pronouncement of judgment simultaneously provide authenticated copies of the judgment to the parties. Appeal shall be filed in the court which passes the decree and no notice shall be served on the advocates of the parties in the court of first instance.

3. The Bill seeks to achieve the above objects.

NEW DELHI;

The 12th August, 1997.

RAMAKANT D. KHALAP.

Notes on clauses

Clause 2.— In section 26 of the Code, a suit is instituted by presentation of a plaint or in such other manner as may be prescribed by rules made by High Court. Since these rules are different with different High Courts, the requirements for institution of suit are not uniform. The rules made by some High Courts require plaint to be supported by an affidavit stating the genuineness of the claim of the plaintiff and of the documents on which he relies upon while no such affidavit is required under the rules made by some High Courts. With a view to bring uniformity and lay down simple procedure to complete the pleadings, clause 2 amends section 26 of the Code and provides that facts must be proved by affidavit in every plaint.

Clause 3 amends section 27 of the Code with a view to lay down a fixed time frame to send summons to defendants. It seeks to provide 30 days from the institution of suit within which summons should be sent to defendants.

Clause 4.— In clause (c) of section 32 of the Code, the court is empowered to impose a fine not exceeding five hundred rupees for the purpose of compelling the attendance of any person in the court. Clause 4 substitutes "five thousand rupees" in place of "five hundred rupees" in the said section for the reason of decrease in the money value since the time provision was made.

Clause 5.— Section 58 of the Code provides for the detention and release of a person from civil prison in execution of a decree. Since the time provisions of section 58 were made, the value of money has decreased considerably. In this view, clause 5 seeks to amend section 58 and it substitutes for the words "one thousand rupees" and "five hundred rupees" the words "five thousand rupees" and "two thousand rupees" respectively.

Clause 6.— Section 60 of the Code provides for attachment and sale of properties in execution of a decree. Clause 6 seeks to amend section 60 by substituting "one thousand rupees" in place of "four hundred rupees" for the reason of decrease in the money value since the time provisions were made.

Clause 7.— provides for the settlement of disputes outside the court. The provisions of clause 7 are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that the Court make require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to their disputes settled through any of the alternate dispute resolution method that the suit could proceed further. In view of the above, clause 7 seeks to insert a new section 89 in the Code in order to provide for alternate dispute resolution.

Clause 8.— In section 95 of the Code, the court may award compensation not exceeding one thousand rupees in case it appears to the court that an arrest, attachment or injunction has been effected and such arrest, attachment or injunction was applied for insufficient ground or that there was no reasonable ground for instituting the suit. Sub-clause (2) of the said section bars a suit for compensation in respect of such arrest, attachment or injunction if an order has been passed by the court on an application for compensation under sub-section (1). In this circumstance, clause 8 seeks to substitutes "fifty thousand rupees" in place of "one thousand rupees".

Clause 9.— Section 96 of the Code provides for an appeal from original decree. Since the time provisions were made the value of money has considerably decreased and the pecuniary limits of "three thousand rupees" require to be revised. Clause 9 therefore seeks to substitute "twenty five thousand rupees" in place of "three thousand rupees" in section 96.

Clause 10.— Justice Malimath Committee examined the issue of further appeal against the judgment of Singly Judge exercising even a first appellate jurisdiction. The Committee recommended for suitable amendments to section 100A of the Code with a view to provide that further appeal in this regard shall not lie. the Committee also recommended for suitable enactment by Parliament for abolition of appeal to a Division Bench against the decision and order rendered by a Single Judge of the High Court in a proceeding under articles 226 or 227 of the Constitution. Clause 10 seeks to substitute a new section 100A with a view to provide for no further appeal in the above cases.

Clause 11. — Section 102 of the Code bars record appeal when the amount or value of the subject matter of the suit does not exceed one thousand rupees. Justice Malimath Committee recommended the amendments by section 102 in order to substitute a limit of twenty-five thousand rupees in place of one thousand rupees for the reasons of decrease in the value of money since the time provisions were made. Clause 11 seeks to bring in a limit of twenty-five thousand rupees to bar record appeal.

Clause 12. — Section 115 of the Code provides for revision by the High Court of an order or decision of any court subordinate to such High Court. The Malimath Committee noticed that often the records of the lower courts are sent to the High Court in the revisional proceedings. It is imperative that records of proceedings pending in the subordinate court should not be sent unless High Court so desires and revision should not operate as stay of proceedings before the trial court. The Committee while agreeing in principle that scope of interference against interlocutory orders should be restricted, felt that the object can be achieved more effectively without demanding the High Court of the power of revision. Clause 12 seeks to achieve the above object by suitable amendments to section 115.

Clause 13. — section 148 of the Code provides for enlargement of time by the court. Where any period is fixed or granted by the court for of any act prescribed or allowed by the Code, court has discretion to enlarge such period. Clause 13 seeks to put a limit on enlargement of such period by inserting the words "not exceeding thirty days in total" in section 148 with a view to minimise the procedural delay at the instance of either party to a suit.

Clause 14. — Order IV of the code provides for the institution of suits. Sub-rule (1) of rule 1 of Order IV states that every suit shall be instituted by presenting a plaint to the court. Since a copy of plaint is sent before court and a duplicate copy of plaint in needed for records, suitable amendments are made in this regard by clause 14 which requires institution of a suit by presenting plaint in duplicate to the court. Sub-rule (2) of rule 1 of the said order requires compliance of certain formalities by the registry of court. With a view to dispel the doubts when a suit is regarded to have been instituted, clause 14 inserts a new sub-rule (3) to provide that the plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).

Clause 15. — Order V of the Code provides for issue and service of summons. The Malimath Committee looked into the problem of arrears of cases in the courts and recommended amendments to the Code with a view to lay down a fixed time frame within which pleadings are to be completed. Clause 15 seeks to substitute sub-rule (1) of rule 1 of Order V to provide for filing written statements within thirty days from the day of institution of the suit except in few situations. Clause 15 amends rules 2, 6 and 7 to ensure that copy of plaint alongwith all documents on which plaintiff relies upon are delivered with summons to the defendant. This clause substitutes rule 9 to provide for delivery of summons by speed post, courier service, fax message or by electronic mail, service as the High Court may prescribe by rules. It makes the Code up to date with the changing needs of the time.

Clause 16.— Order VI of the code provides for pleadings generally. Clause 16 seeks to provide that person verifying the pleading shall furnish an affidavit in support of his pleadings. This clause omits rules 5, 17 and 18 of Order VI to bring in consistency with new changes in the Code.

Clause 17.— In Order VII of the Code, rule 14 provides for production of documents on which plaintiff sues. Clause 17 seeks to substitute rule 14 to provide where a plaintiff sues upon a document in his possession, he shall enter such documents in a list and shall produce it in court when plaint is presented by him and shall deliver document and a copy thereof to be filed with the plaint. The new rule further provides in case a document or copy thereof is not filed with the plaint, it shall not be allowed to be received in evidence on behalf of plaintiff at the hearing of the suit.

Clause 18. — Order VIII of the Code provides for written statement and set off. Clause 18 seeks to substitute rule 1 of Order VIII to provide a fixed time frame within which pleadings are to be completed. The new provisions required the defendant to present a written statement within thirty days from the date of service of summons on the defendant. Clause 18 inserts rule 1A to provide it a duty of defendant to produce documents upon which relief is claimed or relied upon by him. Rule 1A requires the defendant to produce documents in his possession in the court and deliver the document and a copy thereof when the written statement is presented by him. Rule 1A further requires in case a document or copy thereof is not filed with the written statement, it shall not be allowed to be received in evidence on behalf of defendant at the hearing of the suit.

Clause 19.— Rule 2 of Order IX is being substituted so as to provide that where there is default on the part of plaintiff to deliver summons to the defendant, the suit shall be dismissed by the court. This is in addition to non-payment of cost by the plaintiff as a ground of dismissal of suit.

It is proposed by amending rule 5 of Order IX so as to reduce the period from one month to seven days within which the plaintiff is required to apply for fresh summons where summons earlier issued remain unserved.

Clause 20.— Order X is proposed to amend by inserting rules 1A, 1B and 1C in the said order. This amendment is consequential to the insertion of new section 9 vide clause 7 of the Bill.

Clause 21.— Rules 2 and 15 of Order XI are proposed to be amended by fixing time limit to decide an application for leave to deliver interrogatories and to provide that an application for inspection of documents by the parties can be made only before the settlement of issues.

Clause 22.— Rule 2 of Order XII is proposed to be amended for reducing the time from fifteen days to seven days within which notice to admit a document may be given by any party to the suit.

Further the second proviso to rule 4 of the said order is being omitted so as to curtail the discretion of the court in the matter of allowing any party to amend or withdraw admission made by him.

Clause 23.— Rules 1 and 2 of Order XIII are proposed to be substituted so as to provide that the original of documents of which copies have been filed with the plaint and written statement shall be submitted before the settlement of issues is made by the court.

Clause 24.— Rule 4 of Order XIV is proposed to be amended so as to restrict the discretion of court by fixing time-limit beyond which no adjournment for the examination of witnesses or of the document shall be granted by the court before framing of issues by the court.

It is also proposed to omit rule 5 so that issues are framed within time and no application for amendments and striking out the issue is entertained by the court.

Clause 25.— Order XVI is proposed to be amended so as to fix a time limit within which an application may be made for summoning of witness. Further it is proposed to provide that a party applying for summons shall pay fee towards calling the summons within a period not later than seven days from the date of making application.

Clause 26.— Order XVII lays down the procedure for granting adjournments. The Committee on Subordinate Legislation (Eleventh Lok Sabha) recommended that it should be made obligatory in the judgment to record reasons for adjournment of cases as well as award of actual and not merely notional cost against the party seeking adjournment in favour of the opposite party. It is proposed to make it obligatory by amendment of proposed Order. It is proposed to make it obligatory for the judges to record the reasons in writing where the court grants adjournment and to award the actual cost to the opposite party. Further limit up to three adjournments has also been fixed in a case.

Clause 27.— Order XVIII provides for manner of recording the evidence. It is proposed to confer the power of recording of evidence by the commissioner to be appointed by the court.

Clause 28.— Order XX makes it compulsory for a party filing appeal to annex the certified copy of the decree to the Memorandum of Appeal. Justice Malimath Committee has pointed out that it takes a long time for obtaining certified copy of the decree and thus filing of appeal takes a long time. It is proposed to dispense with annexing certified copy of the decree alongwith Memorandum of Appeal and it is also proposed that the whole judgment shall be made available to the parties immediately after the judgment pronounced.

Clause 29.— Order XXVI enables the court to issue commission only in cases where witness resides outside the local limits of the jurisdiction of the court. It is proposed to amend Order XXVI by inserting a new rule 4A so as to enable the court to issue commission in any case where the interest of justice so demands.

Clause 30.— It has been observed that after obtaining temporary injunction the party in whose favour injunction has been granted causes delay in disposal of cases on flimsy and unreasonable grounds. To curb this practice it is proposed to amend Order XXXIX so as to provide that the party who applies for obtaining injunction shall also furnish security so that it may not adopt delaying tactics during the trial of the case.

Clause 31.— seeks to insert a new Order XXXIXA. Under the existing provisions of the Code of Civil Procedure, 1908 no application for interim injunction can be moved unless the suit is filed first in the court having competent jurisdiction. In matters relating to property disputes particularly it may help a person if such a person can make an application to the court of competent jurisdiction for appointment of a Commission to ascertain the factual status of the property so that at the time of filing of the regular suit the report of the Commissioner is available relating to the factual status of the property.

Clause 32.— proposes to amend Order XLI of the First Schedule so as to provide for filing of appeal on the basis of the copy of the judgment, to avoid delay as obtaining copy of decree takes considerable time. Further to avoid delay it is proposed that an appeal may be filed in the same court which passed the judgment and that court shall direct the parties to appear before appellate court.

Clause 33.— By this clause, all amendments to the Code made by the State Legislatures and the High courts before the commencement of the Code of Civil Procedure (Amendment) Act, 1997, are, except to the extent they are consistent with the provisions of this Act, being repealed. The provisions relating to savings are broadly intended to ensure that the amendments made by the sections are broadly intended to ensure that the amendments made by the sections mentioned in sub-section (2) are not taken advantage of in respect of proceedings which are pending at the commencement of the Code of Civil Procedure (Amendment) Act, 1997.

Clause 34.— (Amendment to the Limitation Act, 1963)

Sub-section (3) of section 12 of the Limitation Act, 1963 excludes for limitation purposes the time required for obtaining a copy of judgment on which the decree or order is founded. As it is proposed in clauses 28 and 32 of the Bill that copy of judgment is to be delivered at the time of pronouncement of judgment and that is sufficient for filing of appeal, therefore, amendment of consequential nature are being made under the aforesaid sub-section by omitting the words "on which the decree or order is founded".

Clause 35.— (Amendment to the Court Fees Act, 1870)

The proposed amendment is consequential to the new section 89 in the Code of Civil Procedure, 1908, proposed to be inserted vide clause 7 of the Bill so as to enable the party to claim refund of court-fee in case the matter in dispute is settled outside the court.

Clause 36.— (Amendment to the Schedule to the Court-Fees Act, 1870)

The proposed amendment is consequential to the insertion of new order XXXIXA in the First Schedule proposed to be inserted vide clause 31 of the Bill. The proposed amendment prescribes fee in these cases where a person applies for inspection before institution of the suit.

MEMORANDUM REGARDING DELEGATED LEGISLATION

Clause (d) of sub-section (2) of section 89, as sought to be inserted by clause 7 of the Bill, empowers the Government and the High Courts to make rules to be followed in mediation proceedings to effect the compromise between the parties.

Rules 9 and 9A of Order V as sought to be substituted by clause 15 of the Bill, empowers the High Courts to approve the courier service for the purpose of service of summons and also empowers to make rules with regard to other means of service of summons.

Rule 4 of Order XVIII as sought to be substituted by clause 27 of the Bill empowers the High Courts to provide, by rules the sums to be paid to the Commissioner for recording of evidence and the amount payable to the Commissioner by the court or by the parties.

Rule 6B of Order XX as sought to be substituted by clause 28 of the Bill empowers the High Courts to make rules with regard to the charges to be paid by the parties for supply of copy of the judgment.

The matters, in respect of which such orders or rules may be made are matters of detail and may hardly be provided for in the Bill. The delegation of legislative power is, therefore, of a normal character.

1991 DLS

ANNEXURE

EXTRACTS FROM THE CODE OF CIVIL PROCEDURE, 1908

(5 OF 1908)

* * * * *

INSTITUTION OF SUITS

Institution of suits.

26. Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

SUMMONS AND DISCOVERY

Summons to defendants.

27. Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

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Penalty for default.

32. The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

(*c*) impose a fine upon him not exceeding five hundred rupees;

* * * * *

Detention and release.

58. (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(*a*) where the decree is for the payment of a sum of money exceeding one thousand rupees, for a period not exceeding three months, and

(*b*) where the decree is for the payment of a sum of money exceeding five hundred rupees, but not exceeding one thousand rupees, for a period not exceeding six weeks:

Provided that he shall be released from such detention before the expiration of the said period of detention—

(*i*) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(*ii*) on the decree against him being otherwise fully satisfied, or

(*iii*) on the request of the person on whose application he has been so detained, or

(*iv*) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance:

Provided, also that he shall not be released from such detention under clause (*ii*) or clause (*iii*), without the order of the Court.

(*1A*) For the removal of doubts, it is hereby declared that no order for detention of the judgment-debtor in civil prison in execution of a decree for the payment of money shall be made, where the total amount of the decree does not exceed five hundred rupees.

* * * * *

ATTACHMENT

60. (*1*) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, molvable or immivable, belonging to the judment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment0debtor or by another person in trust for him or on his behalf: **Property liable to attach-ment and sale in execution of decree.**

Provided tha the following particulars shall not be liable to such attachment or sale, namely:—

* * * * *

(i) salary to the extent of the first four hundred rupees and two-thirds of the remainder in execution of any decree other than a decree for maintenance:

Provided that where any part of such p[ortion of the salary as is liable to attachment has been under attachment, whether continuously or intermittently, for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelveve months, and where such attachment has been made in execution of one and the same deere, shall, after the attachment has continued for a total period of twenty-four months, be finally exempt from attachment in execution of that decree.

95. (*1*) Where, in any suit in which an arrest or attachemnt has been effected or a temporary injunction granted under the last preceding section,— **Compen-sation for obtaining arrest, attach-ment or injunction on sufficient grounds.**

(*a*) it appears to the Court that such arrest, atachemnt or injunction was applied for on in sufficient grounds, or

(*b*) that suit of the plaintiff fails and it appears to the Court tht there was no reasonable or probable grolund for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application,award against the plaintiff by its order such, amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendannt for the expense or injury (including injury to reputation) caused to him:

Provided that the Court shall not award, under this section, an amount exceeding the lkimits of its pecuniary jurisdiction.

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PART VII

APPEALS

APPEALS FROM ORIGINAL DECREES

96. (*1*) * * * * * **Appeal from Original decree.**

(*4*) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable byh Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

* * * * *

No further appeal in certain cases.

100A. Notwithstanding anything contained in any Letters Patent for any High Court in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgement, decision or order of such single Judge in such appeal or from any decree passed in such appeal.]

* * * * *

No second appeal in certain suits.

102. No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

* * * * *

Revision.

115. (*1*) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—

(*a*) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(*b*) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation.—In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

* * * * *

148. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. **Enlargement of time.**

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ORDER IV

INSTITUTION OF SUITS

1. (*1*) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. **Suit to be commenced by plaint.**

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ORDER V

Issue and Service of Summons

Issue of Summons

1. (*1*) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified: **Summons.**

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim:

Provided further that where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons.

2. Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. **Copy or statement annexed to summons.**

* * * * *

6. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day. **Fixing day for appearance of defendant.**

7. The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case. **Summons to order defendant to produce documents relied on by him.**

* * * * *

Service of Summons

Delivery or transmission of summons for service.

9. (*1*) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

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Simultaneous issue of summons for service by post in addition to personal service.

19A. (*1*) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent, empowered to accept the service, at the place where the defendant, or his agent actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgment purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post, acknowledgment due, the declaration referred to in sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of the summons.

* * * * *

Service of summons where defendant resides within jurisdiction of another Court.

21. A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers or post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

* * * * *

Service on defendant in prison.

24. Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

25. Where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate: Service where defendant resides out of India and has no agent.

Provided that where any such defendant resides in Bangladesh or Pakistan, the summons, together with a copy thereof, may be sent for service on the defendant, to any Court in that country (not being the High Court) having jurisdiction in the place where the defendant resides:

Provided further that where any such defendant is a public officer in Bangladesh or Pakistan (not belonging to the Bangladesh or, as the case may be, Pakistan military, naval or air forces) or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant, to such officer or authority in that country as the Central Government may, by notification in the Official Gazette, specify in this behalf.

* * * * *

ORDER VI

PLEADINGS GENERALLY

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5. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just. Further and better statement, or particulars.

* * * * *

17. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Amendment of pleadings.

18. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court. Failure to amend after order.

ORDER VII

PLAINT

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9. (*1*) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present, within such time as may be fixed by the Court or extended by it from time to time, as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements. Procedure on admitting plaint. Concise statements.

(*1A*) The plaintiff shall, within the time fixed by the Court or extended by it under sub-rule (*1*), pay the requisite fee for the service of summons on the defendants.

(*2*) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(*3*) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(*4*) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

* * * * *

Documents relied on in pliant

Production of document on which plaintiff sues.

14. (*1*) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

List of other documents.

(*2*) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

Statement in case of documents not in plaintiff's possession or power.

15. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

Inadmisibility of document not produced when plaint filed.

18. (*1*) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

* * * * *

ORDER VIII

WRITTEN STATEMENT, SET-OFF AND COUNTER-CLAIM

Written statement.

1. (*1*) The defendant shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

(*2*) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter-claim, he shall enter such documents in a list, and shall,—

(*a*) if a written statement is presented, annex the list to the written statement:

Provided that where the defendant, in his written statement, claims a set-off or makes a counter-claim based on a document in his possession or power, he shall produce it in Court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement;

(*b*) if a written statement is not presented, present the list to the Court at the first hearing of the suit.

(*3*) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(*4*) If no such list is so annexed or presented, the defendant shall be allowed such further period for the purpose as the Court may think fit.

(*5*) A document which ought to be entered in the list referred to in sub-rule (*2*), and which is not so entered, shall not, without the leave of the Court, be received in evidence on behalf of the defendant at the hearing of the suit.

(*6*) Nothing in sub-rule (*5*) shall apply to documents produced for the cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.

(*7*) Where a Court grants leave under sub-rule (*5*), it shall record its reasons for so doing, and no such leave shall be granted unless good cause is shown to the satisfaction of the Court for the non-entry of the document in the list referred to in sub-rule (*2*).

Duty of defendant to produce documents upon which relief is claimed by him.

8A. (*1*) Where a defendant bases his defence upon a document in his possession or power, he shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement.

(*2*) A document which ought to be produced in Court by the defendant under this rule, but is not so produced, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(*3*) Nothing in this rule shall apply to documents produced,—

(*a*) for the cross-examination of the plaintiff's witnesses, or

(*b*) in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or

(*c*) handed over to a witness merely to refresh his memory.

Subsequent pleadings.

9. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Procedure when party fails to present written statement called for by Court.

10. Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit, and on the pronouncement of such judgment, a decree shall be drawn up.

ORDER IX

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

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Dismissal of suit where summons not served in consequences of plaintiff's failure to pay costs.

2. Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or to present copies of the plaint or concise statements, as required by rule 9 of Order VII, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made, if, notwithstanding such failure, the defendant attends in person (or by agent when he is allowed to appear by agent) on the day fixed for him to appear and answer.

* * * * *

Dismissal of suit where plaintiff, after summons referred unserved, fails for one month to apply for fresh summons.

5. (*1*) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of one month from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(*a*) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(*b*) such defendant is avoiding service of process, or

(*c*) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

* * * * *

ORDER X

Examination of Parties By the Court

* * * * *

Consequence of refusal or inability of pleader to answer.

4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

* * * * *

ORDER XI

Discovery and Inspection

* * * * *

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

Particular interrogatories to be submitted.

* * * * *

15. Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, or who has entered any document in any list annexed to his pleadings, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

Inspection of documents referred to in pleadings or affidavits.

* * * * *

ORDER XII

Admissions

* * * * *

2. Either party may call upon the other party to admit, within fifteen days from the date of service of the notice any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the results of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

Notice to admit documents.

* * * * *

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice:

Notice to admit facts.

Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

* * * * *

ORDER XIII

Production, Impounding and Return of Documents

Documentary evidence to be produced at or before the settlement of issues.

1. (1) The parties or their pleaders shall produce, at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

Effect of non-production of documents.

2. (1) No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

(2) Nothing in sub-rule (1) shall apply to documents,—

(a) produced for the cross-examination of the witnesse of the other party, or

(b) handed over to a witness merely to refresh his memory.

* * * * *

ORDER XIV

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon

* * * * *

Court may examine witnesses or documents before framing issues.

4. Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

Power to amend, and strieke out, issues.

5. (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

* * * * *

ORDER XVI

Summoning and Attendance of Witnesses

1. (*1*) * * * * *

List of witnesses and summons to witnesses.

(*4*) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf.

* * * * *

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Expenses of witness to be paid into Court on applying for summons.

* * * * *

ORDER XVII

Adjournments

1. (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time, adjourn the hearing of the suit.

Court may grant time and adjourn hearing.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Cost of adjournment.

Provided that,—

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

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party,

(c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment,

(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

(e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid.

* * * * *

ORDER XVIII

Hearing of the Suit and Examination of Witnesses

Statement and production of evidence.

2.(1)* * * * *

(4) Notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage.

* * * * *

Witnesses to be examined in open Court.

4. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

* * * * *

Production of evidence not previously known or which could not be produced despite due diligence.

17A. Where a party satisfies the Court that, after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the Court may permit that party to produce that evidence at a later stage on such terms as may appear to it to be just.

* * * * *

ORDER XX

Judgment and Decree

Judment when pronounced.

1.(1) * * * * *

(2) Where a written judgment is to be pronounced, it shall be sufficient if the findings of the Court on each issue and the final order passed in the case are read out and it shall not be necessary for the Court to read out the whole judgment, but a copy of the whole judgement shall be made available for the perusal of the parties or the pleaders immediately after the judgment is pronounced.

* * * * *

Last paragraph of judgment to indicate in precise terms the relief granted.

6A. (1) The last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment.

(2) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible, and, in any case, within fifteen days from the date on which the judgment is pronounced; but where the decree is not drawn up within the time aforesaid, the Court shall if requested so to do by a party desirous of appealing against the decree, certify that the decree has not been drawn up and indicate in the certificate the reasons for the delay, and thereupon—

(a) an appeal may be preferred against the decree without filing a copy of the decree and in such a case the last paragraph of the judgment shall, for the purposes of rule 1 of Order XLI, be treated as the decree; and

(b) so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution and the party interested shall be entitled to apply for a copy of that paragraph only without being

required to apply for a copy of the whole of the judgment; but as soon as a decree is drawn up, the last paragraph of the judgment shall cease to have the effect of a decree for the purpose of execution or for any other purpose:

Provided that, where an application is made for obtaining a copy of only the last paragraph of the judgment, such copy shall indicate the name and address of all the parties to the suit.

Copies of the typewritten judgment when to be made available.

6B. Where the judgment is type-written, copies of the type-written judgment shall, where it is practicable so to do, be made available to the parties immediately after the pronouncement of the judgment on payment, by the party applying for such copy of such charges as may be specified in the rules made by the High Court.

* * * * *

ORDER XXXIX

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

Temporary injunctions

Cases in which temporary injuction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(*c*) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders.

* * * * *

ORDER XLI

APPEALS FROM ORIGINAL DECREES

Form of appeal.

1. (*1*) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded:

Provided that where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the appellate Court may dispense with the filing of more than one copy of the judgment.

* * * *

Procedure on admission of appeal

9. (*1*) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

(2) Such book shall be called the Register of Appeals.

* * * * *

11. (*1*) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

* * * * *

12. (*1*) * * * *

(2) Such day shall be fixed with reference to the current business of the court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

13. (*1*) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate court, the court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

(*3*) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

* * * * *

15. The notice to the respondent shall declare that, if he does not appear in the appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Procedure on hearing

* * * * *

18. Where on the day fixed, or on any other day to which the hearing way be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice or, if the notice is returned unserved, and it is found that the notice to the respondent has not been issued in consequence of the failure of the appellant to deposit, within any subsequent period fixed, the sum required to defray the cost of any further attempt to serve the notice, the court may make an order that the appeal be dismissed:

Provided that no such order shall be made although the notice has not been served

upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

19. Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply to the appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

* * * * *

22. (*1*) * * * *

(*3*) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

* * * * *

EXTRACTS FROM THE LIMITATION ACT, 1963
ACT NO. 36 OF 1963

* * * * *

PART III

COMPUTATION OF PERIOD OF LIMITATION

12. (*1*) * * * *

(*3*) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from decree or order, the time requisite for obtaining a copy of the judgment on which the decree or order is founded shall also be excluded.

* * * * *

RAJYA SABHA

A

BILL

further to amend the Code of Civil Procedure, 1908, the Limitation Act, 1963 and the Court Fees Act, 1870.

(Shri Ramakant D. Khalap, Minister of State for Law and Justice)

ANNEXURE - B

LAW COMMISSION OF INDIA

QUESTIONNAIRE ON THE

CODE OF CIVIL PROCEDURE, 1908

LAW COMMISSION OF INDIA

DRAFT QUESTIONNAIRE

ON THE

CODE OF CIVIL PROCEDURE, 1908

Introductory Remarks

1. The Law Commission of India has been requested by the Government of India in the Ministry of Law to make recommendations for revision of the Code of Civil Procedure, 1908.

2. The Commission proposes to undertake the exercise in two phases. In the first phase, the Commission proposes to express its views on the various amendments suggested by the Code of Civil Procedure (Amendment) Bill, 1997, which has been introduced as an official Bill in the Rajya Sabha. In the second phase of the work, the Commission will, if necessary, consider the provisions of the Code which have not been dealt with in

the Bill (that is, provision on which the Bill does not propose any amendment) but which may appear to be in need of revision, in the interests of simplicity, certainty and uniformity in the law of Civil Procedure and with a view to achieving rationalisation and modernisation of the law.

Division of the project into two phases (as above) has been decided upon by the Commission, in the light of the fact that proposals for a comprehensive revision of the Code at this juncture may involve considerable length of time, while the proposals contained in the Bill seem to require a comparatively urgent attention.

3. In order to elicit informed opinion on the various proposals contained in the Bill, the Commission has prepared a Questionnaire on the subject. In the various questions as formulated by it, the Commission has attempted to mention, very briefly, some of the courses and alternatives that can be

possibly adopted with reference to the points to which the various amendments (as proposed in the Bill) relate. The Commission would like to make it clear that these courses and alternatives do not necessarily represent the final views of the Commission. They have been put forth, mainly in order to elicit informed opinion on the subject, and in order to facilitate a detailed consideration of the various points by the persons and bodies who may like to express their opinions on the proposals contained in the Bill.

4. The Commission will appreciate if interested persons and bodies will kindly forward their comments by the 30th of April, 1998, to the Commission.

[For facility of reading, each amendment proposed on the Bill is set out, along with the text of the existing provision].

QUESTIONNAIRE

INSTITUTION OF SUITS

Q-1 : Section 26 (Plaint) : Clause 2 of the Bill.

Section 26 of the Code provides that a suit shall be instituted by the presentation of a plaint or in other prescribed manner. The Bill proposes the addition of the following :

"In every plaint, facts shall be proved by affidavit".

[See also Q-11 below - Order 6, rule 15].

The main object is to reduce the possibility of false statements made in a plaint - believed to be a common phenomenon.

(a) Do you consider that above amendment will serve a useful purpose ?

(b) If so, would you favour a re-framing of the amendment - say, as under :

"The allegations of fact made in a plaint shall be supported by an affidavit, setting out separately facts which the plaintiff states on his own knowledge and the facts which he states on information received by him and believed by him to be true ?"

Q-2 : Section 58 (Detention in prison - maximum period) : Clause 2 of the Bill

Existing section 58 of the Code makes certain provisions, placing limits on the period of detention of the judgment debtor in execution of a decree. The limits are based on the amount of the money decree. In view of fall in the value of the rupee, the Bill seeks to increase the relevant amounts as under :

Existing Amount	Proposed Amount	Maximum period
(a) exceeding 1,000 rupees	exceeding 5,000 rupees	3 months

(b) exceeding 500 rupees but not exceeding 1,000 rupees	exceeding 2,000 rupees but not exceeding 5,000 rupees	6 weeks
(c) amount does not exceed 500 rupees	amount does not exceed 2,000 rupees	no detention can be ordered

Would you agree with the need for the above amendment ?

A.D.R

Q-3 : Section 89 (to be inserted) settlement of disputes outside the court) : Clause 7 of the Bill

The Bill proposes to insert a new section (as section 89), seeking to provide that "Where it appears to the court that there exist elements of settlement, which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations". After observations of the parties, the court (it is proposed) may re-formulate the

terms of a possible settlement and refer the same for arbitration, conciliation "judicial settlement" including settlement through Lok Adalat) or mediation.

Where the reference of the dispute is for arbitration or conciliation, the Bill proposes that the Arbitration and Conciliation Act, 1996 shall apply, "as if the proceeding for arbitration or conciliation were referred for settlement under the provisions of the Act".

Where the reference is to Lok Adalat or "judicial settlement", the Legal Services Authority Act, 1989 is to apply.

Where the dispute is referred for mediation, the proposal is that "the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed".

It should also be mentioned that while clause 7 of the Bill requires such attempts at "settlement", "only where there exist elements of settlement", clause 20(i) of the Bill proposes to

introduce Order 10, rule 1A, whereunder, after the admissions and denials of the parties are recorded by the court, "the court shall direct the parties to the suit to opt either mode of settlement outside the court as specified in sub-section (1) of section 89".[See Q-22, infra].

(Thus, one or other mode must be opted for, by the parties, under proposed Order 10, rule 1A).

The object of the proposal in the Bill is obviously to promote alternative methods of dispute resolution. However, on the proposals as formulated in the Bill, certain points of substance as well as points of form, arise for consideration. Opinion is therefore invited on the following points :

(a) Would the proposal in clause 3 make for quicker resolution or would it lead to the insertion of one more step in the chronology of the suit ?

(b) Should the reference by the court to the alternative method be discretionary

(with the court) or should it be mandatory?

(c) Should the stage for reference be set out in proposed section 89 itself ?

(d) Where the reference is to arbitration or conciliation, would the formula in proposed section 89(2)(a) "as if the proceedings were referred for settlement under the provisions of that Act (i.e. the Arbitration and Conciliation Act, 1996)" be appropriate and in conformity with the language of that Act ?

(e) Should the court itself be required to frame the agreement or, would it be better to permit the parties to enter into an agreement ? (This needs deep thinking, because the Act of 1996 is basically structured upon the concept of <u>an arbitration agreement</u>).

(f) In case of arbitration, several points of detail may arise, e.g. - who

will be the arbitrator, what will be his jurisdiction, what will be the venue, what will be the arbitrator's fees, etc.. How will these issues be dealt with ?

(g) Where mediation is decided upon, then, under section 89 as (proposed), "the court shall effect a compromise between the parties". What will be the situation, if the parties do no agree on a compromise?

[Some further points may also arise in the context of clause 20, seeking to insert Order 10, rule 1A - See Q-22 below].

APPEAL AND REVISION

Q-4 : Section 100A (Appeals from decisions of single Judge of High Court) : Clause 10 of the Bill.

At present, section 100A of the Code bars an appeal (Letters Patent appeal) from the appellate decision of a single Judge. The Bill proposes to

enlarge the scope of this bar (by amending section 100A), so as to bar an appeal even from an original decision of a single judge, as also from the writ, direction or order issued by a single judge "on an application made under article 226 or article 227 of the Constitution".

Do you consider that this amendment will be in the interests of justice ?

Would you favour, as an alternative, an amendment which would restrict such appeal to cases where the decision of the single judge involves a substantial question of law or is likely to result in a serious miscarriage of justice ?

Q-5 : Section 102 : No second appeal in certain cases : clause 11 of the Bill.

Section 102 of the Code bars second appeal in certain (what may be called "petty") cases. The bar operates, if two conditions are satisfied, namely:

(i) The suit is of a nature cognizable by a court of small causes;

(ii) The amount or value of the subject matter of the suit does not exceed three thousand rupees.

Thus, a double test is to be satisfied at present, depending on -

(i) the nature of the controversy; and

(ii) valuation of the subject matter.

The Bill seeks to eliminate the requirement at (i) above. As regards the second requirement, the Bill seeks to replace "three thousand rupees" by twenty five thousand rupees (in view of the fall in the value of the rupee).

Do you agree with the above approach ?

Would you agree with the desirability of retaining the criterion that the suit must be of a nature cognizable by the court of small causes

(while increasing the amount of pecuniary valuation) ? It may be necessary to keep in mind in particular, suits for declaration, injunction, etc. The present section (as mentioned above) primarily looks to the suit and only secondarily concerns itself with the value of the subject matter.

[At present, section 102 does not apply to declaratory suits: -Rameshchandra Aiyer Vs. Noorulla Sahib, (1907) ILR 30 Mad 101 or to suit for title - see sections 15, 16, 27, Provincial Small Cause Courts Act, 1887. Nor does it apply to suits for accounts.

[Small Cause Courts Act, 1887, Second Schedule, article 31).

The nature of the suit determines appealability.

Digambar Parshwanath Jain Mandir Vs. Valubai, AIR 1961 Bom. 221.

Mohini Vs. Rama-Sankar Das, AIR 1924 Cal. 487.

B.P.Gautam Vs. R.K.Agarwal,

AIR 1977 All. 103.

[Your comments on Clause 11 of the Bill are invited in the light of the above legal position.].

Q-6 : Section 115 (Revision) Clause 12 of the Bill.

(i) Section 115 (1), Proviso, of the Code (as inserted in 1976), provides that the High Court shall, not in revision, vary or reverse an order made in the course of a suit or an order deciding an issue in the course of a suit (briefly, interlocutory orders), unless one of the following conditions is satisfied :

(a) the order, if it had been made in favour of the revision petitioner, would have finally disposed of the case or

(b) the order, if it is allowed to stand, would occasion a failure of justice or cause irreparable injury to

the petitioner.

In either of the two cases mentioned above, the High Court can interfere.

Of course, the requirements given in the main paragraph of the section, -clause (a), (b), or (c) - are still to be satisfied. See Mulla, CPC (1995), Vol. 1, pages 776 and 824.

The Bill proposes to amend the proviso, so as to delete clause (b). The effect would be to bar interference in revision against interlocutory orders, even where there is failure of justice or irreparable injury. The proposal is intended to cut the number of revisions on petitions. However, it is to be noted that the effect would be to bar interference even in cases of serious injustice resulting from an interlocutory order.

For example, an order of the trial court refusing an amendment of pleadings, even

where the amendment is sought because of intervening events or to rectify a bona fide mistake or to remedy unintentional omission to implead a party or unintentional omission to take a plea in defence which is left out, would cease to be revisable under the Bill.

(ii) An order rejecting a document as inadmissible would cease to be revisable, even though the document may be very material.

(Such orders can possibly be made a ground of attack in appeal against the ultimate decree, but the lapse of time would itself cause serious injustice).

(iii) The revisional court would be deprived of the opportunity of taking into account subsequent events - a power which it possesses at present.

State of Madras Vs. Asher Textiles Ltd., AIR 1960 Mad. 180.

(iv) If the trial court wrongly frames an issue on a fact which is admitted by the defendant, the High Court can (under the existing section), interfere.

Gorakh Vs. Vithal,
(1887) ILR 11 Bom. 435 Cf.
Sivaprasad Vs. TricOmdas,
(1915) ILR 42 Cal. 926, 931.

[The proposal will take away this power.]

Keeping the above aspects in mind, would you favour the proposed amendment of section 115 ?

PLAINT AND SUMMONS

Q-7 : Order 4, rule 1 (Commencement of suit by plaint) : Clause 14 of the Bill.

Order 4, rule 1(1) of the Code provides that every suit shall be instituted by presenting a plaint, etc.. Order 4, rule 1(2) further provides that every plaint shall comply with the provisions of Order 6 and Order 7, so far as they are applicable. The Bill proposes two amendments in

this regard :

(i) It is proposed that the plaint must be in duplicate. This will become Order 4, rule 1(2); [For consequential proposals, see Q-14, below].

(ii) It is further proposed to add Order 4, rule 1(3), as under :

"(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub rules (1) and (2)."

It would appear that while the first amendment is a comparatively minor one, the second one may require serious consideration. The effect would be obvious, particularly on reading proposed rule 4(3) with rules 4(1) and 4(2), under which any omission to comply with Order 6 or Order 7 would have serious consequences.

In this context, it is to be remembered that Order 6 (pleadings generally) and Order 7 (plaint)

contain a vast variety of provisions, dealing with numerous matters of detail. If it is to be provided that a deficiency in respect of any of the detailed matters is to mean that there is no plaint in law, then great anomalies and hardships are bound to ensue. For example, the Code lays down, inter alia, [Order 6, rule 2] that pleadings shall state the material facts on which the plaintiff relies - and this must be done "concisely". If the registry of the court regards the pleadings as /not "concise" and, consequently, the suit is not regarded as not properly instituted, the result will be that the plaintiff will have to re-draft the plaint. But, even if he is prepared to do so, he will not be certain, if the re-drafted plaint itself is "concise" enough (in style) or whether (in point of substance), it contains all material facts. No doubt, the level of drafting should be improved. But it is apprehended, that that object can be more appropriately achieved by educating junior members of the bar, rather than by visiting the litigants with adverse consequences for deficiencies in

drafting.

To take another instance, similar problems could arise, if the provision relating to Order 7, rule 14 (documents to be produced, etc.) is alleged to have been infringed. Under the proposed amendment, the plaintiff and the court registry may be compelled to enter into long-ranging controversies, as to what are basic documents, what are evidentiary documents, etc..

A still more fertile source of trouble would emerge from the requirement in Order 7, rule 1(c) that the plaint must contain the facts which show the cause of action. It is not always easy at the initial stage for the plaintiff to decide what are the "essential facts" in this regard. Even a good lawyer may not always find the matter easy, as the question is a mixed one of fact and law; and complex issues of substantive law may be inextricably linked with the factual matrix. A difference of opinion between the plaintiff's lawyer and the registry may create problems.

The Commission would like the respondents to this Questionnaire, to offer their considered views in the matter in the light of the above position.

Q-8 : Order 5, rule 1 (Summons to appear and answer) : Clause 15(i) of the Bill.

Order 5, rule 1 of the Code empowers the court (after the institution of the suit), to issue to the defendant summons to appear and answer the claim, on a day to be therein specified.

The Bill proposes an amendment of this rule, whereunder the day so fixed has to be within thirty days from the day of institution of the suit.

Secondly, while the present rule leaves it to the court's discretion to require that the defendant should file his written statement also on that date, the amendment proposes that the day fixed for appearance shall also be the day fixed for filing the written statement.

Thirdly, the proposed amendment envisages that if the defendant fails to file his written statement on the date so specified, he shall be allowed to file the written statement on a specified day, but that (later) day "shall not be beyond thirty days from the date of service of summons on the defendant."

Thus, the date fixed for appearance (under the proposed amendments) shall never be beyond thirty days from the filing of the plaint. And the date for written statement can never be beyond 30 days from the date of service of summons.

The amendments so proposed are obviously well-intentioned, aiming at as speedy a completion of the preliminary of trial of the case, as possible. At the same time, certain counter -balancing factors do arise for consideration, as under :

(a) Is it proper to fix a rigid time limits for the acts in question - rigid, in the sense that the court will have no discretion to relax or modify the same, even when the special facts of a case so

demand ?

(b) The date of appearance and date for filing written statement are fixed after taking into account several factors, including the following -

(i) Volume of work before the court in question;

(ii) Distance of the defendant's place of residence from the headquarters of the court;

(iii) Available facilities for sending the summons;

(iv) Magnitude of the claim (A big claim may require good deal of documentation, for properly defending it).

(v) Complexity of the controversy (sometimes, the claim which is to be met by the defendant may need good deal of time for dealing with it. For example,

he may have to take competent legal advice, not only as to what facts he should admit or deny, but as to how the denial should be framed.).

(vi) Consulting his (defendant's) lawyers for ascertaining whether legal defences, such as jurisdiction, limitation, want of cause of action, plea of res judicata, etc. are available.

The point to make is, that most of these factors are flexible and variable and they cannot be governed by one uniform criterion as to the requisite time.

Comments on the proposed amendment, in the light of the above aspects, are welcome.

[Clause 15(iii) and clause 15(iv) of the Bill propose certain amendment, which are consequential on other proposals].

Q-9 : Order 5, rules 9, 9A, 19A, 21, 24 and 25 (Modes of service of summons) : Clause 15(v) to Clause (ix).

The Code (in Order 5, rules 9, 19A, 21, 24, 25, etc.) at present contemplates service of summons –

(1) through proper officer of the court, and

(2) also by registered post (unless the court dispenses with it).

Instead of this scheme, the amendment proposes that the service shall be under a different scheme, whose main features are as under :

(a) The court shall hand over the summons to the plaintiff or his agent, who shall arrange to serve it within two days in the manner provided in (b) below;

[For the consequences of default, see Q-20, below, see also Q-13, below].

(b) The plaintiff (or his agent) will serve the summons on the defendant by -

(i) registered post; or

(ii) speed post; or

(iii) approved courier service; or

(iv) fax message; or

(v) Electronic mail service; or

(vi) other means prescribed by the High Court by rules.

[The actual mode to be adopted, out of (i) to (vi) above, will be specified by the court].

(c) In addition, the court may also direct service through the proper officer of the court.

Would you prefer the above scheme which seeks not only to take advantage of modern technological innovations but also provide for modes of service which are more abuse-proof?

Would you agree that both the modes of service (b) and (c) above should be mandatory?

PLEADINGS AND PARTICULARS

Q-10 : Order 6, rule 5 (Further and better statement of particulars) : Clause 1(i) of the Bill.

Order 6, rule 5 of the Code provides that the following may be ordered (by the court) :

(a) A further and better statement of the particulars;

(b) further and better particulars of any matter stated in any pleading;

(c) The order may be upon such terms as may be just.

The Bill proposes deletion of this rule. The proposal seems to be based on the assumption that the present rule is unnecessary and may cause delay. However, the assumption so made may require further consideration. "Further and better particulars" are undeniably intended to enlighten the court and the opposite party, as to the nature of the case. The expression "further" denotes the

quantitative aspect, while the expression "better" denotes the qualitative aspect. In principle, the law should encourage such clarification of the controversy. Ordering of particulars may not necessarily cause delay. Rather, the more clear the controversy becomes, the less time will be taken, in future in disposing of the issues. The object of particulars is to enable the parties to understand the case better. Spedding Vs. Fitzderald, (1888) 38 Ch. D 413.

Your views on the subject will be welcome.

Q-11 : Order 6, rule 15 (Verification) : Clause 16(11) of the Bill.

Order 6, rule 15 of the Code deals with verification of the pleadings. The Bill proposes to add sub-rule (4), to the effect that the person verifying shall also make an affidavit, in support of the pleadings. This is connected with the amendment proposed in section 26, to the effect that facts in the plaint shall be "proved by affidavit". [Clause 2 of the Bill] - See Q-1,

above.

What are your comments in this regard ?

Q-12 : Order 6, rules 17-18 (Amendment of pleadings) : Clause 16 (iii) of the Bill.

The Bill proposes deletion of Order 6, rules 17-18 of the Code, which empower the court to grant leave to amend the pleadings. The proposal appears to be based on the assumption (i) that this power is unnecessary and (ii) that recourse to it causes delay.

The above proposal may, however, require very careful consideration. Amendment of the pleadings is not always necessitated by carelessness. It may become necessary for a variety of causes. It may (for example) be necessitated by subsequent events or by reason of facts, which would not have been in the plaintiff's knowledge in spite of his due diligence. (In fact, in such cases, the law allows even a review of the judgment - see Order 47, rule 1 of the Code). [See "Illustrative cases,

below].

Occasionally, a document which is material to the case was not originally known to the party now applying for amendment. The document may affect the nature of the pleading. In such cases, the considerations of justice obviously demand that the real issue should come before the court. A court of justice is expected to deal with the real controversy that troubles the parties and not with a debate which reflects the contest in a very imperfect manner.

Delay in the disposal of the litigation in such cases may be unavoidable. But the parties will have at least the satisfaction, that the real dispute between them has been "adjudicated" - which, indeed, is the heart of the judicial function. Otherwise, the judgment will leave undecided the dispute as the parties perceive it.

Illustrative cases as to amendment

In order to illustrate the points made above more concretely, a few instances, culled out from

reported decisions, are noted below :

(i) Plaintiff sued for partition and accounts. Defendant objected, that the suit should have been for dissolution of partnership and accounts. Amendment of the plaint to that effect was allowed (even at the appellate stage), as it was based on the pleadings and evidence of the defendant himself.

K.Krishna Rao Vs. K.Babjee Rao,
AIR 1991 AP 232 (DB).

(ii) Amendment of the plaint may be more readily granted, if the necessary materials are already on record.

Ishwardas Vs. State of MP,
AIR 1979 SC 551.

(iii) Plaint did not give the valuation for court fees. Amendment was allowed, to permit the plaintiff to add such valuation.

Sathappa Chettiar Vs. Ramanathan Chettiar, AIR 1958 SC 245.

(iv) Plaintiff sued in a court for an amount beyond the pecuniary jurisdiction of the court. He wished to relinquish a part of his claim, in order to bring the suit within the jurisdiction of the court. It was allowed.

Durga Prasad Vs. Radhey Shyam,
AIR 1990 Raj. 57.

Compare Shobha Venkat Rao Vs. K.R.Mahale, AIR 1969 Bom. 370.

[It may be mentioned that Order 2, rule 2(2) and Order 23, rule 1 of the Code permit the plaintiff to abandon or relinquish a part of the claim].

(v) In considering the prayer for amendment, subsequent events can be taken into account.

Vineet Kumar Vs. Mangal Sain,
AIR 1985 SC 671 = (1984) 3 SCC 352;
Brijlal Vs. Hotel Neelam,
AIR 1984 Bom. 432.

(vi) Amendment of the plaint may be necessitated by intervening events, where the changed circumstances give rise to a new cause of action : (Of course, after such amendment, the defendant has to be allowed opportunity to meet the amended plaint).

R.Durgaraju Vs. Venkataraju,
AIR 1979 AP 14;
Prem Lal Vs. Jadav Chand,
AIR 1979 Raj. 44;
Satish Chandra Vs. State of WB,
AIR 1960 Cal. 278.

(vii) Plaintiff in a suit for specific performance failed to make an avertment of his own readiness and willingness to perform the contract as required by section 16(c), Specific Relief Act, 1963. Amendment was allowed to add this averment. (It did not introduce any new cause of action).

Gajanan Jaikishan Joshi Vs. Prabhakar Mohanlal Kalwar, (1990) 1 SCC 166.

(viii) In a petition for divorce under the Hindu Marriage Act, 1955, a prayer for seeking judicial separation (as an alternative) was allowed to be added, by way of amendment.

Satyamma Vs. Gopala Reddy,
AIR 1961 AP 112.

(ix) A suit was filed to annul a marriage, but the date of the marriage was left out, by slip. Amendment to add the date of marriage was allowed, being bona fide mistake and essentially required to bring the facts on record.

Mandakini Vs. Chandrasen,
AIR 1986 Bom. 172.

(x) Amendment of the plaint may be allowed to permit withdrawal of an admission made by the plaintiff in the plaint (under a misconception).

Panchdeo Narain Vs. Jyoti Sahay,
(1984) Suppl. SCC 594.

As to withdrawal of admission made in the written statement compare -

Mahendra Radio & Telivision Vs. State Bank of India, AIR 1988 All. 257.

(xi) An amendment of the plaint to add the relief of possession should be allowed, if no grave prejudice is caused to the defendant.

Haridas Vs. Godrej Rustom.

AIR 1983 SC 319.

Views are invited on the proposal in question, in the light of the above legal position.

Q-13 : Order 7, rule 9 : Procedure on admission of plaint : Clause 17(i) of the Bill.

Under Order 7, rule 9, the plaintiff is to endorse on the plaint, etc. a list of documents and (on the plaint being admitted), he shall furnish the necessary number of copies of the plaint or (if so permitted) concise statement of the plaint. The Bill seeks to revise this rule, on the following points :

(i) On admission of the plaint, the court shall give to the plaintiff the summons, to be served as per Order 5 (as proposed to be amended). [See under Q-9, supra.].

(ii) The plaintiff shall forward the summons to the defendant within two days.

(iii) Where (under Order 5, rule 9A as proposed), the summons is to be given to the court (i.e. its proper officer), the court will direct the plaintiff to file the necessary number of copies (and service fees) within 2 days.

Have you any comments in this regard ?

Q-14 : Order 7, rule 11 (Rejection of plaint) : Clause 17(ii) of the Bill.

Order 7, rule 11 of the Code requires the court to reject the plaint in four situations. The Bill seeks to add, to this enumeration the

following additional situations :

"(e) where it (i.e. the plaint) is not filed in duplicate;

(f) where the plaintiff fails to comply with sub-rule (2) of rule 6 (The reference seems to be to Order 5, rule 9, as proposed to be revised - See Q-13 above).

(g) where the plaintiff fails to comply with sub-rule (3) of rule 9A [This seems to refer to Order 5, rule 9A (2), relating to court-controlled service of process].

In order to help the respondents in answering this Questionnaire, it may be convenient to elaborate the impact of the proposed amendments in some detail, as under :

Proposed clause (e) - The Bill, by clause 14(i), proposes that the plaint shall be filed in duplicate. [See Q-7, above]. Presumably, as a connected amendment, clause 17(ii), by inserting Order 7, rule

11(e), seeks to provide that for failure to file a duplicate, the plaint shall be rejected" (The proposal does not envisage any time to be given to the plaintiff for the purpose of rectification].

It seems to be preferable that some time should be given to the plaintiff to rectify the omission.

Proposed Clause (f) - Order 7, rule 5 as proposed to be amended [See Q-9, above], requires the plaintiff to send the summons to the defendant (alongwith a copy of the plaint) for carrying out the mode of service through the plaintiff (as now contemplated). This must be done within 2 days. Order 7, rule 11(f) proposes that if this is not dome, the plaint shall be rejected.

Now, it is to be noted that the above stage will really arrive, only after the plaint is admitted under (proposed), Order

7, rule 9(1). Post-admission "rejection" may not be quite appropriate. Apart from that linguistic point, there is a matter of substance to be considered. Should not the plaintiff be allowed some time to rectify the failure to send the copies ?

Ordinarily, the plaintiff will not deliberately delay the service; but the pressures of work or other circumstances may come in the way in special situations.

Proposed clause (g) - Clause (g), as proposed to be inserted in Order 7, rule 11, in effect means that if, as contemplated by proposed Order 5, rule 9A(2), the plaintiff does not deliver to the court office the copies and fees etc. for court-controlled service, then the plaint shall be rejected. Here again, no opportunity is to be given to the plaintiff to rectify the failure. It is to be considered whether a straightway rejection of the plaint (compulsorily) is

called for, in such cases. It is true that the rejection (i) is appealable and (ii) does not bar a fresh suit (there being no decision on the merits). But, in the long run, an appeal or a fresh suit will mean fresh burden on the court (apart from the trouble and expense which have to be incurred by the plaintiff).

Comments on Clause 17(ii) of the Bill are invited in the light of the above points.

[See also Q-7, supra].

Q-15 : Order 7, rule 14, 15, 18 (Production of documents on which plaintiff sues) : Clause 17(iii) (iv) (v) of the Bill

Existing Order 7, rules 14, 15, and 18 of the Code deal with the production or listing of documents, alongwith the plaint. For this purpose, the present scheme makes a distinction between :

(a) documents which form the foundation or basis of the suit (one can call them the "basic documents") and

(b) documents which merely constitute evidence of the claim ("evidentiary documents")

Documents under category (a) above have to be physically produced (if in the plaintiff's possession etc.), while documents under category (b) above are merely to be listed.

Further, non-production or non-listing of documents does not necessarily mean exclusion (of the documents) from evidence, In every case, the Court can, under existing Order 7, rule 18, grant leave to admit them in proper cases.

This existing scheme is sought to be replaced (under the Bill) by a more drastic scheme, whose chief features are as under :

(a) All documents must be physically produced along with the plaint;

(b) Non-compliance with the above cannot be cured, as the court's power to grant leave is sought to be taken away, by

amending Order 7, rule 18.

Now, with reference to the above amendments, at least two major points require consideration. First, whether it is really necessary to insist on physical production and delivery (at the commencement suit) of even evidentiary documents ? This would mean burdening the court with many documents which may ultimately never be formally tendered in evidence (say, because the defendant's admission of certain facts may render them superfluous). The present scheme, which makes a distinction between "basic" and "evidentiary documents", has worked well. Evidentiary documents are to be produced when the issues are (or are about to be settled). See Order 13, rule 1-2 (whose scheme is examined in detail in AIR 1990 Gauhati 7). If the defendant has, by that stage, already admitted certain facts, the related documents will have no role to

perform.

Secondly, to completely deprive the court of the power to permit production etc. of a document at a later stage (for sufficient cause) appears to be a course uncalled for. It is not in every case that non-production will cause prejudice to the defendant. If, for example, there is no possibility of fraud, etc. and there is no doubt about the existence of a document at the date of suit, the court should admit the document.

Devidas Vs. Pirjada Begum,
(1884) ILR 8 Bom. 377.;

V. Arjun Vs. Sankariah,
AIR 1957 AP 784;

Shibkumar Vs. Rasulbux,
AIR 1959 Cal. 302.

This is particularly the case where certified copies of public documents are sought to be produced at a late stage.

Talewar Singh Vs. Bhagwan Das,
(1908) 12 CWN 312.

The utility of the discretion conferred at present on the court to relax the rigour of the rules relating to production of documents has been recognised at the highest level.

(i) Kanda Vs. Waghu,
AIR 1950 PC 68.

(ii) Imambandi Vs. Mutsaddi,
ILR 45 Cal. 878 (PC).

One small point (not arising out of the proposals) can be conveniently mentioned, at this stage. Present Order 7, rule 15 reads as under :

"15. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is".

It can be considered whether, at the end of Order 7, rule 15, the following words should be a added "and take steps for getting it produced before the court by applying to the court for issuing process

for such production". [See also Q-28, below].

Q-16 : Order 8, rule 1 (Written statement by defendant) : Clause 18(i) of the Bill.

Order 8, rule 1 of the Code (as it stands at present) requires the defendant to present his written statement at the first hearing or "within such time as the court may permit". The Bill proposes to provide that the time permitted by the court shall not be beyond thirty days from the date of service of summons on the defendant. The question is, whether an inflexible limit of 30 days should be categorically provided by the law. It is to be kept in mind that when a summons is received by the defendant, who is now to prepare his defence, such defence usually involves the following steps-

(i) getting ready the necessary documents;

(ii) engaging a lawyer and giving him instructions;

(iii) allowing the lawyer some time, to go through the material;

(iv) drafting (and getting typed) the written statement; and

(v) physically filing it in court.

Steps at (iii) and (iv) above are not within the control of the defendant personally. Further, if the case is a complex one, the lawyer will take some time to study the legal defences (if any), that may be available.

Having regard to these considerations, a proposal depriving the court of its present discretion in regard to the time limit for filing the written statement may not be a very desirable step. Sometimes, in order to keep to the (proposed) time limit, the defendant's lawyer may be induced to include in the written statement all conceivable defences - sound and unsound - thus leading to delay in disposal and to the framing of unnecessary issues.

Q-17 : Order 8, rule 1A (proposed) Defendant's documents : Clause 18(ii) of the Bill.

Order 8, rule 1(2) at present, requires the defendant to file a list of documents on which he proposes to rely. A document not so listed cannot be later received in evidence for the defendant, without the court's leave, for which reasons have to be recorded. This is the gist of existing Order 8, rules 1(2), 1(5) and 1(7). If the defendant relies on a document as the basis of his set off or counter-claim, then that document must be physically delivered to the court with the written statement.

Where no set off is claimed, but the defendant bases his defence on a document which is in his possession or power, the same also must be physically delivered to the court, along with the written statement, as provided by Order 8, rule 8A(1). If it is not so produced, it cannot be received in evidence for the defendant, without the leave of the court, under existing Order 8,

rule 8A(2).

The Bill proposes to change this scheme, both in substance and in structure, by replacing existing Order 8, rule 1(2) to 1(7) and rule 8A, by Order 8, rule 1A, whose main features are as under:

(a) Defendant must list, produce and deliver, along with the written statement every document on which he relies -

(i) whether it is a document which forms the basis of his defence (without set off etc.) or

(ii) whether it is a document on which he bases his set off or counter-claim or

(iii) whether it is a document on which he merely "relies" (i.e. which is merely an evidentiary document and not a basic or foundational document).

(b) A document which is not so listed,

produced and delivered, cannot be tendered in evidence on behalf of the defendant at the hearing of the suit. This bar is mandatory (under the Bill) and admits of no relaxation by the court, even if good cause is shown for its non-filing etc. [Contrast proposed Order 8, rule 1A(2), with existing Order 8, rule 1(5) and Order 8, rule 8A(2)].

It is a matter for serious consideration whether such a provision, admitting of no relaxation, would preserve the essentials of fair trial. It would even render nugatory Order 47, rule 1, under which the court can entertain a review application for evidence subsequently discovered. Other inconveniences may also result from the proposal. [See also Q-28, below].

Q-18 : Order 8, rule 9 (Subsequent pleadings) : Clause 18(iii) of the Bill.

Existing Order 8, rule 9 of the Code provides as under :

"No pleading subsequent to the written statement of a defendant, other than by way of defence to a set off or counter-claim, shall be presented except by the leave of the court and upon such terms as the court thinks fit; but the court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same."

The Bill proposes to delete this rule. The consequences of the proposed deletion of Order 8, rule 9 need to be analysed in some detail.

(a) The existing rule begins with a prohibition. Couched in negative language, it lays down that no pleading (subsequent to the first pleading) shall be allowed, without the leave of the court. Thus, literally, its deleting would mean removal of the prohibition

against subsequent pleadings.

(b) However, that does not seem to be the intention underlying the Bill, whose general approach is towards eliminating (what are regarded as) procedural refinements. The object seem to be to take away the power of the court to permit subsequent pleadings. If so, the proposal seems to be extremely unrealistic and may cause serious injustice. Filing of such supplementary pleadings may become necessary in various situations. Following list of such situations is illustrative only :

Illustrative cases (Supplementary pleadings

(i) If the defendant introduces a new case, it is fair to allow the plaintiff to file his subsequent pleading.

Shakoor Vs. Jaipur Development Authority, AIR 1987 Raj. 19.

(ii) If the plaintiff amends (with leave) his plaint, defendant should be given leave to file a subsequent pleading.

Sali Charan Vs. Sukanti,
AIR 1979 Orissa 78.

Conversely, if the defendant amends his written statement, then leave should be granted to permit the plaintiff to file his additional pleading, to react to it.

(iii) Leave to file an additional pleading may be granted to take into account subsequent events, occurring after the filing of the suit and to avoid multiplicity of suits.

Ramaswami Naidu Vs. Pathu Pillai,
AIR 1965 Mad. 9.

(iv) When a minor attains majority during the pendency of litigation and is not satisfied with the pleading filed by

the guardian ad litem, the minor should be given leave under this rule.

Shiva Kumar Singh Vs. Kari Singh,
AIR 1962 Pat. 159.

Your views on the point under consideration are invited in the light of above aspects.

Q-19 : Order 8, rule 10 (Defendant's failure to file written statement) : Clause 18(iii) of the Bill.

Present Order 8, rule 10 deals with the situation where the defendant fails to file a written statement. The rule (as amended in 1976) leaves to the court two alternatives :

(a) the court may proceed to pronounce judgment, or

(b) the court may make such order as it thinks fit.

Ganpat Chand Vs. Jeth Mal,
AIR 1983 Raj. 146.

The Bill proposes to delete this rule. It would appear that this would remove from the Code a power which is badly needed. Its deletion would create a void in the procedural apparatus and create uncertainty.

Would you favour the proposal ?

SUMMONS NOT SERVED

Q-20 : Order 9, rule 2 (Dismissal of suit where summons not served for failure to pay process fees, etc.) : Clause 19(i) of the Bill.

Order 9, rule 2 of the Code, at present, empowers (but does not require) the court to dismiss the suit, if the summons has not been served upon the defendant because of the plaintiff's failure to pay the process fees or to present necessary copies of the plaint, etc.. The Bill makes the provision more stringent, by requiring the court to dismiss the suit, if the summons has not been served because of plaintiff's failure to send the summons to the defendant

within two days (that being the scheme in the Bill in the amendments proposed in Order 5, rule 9) - See Q-9, above.

(Further, the Bill does not mention non-service because of failure to file copies of the plaint - presumably because of the amendment, proposed in Order 4, rule 1).

The amendment to Order 9, rule 2 is thus consequential and does not need separate comments.

Q-21 : Order 9, rule 5 (Failure to apply for fresh summons) : Clause 19(ii) of the Bill.

Under existing Order 9, rule 5(i), if the plaintiff fails to apply, within one month, to apply for fresh summons (after the first one has been returned unserved), the court shall dismiss the suit, unless the plaintiff satisfies the court about certain specified circumstances excusing the failure.

The Bill proposes to substitute seven days, in place of thirty days.

Would you favour the proposal ?

PROCEDURE FOR A.D.R.

Q-22 : Order 10, rule 1A (New) Alternative dispute resolution : Clause 20(i) of the Bill.

Order 10 of the Code deals with examination of the parties by the court at the pre-trial stage. In this Order, the Bill proposes the addition of new rule 1A, to the effect that after recording the parties' admissions and denials, the court "shall direct the parties to opt (for) either mode of the settlement outside the court as specified in sib-section (1) of section 89".

This new rule is, in substance consequential on the proposed amendment, of section 89 (as per clause 7 of the Bill. However, it is necessary to point out that sector 89 (as proposed by Clause 7 of the Bill) begins as under :

"89(i) Where it appears to the court that there exist elements of a settlement which

may be acceptable to the parties the court shall formulate the terms of settlement....".

[See under Q-3, above].

Thus, under section 89 as proposed, the court is to take into account the possibility of settlement in the particular case, while proposed Order 10, rule 1A contains no such requirement. On the general principle that rules should not go beyond the sections, it would be a point worth considering if Order 10 rule, 1A (proposed) would not require some change.

[This point of drafting is, of course, in addition to the major question whether ADR through court, with "limited" compulsion under section 89, can reduce delay.]

REFUSAL TO ANSWER

Q-23 : Order 10, rule 4, Refusal to answer material questions : Clause 20(ii) of the Bill.

Where the party's pleader, appearing at the pre-trial hearing, is unable to answer material questions, and the court is of the opinion that the party himself can answer those questions, it can, under Order 10, rule 4, "postpone the hearing of the suit to a future day" and direct that such party shall appear in person on the day so specified. The Bill proposes that such "future day" shall not be later than seven days from the date of first hearing.

The object, obviously, is to cut short the interval. But a few important aspects may have to be kept in mind, while evaluating this proposal.

(i) The volume of business before the court may be such, that in the next week, it has no free time left.

(ii) The defendant (assuming that he is well-connected with his counsel) may not

necessarily be able to arrange for his travel in five or six days.

INTERROGATORIES AND INSPECTION

Q24 : Order 11, rule 2 : Interrogatories.

Order 11, rule 2 of the Code provides for delivery of interrogatories by a party to the court, but lays down no time limit, as such, within which the court must decide about their admissibility. The Bill seeks to add these words "and that court shall decide within seven days from the day of filing of the said application".

Since decision on the interrogatories within 7 days (though good as a working rule) may not always be feasible (where the court calendar is a heavy one), this proposal may need modification. It can, for example, be provided that the court shall ordinarily decide the application within two weeks".

Q-25 : Order 11, rule 15 Notice for inspection of documents : Clause 21 (ii) of the Bill.

Under Order 11, rule 15 of the Code, "every party to a suit shall be entitled at any time", to give to any other party notice to produce for inspection documents referred to in the pleadings, affidavit, list of documents etc. filed by that party. The Bill proposes an amendment, whereunder the notice must be given "at or before the settlement of issues".

The proposal appears to be acceptable. Of course, this is the usual practice, though parties do not resort often to the notice procedure in India.

ADMISSIONS

Q-26 : Order 12, rule 2 (Notice to admit documents) : Clause 22(i) of the Bill.

Order 12, rule 2 deals with the notice given by a party to the opposite party to admit, within

fifteen days from the date of service of the notice certain documents. The proposed amendment seeks to reduce this period to seven days.

The proposal is prima facie, acceptable.

Q-27 : Order 12, rule 4 (Notice to admit facts.

Under Order 12, rule 4 of the Code, a party may give to the other party notice to admit certain facts. Even where an admission is made in pursuance of such notice under the second proviso, the court may, at any time, allow any party to amend or withdraw any admission so made", on such terms as may be just". The proposal now is to delete the second proviso altogether. The effect, of course, would be that an admission can neither be withdrawn, nor can it be amended - and this would be so, even if the admission was made under a mistake, coercion, fraud or undue influence. Prima facie, the proposal seems to go too far. Moreover, even the present rule does not give a right to withdraw. The matter is in the discretion of the court. There do arise occasions when an

admission - even in the pleadings - may have been made under mistake, etc.. Facility of withdrawal should therefore be preserved.

cf. Hollis Vs. Burton, (1892) 3 Ch. 226.

DOCUMENTS

Q-28 : Order 13, rules 1 and 2 (Production of documents) : Clause 23 of the Bill.

Order 13, rules 1-2 of the Code provide that where a document is not already filed in court by a party, the party must produce it (if in the party's possession or power) at or before the settlement of issues Otherwise it cannot be tendered in evidence, without leave of the court.

In the Bill (see the amendments proposed in Order 7, rule 14 and Order 8, rule 1A), the scheme adopted is different. All documents - basic or evidentiary - must be produced - in original or in copy -with the pleading. Where a copy has been so filed, the original must be delivered when the issues are settled. [See under Q-15 and Q-17,

above].

To a very large extent, the amendment of Order 13, rules 1-2 is consequential on the more stringent approach already adopted in the Bill under Order 7, rule 14 and Order 8, rule 1A, and the fate of the two proposals hangs together. However, one point of detail needs examination. A party may be having only a copy of a document and may be able to file it under Order 7, rule 14, etc.. But he may not be able to comply with proposed Order 13, rule 1 (requiring the filing of the original on settlement of the issue in every case where he has filed the copy earlier). In such a situation, the rule must provide that the party ought to apply to the court to send for the document from the custody of the person in possession of it.

ISSUES

Q-29 : Order 14, rule 4 : Adjournment for framing issues : Clause 24(i) of the bill.

Under Order 14, rule 4 of the Code, when a court cannot frame the issues immediately (because it desires to examine some witness or to inspect some document), it may adjourn the case to a

future day. The proposal in the Bill is that the future day should not be later than seven days.

The object of course, is to reduce the intervals. But one has to remember that the later date will be for production of some witness or document. Circumstances may arise where the witness or document may not be available so soon. The proposed rigid time limit will then prove to be unworkable.

The proposal has to be examined in the light of the above practical aspects.

Q-30 : Order 14, rule 5 : Amendment, etc. of issues : Clause 24(ii) of the Bill.

Existing Order 14, rule 5 of the Code empowers the court to add to or amend, the issues, even after they are framed. The Bill seeks to delete this rule. It seems to have been assumed that since the power to grant leave to amend the pleadings (Order 6, rule 17) is to be removed, [Q-12, supra]. [see Clause 16 (iii) of the Bill], therefore, there is no need to retain the

provision relating to addition etc. of issues.

However, it needs to be pointed out that this is not a totally complete or accurate picture of the position. Addition to, or amendment of, the issues may become necessary or desirable, not only by reason of amendment of the pleadings, but also because, even on the pleadings as filed originally, some issues may have been incorrectly framed. Obviously, the court should have power to rectify the mistake.

Moreover, even leaving aside these situations (i.e. amendment of the issues, consequential on amendment of pleadings or necessitated by mistake of the court), there may exist other special circumstances, justifying a re-framing of the issues. The following is an illustrative list.

Illustrative list - Amending the issues

(i) Evidence may show that a certain document (not illegal) is void. The court may like to examine the implications. and

to amend the issues.

c.f Sharma Patter V. Abdul Kadir (1912) ILR 35 Mad. 607 (P.C.)

(ii) Evidence may show that an agreement is illegal (and not merely void). Court has itself to frame an issue on the point.

(iii) Defendant may admit a certain fact (in his evidence) or under Order 12 (in response to a notice). The related issue may then require deletion or modification.

(iv) Court may discover that the issue framed by it cannot possibly arise having regard to the nature of the suit.

Chikkaveera Gowda Vs. Devegowda, AIR 1975 Karn. 145.

In fact, the power to amend, etc. issues, instead of causing delay, can well be exercised to avoid multiplicity of litigation.

Chartered Bank of India Vs. Imperial Bank of India, AIR 1930 Cal. 534.

It is presumably because of the valuable object which can be achieved through amendment of the issues, that the Privy Council in one case held that an issue can be raised, even after the close of arguments.

Shamu Patter Vs. Abdul Kadir,
ILR 35 Mad. 607 (PC).

PROCESS

Q-31: Order 16, rule 1(4) (Summons to be obtained by parties : Clause 25(i) of the Bill

Under Order 16, rule 1(4) of the Code, the parties may obtain summons to witnesses by applying to the court. The Bill proposes that this should be done within 5 days of presenting the list of witnesses.

Do you agree ?

Q-32 : Order 16, rule 2(1) : Deposit of expenses Clauses 25(ii) of the Bill

Order 16, rule 2(1) requires a party applying for witness summons to deposit the expenses of witnesses. The Bill proposes that the deposit should be made within 7 days of the application under Order 16, rule 1(4).

Do you agree ?

ADJOURNMENT

Q-33 : Order 17, rule 1 Adjournment and costs thereof : Clause 35 of the Bill.

At present, the Court has power to adjourn the hearing under Order 17, rule 1, and "may make an order" as to costs. The Bill proposes that -

(i) not more than three adjournments shall be granted to a party during the hearing of the suit; and

(ii) the court shall make an order as to costs (including such higher costs as the

court deems fit), when adjournment is granted.

It is felt that the fettering of the court's discretion as to the grant of adjournment and the award of costs (as proposed) may not be a very expedient course, as there may arise, in practice, exceptional cases justifying a special approach. For example, if party "A" dies and is succeeded by "B", who also dies and is succeeded by "C", adjournment may be necessary at the instance of the plaintiff, on both the occasions. Thereafter, plaintiff's lawyer has fallen ill on one occasion, necessitating an adjournment. Later, the plaintiff is injured in an accident. These episodes would make up four adjournments. Rigidity would not be desirable. [See Bashir Ahmend Vs. Mehmood Hussain, AIR 1995 SC 1857].

WITNESSES AND EVIDENCE

Q-34 : Order 18, rule 2(4), Order of examination of parties : Clause 27(i) of the Bill.

Order 18, rule 2 of the Code provides for the order in which witnesses shall be examined. The

general rule may be departed from, under Order 18, rule 2(4), which reads as under :-

> "(4). Notwithstanding anything contained in this rule, the court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage."

The Bill proposes that this sub-rule shall be deleted.

For understanding the implications of this proposal, it is desirable to look at the scope and utility of the present sub-rule. It confers two different kinds of power on the court -

(i) power to <u>direct</u> the examination of witnesses at any stage; and

(ii) power to <u>permit</u> the examination of witnesses at any stage.

At the outset, it should be pointed out that sub-rule(4) (now proposed to be deleted came to be inserted in 1976, and incorporates the gist of High Court Amendments (made by the High Courts of

Assam and Nagaland, Kerala, Madhya Prasdesh, etc..) One of the reasons why the law was regarded as needing such clarification was the fact that some High Courts had taken the view, that after the case is adjourned for arguments, the Court is not bound to examine a witness (even if he is present).

cf. Mohanlal Vs. Indarman, AIR 1954 Raj. 238, dissenting from the opinion of the Chief Justice in Monilal Bandopadhyaya Vs. Khiroda Dasi, (1894) ILR 20 Cal. 740.

The sub-rule was added in 1976 to remove the controversy. If it is deleted, the earlier controversy will be revived.

That apart, on the merits also, the provision in sub-rule (4) seems to be needed. Following are some illustrative situations :

Illustrative cases - Order of examination

(i) After the plaintiff had closed his case, the defendant tendered certain documents through his witnesses. Plaintiff had no opportunity of rebutting them. The

court permitted him to produce additional evidence for the purpose.

Aranya Kumar Vs. Chintamani,
AIR 1977 Orissa 87

cf. Alekh Pradhan Vs. Bahamar Pal,
AIR 1978 Orissa 58.

(ii) Plaintiff was in hospital, when his witnesses were being examined. Court allowed the plaintiff himself to be examined at the end.

Shiv Sahay Vs. Nandlal,
AIR 1989 MP 40, 42.

cf. Brahmdeo Prasad Sah Vs. Ram Sakal Sah, AIR 1985 Pat. 57.

(iii) Case was set ex parte for the defendant absence. The defendant was later permitted to participate in the trial (though ex parte order was not set aside as such). It was held that the court could permit a party to examine its own witnesses.

Subala Charan Rout Vs. Prafulla Kumari

Dalai, AIR 1991 Orissa 157.

Q-35 : Order 18, rule 4 (Examination by the Judge in open court) : Clause 27(ii) of the Bill.

In the present scheme of the Code, witnesses are to be examined in open courtby the Judge. Order 18, rule 4 provides as under :

> "4. The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and supretendence of the judge."

This applies, inter alia, to expert witnesses also.

Lakshmayya Vs. Suryanarayana,
AIR 1958 AP 254.

The Bill proposes to substitute a radically different scheme, by revising Order 18, rule 4.

The revised rule, (which is lengthy enough) need not be quoted at this place. But its

principal features are as under :-

(a) Examination in chief of a witness shall be in the form of affidavit.

(b) Thereafter, his cross-examination shall be taken orally by a Commissioner.

(c) The Commissioner shall be selected by the trial court from a panel constituted by the District Judge. He will be suitably renumerated (High Court will make rules on the subject).

(d) Commissioner shall record the evidence and make a report and submit the same to the court.

(e) When a question is objected to by a party, but is still allowed by the Commissioner, "the Commissioner shall take down the question together with his decision" - this is laid down in proposed Order 18, rule 4(7). [Incidentally, the proposed sub-rule is silent about taking down the gist of the objection and the

answer given by the witness].

(f) For reasons to be recorded, the court may examine a witness in open court. [See proposed Order 18, rule 4(2), proviso].

The language of proposed Order 18, rule 4(2) main para, would seem to suggest that (subject to the proviso), the ordinary mode will be examination through commissioner. But proposed Order 18, rule 19 (new) and Order 26, rule 4A (new) [see clause 27 of the Bill] suggest that the matter is in the court's discretion. [See under Q-37 and Q-39, below].

The Commission is of the opinion that this is a very salutory and long overdue provision. The age-old rule that final decision by the judge who has heard the evidence is conducive to a fair judgment has lost much of its validity in the present day situation. Very often we find that the judge who decides the case finally is not the judge who has recorded the evidence. In many places, retired judicial officers are available, who can be assigned this job which will also save the frequent trips and the incidental expenses involved in bringing the witnesses on every adjourned date of hearing. This would also mean a great saving of time of trial courts, which can be gainfully employed in final hearing of suits and/or the interlocutory matters. In most of the States, the courts are groaning under the weight of workload and the proposed process would mean a god - send to them. This does not mean that the court cannot itself take up

the recording of deposition of witness(s). Where it thinks that such a course is just and proper or where the court has ample time at its disposal, it can certainly choose to do so.

So far as demeanour of witness is concerned, the ordinary rule is that it should be recorded at the time of recording of his deposition (See Order 18 Rule 12). If it is not so recorded, but is refered to in the judgment, proper reasons must be given for such opinion (see AIR 1972 SC 1618) referred with reference to Section 363 Cr.P.C. (1898) which broadly corresponds to order 18 rule 12, CPC.

Such a procedure is in vogue in USA and has been working successfully.

A few points of detail should also be adverted to, at this stage :

(a) In Order 18, rule 4 is to be amended as proposed, some consequential changes

may be needed in other rules also (for example, in Order 18, rule 5, Order 18, rules 8, and 14, Order 18, rule 15, etc.).

(b) Where a question is objected to, by the opposite party, but is allowed by the Commissioner, it may be better to provide that the Commissioner shall take down :

(i) the question

(ii) the nature of the objection

(iii) the name of the objector

(iv) the decision of the Commissioner, and

(v) the answer given by the witness.

[cf. Order 18, rule 11, as to the evidence recorded by the Judge himself].

(c) It should also be considered as to what is the status of the order passed by the Commissioner. At present, a

Commissioner appointed to take the evidence of witnesses has no power to disallow questions which he considers irrelevant.

Ram Krishna Dalmia vs. Firoze Chand,

AIR 1960 Punj, 430.

Such a power may have to be conferred upon the Commissioner, by the Rule.

At present, Order 26, rule 16A (inserted in 1976), deals with the matter in some detail.

Q-36 : Order 18, rule 17A (Evidence not previously known, etc.).

At present, Order 18, rule 17A of the Code empowers the court to permit a party to produce (at a later stage) evidence which he could not produce earlier, either because it was not within his knowledge or because it could not be produced when he was leading his evidence. In either case, due diligence must be proved.

The Bill proposes to delete this rule.

It is submitted that in coming to a conclusion on this proposal, several points need to be considered.

(i) The rule was inserted as late as 1976 and its deletion today, within two decades, should *prima facie* be considered an an unusual course, for which very strong reasons would be required.

(ii) On the merits also, the rule appears to be a rational one. If certain evidence

(not earlier available) becomes available before the judgment is pronounced, it stands to reason that the court should have power to permit it. It would be pointless to compel the party to wait until the judgment is pronounced and then expect the party to file an application for review under Order 47, rule 1, on the ground that such evidence had become available. Order 18, rule 17A, far from delaying the trial or making the procedure complex, has really the effect of lessening the time spent in litigation and making the procedure less complex, because it avoids the laborious chronology of :

(1) judgment and decree;

(2) application for review (because of fresh evidence);

(3) hearing and disposal of the review application;

(4) (if review is granted), fresh

hearing of the main case, though limited to the new evidence and

/evidence and

(5) fresh/judgment in the trial so re-opened.

[cf. Kaura Ram Vs. Gobind Ram, AIR 1980 P&H 160.].

Q-37 : Order 18, rule 19 (New) (Power to get statements recorded on Commission) : Clause 27(iv) of the Bill

The Bill proposes the insertion of a new rule - Order 18, rule 19, under which the court may, instead of examining witnesses in open court, direct their statements to be recorded on Commission under proposed order 26, rule 4A. By clause 29 of the Bill, it is proposed to insert Order 26, rule 4A, to the effect that the court may in the interests of justice or for the expeditions disposal of the case or for any other reason, issue a commission for the examination of any person resident within its jurisdiction" and the evidence so recorded shall be read as

evidence" (Compare Rajasthan amendment Order 26, rule 1A).

Thus, Order 18, rule 19 (proposed) and Order 26, rule 4A (proposed), go together.

Order 26, rule 4A, at the first sight, appears innocuous. But the real problem arises from the vogueness of the language. What is the basis on which the discretion is to be exercised ?

Is the Commission procedure to be resorted to as a routine ?

Apart from that, there is the question of disharmony between -

(i) Order 18, rule 4(i) (as proposed) under which (subject to the proviso) cross examination, etc. must be done on Commission, [see Q-35, suprs].

(ii) Order 18, rule 9 and Order 26, rule 4 (as proposed), whereunder it is discritionary?

[See Q-39, infra].

JUDGMENT AND DEGREE

Q-38 : Order 20, rule 1 (Pronouncing of the judgment and giving copy, etc.) : Clause 28 of the Bill, read with Clause 32(i).

The Bill, in clauses 28, and 32(i), proposes certain material changes -

(i) in the course to be adopted by a trial court, when it pronounces judgment, regarding giving the parties a copy of the judgment, and preparation of the decree, etc. [Clause 28 of the Bill], and

(ii) in the requirements of the law relating to the copy of the decree, etc. that must accompany the filing of the first appeal [clause 32(i) of the Bill].

The proposals are fairly elaborate and relate to Order 20, rule 1(2), Order 20, rule 6A and rule 6B and Order 41, rule 1 of the code. It will be convenient, if the present law and the proposed amendments are analysed as under :

(a) Under existing Order 20, rule 1(2), a copy of the whole judgment shall be made available "for the perusal of the parties, etc." immediately after the judgment is pronounced. Under the proposal regarding Order 20, rule 6B, copies shall be made available to the parties, immediately "for preferring an appeal", on payment of charges specified by rules made by the High Court.

(b) Under present Order 20 rule, 6A(1) and (2), and rule 6A(2), the scheme is as under:

(i) The last paragraph of the judgment shall state precisely the relief granted.

(ii) The court shall endeavour to draw up the decree expeditiously and within 15 days, but, if the decree is not ready within 15 days, the party desirous of appeal can obtain from the

court a certificate and thereupon the appeal can be preferred without filing a copy of the decree. The last paragraph of the judgment will constitute the decree, for purposes of appeal and execution.

In contrast, under the proposed scheme, the position will be as under :

(1) The decree must be drawn up within 15 days [Order 20, rule 6A(1), as proposed].

(2) Provision that last paragraph of the judgment should contain the precise relief, is omitted [Order 20, rule 6A(1), as proposed].

(3) Copies of the judgment must be available for preferring an appeal. [order 20, rule 6B, as proposed].

(4) Appeal can be filed without filing a copy of the decree. Copy of the judgment [made available under

point (3) above] is to be treated as the decree. But once the decree is prepared, the judgment ceases to have the effect of a decree. [Order 20, rule 6A and Order 41, rule 1, as proposed].

[Order 41, rule 1 as proposed by clause 32(i) of the Bill].

In a rough and ready manner, it can be stated that the Bill wishes to place strict emphasis upon a timely preparation of the decree and (consequentially) deletes the facility of filing an appeal with copy of the last paragraph of the judgment. (pending preparation of the decree) However, the judgment can be treated as the decree, till decree is prepared.

The main question to be considered is, whether this altered scheme is an improvement on the present law, which is based on the extensive examination of the subject by the Law Commission in its 54th report and connected recommendation.

Present law does not seem to have given rise to any serious complaint. It takes note of the realities - i.e. delay in the preparation of the decree and makes other connected provisions.

Incidentally, the present provision in Order 20, rule 6A(1). [Judgment to state the precise relief] is not only helpful for appeal, but also serves to improve the quality of judgment writing It compels the judge to focus and concentrate his mind on the relief, thus promoting the cause of clarity and precision. The proposed amendment seems to have missed this aspect very important aspect also.

[See also Q-42, infra].

Q-39 : Order 26, rule 4A (New) Commission for witnesses : Clause 29 of the bill. [See also Q-35, supra].

Clause 29 of the Bill proposes to insert Order 26, rule 4A (new), under which, the court "may in the interest of justice, etc. issue Commission, for examining a witness within its jurisdiction." it may be noted that clause 27(ii) of the Bill proposes to amend Order 18, rule 4 to make such commissions mandatory (except in certain cases). [See Q-35, supra].

INTRERLOCUTORY RELIEF

Q-40 : Order 39, rule 31 (Temporary) Injunction : Clause 30 of the bill.

Present Order 39, rule 1 of the Code empowers the court to issue temporary injunctions - mostly relating to disputed property or on apprehension that the defendant will dispose of his property to defraud his creditors. The Bill seeks to add sub-rule (2), under which "the court shall" (when

granting such injunction) "direct the plaintiff to give security or make such other directions as the court thinks fit."

It is not certain if such a mandatory provision is really required; and this point of substance will definitely need attention. In addition, the drafting may also need a second look.

Q-41. : Order 39A (proposed) (Inspection before institution of suit) : Clause 31 of the Bill

The Bill proposes to insert Order 39A, in the Code. The object (though not precisely stated in the draft rules) is that even while a suit is not yet filed , some one representing the plaintiff may apply to the court to appoint a Commissioner for local investigation "for the purpose of elucidating any matter in dispute". The Commissioner so appointed will be deemed to be appointed under Order 26. Order 39A, rule 2 further proposes that within seven days of filing of such application, "the person competent to file

suit, shall file the suit.

The draft given in the Bill is silent about the consequences to follow -

(i) if the suit is so filed; or

(ii) if the suit is not so filed.

The intention presumably is that if the suit is filed, then the appointment will continue. If not, then it will lapse.

Probably the order as drafted does not bring about the real object behind this provision, which appears from clause (h) of para 3 of the Statement of objects and reasons which reads as follows:-

> "(h) in matters relating to property disputes, particularly in matter of unauthorised construction on the land of others, it has been found that, under the existing provisions of the Code of Civil Procedure, no application for injunction can be moved unless the suit is filed first in the court having competent jurisdiction. With a view to obviate this hardship, it is proposed that a person may make an application to the court of competent jurisdiction for appointment of a commission to ascertain the factual status of the property so that at the time of the filing of the regular suit the report is available to the commissioner relating to the factual status of the property in dispute."

The rule in this order may be redrafted to accord with the said objective or to bring about clearly the intendment and scheme the draftman has in mind in this regard.

The proposal is unexceptionable in substance. In fact, it could be expanded to cover certain other types of commission - e.g., to record the statements of witnesses who are likely to leave the country or are very ill. Of course, in the absence of cross-examination, their statements (cannot constitute "evidence". But the statements so recorded can (<u>if statutorily recorded)</u> serve certain other purposes (e.g. see sections 32, 145, 157 and 159, Evidence Act).

However, the drafting will need changes in many respects, and it will also be necessary (as

suggested above) to add a provision as to the consequences of filing / non-filing of suit after the pre-suit application is made..

The class of suits for which the provision is intended, may also have to be indicated with some precision.

You may like to offer your comments in the light of the above.

APPELLATE PROCEDURE

Q-42. : Order 41, rule 1(1) (Form of appeal) : Clause 32(i) of the Bill.

In view of the amendment proposed by the Bill in Order 20, rule 6A, 6B, etc. the Bill (as a consequential change) proposes to amend Order 41, rule 1(1). [See Q-28, supra].

Q-43 : Order 41, rule 9 Presentation and registration of memo of appeal : Clause 32(ii) of the Bill.

Under existing Order 41, rule 1, 9, etc. the memorandum of appeal is to be presented to the appellate court. Thereafter (subject to technical scrutiny), the memo of appeal is admitted by the court (or its officer), who shall endorse thereon the date of presentation and enter it in the register of appeals.

In place of the above procedure, the Bill envisages a different scheme. The memorandum of appeal will be filed in the very court which pronounced the judgment. This is the gist of the amendment proposed in Order 41, rule 9 - though Order 41, rule 1 is not being amended in so many words, for this purpose. It is proposed that the trial court will forward the memo to the appellate court (though the suggested amendments do not make this specific provision explicitly).

How far do you favour this scheme ?

[The amendments proposed by the Bill in Order 41, rules 11, 12, 13, 15, 18, 19 and 22 by clause 32(vii) are consequential, on those referred to in Questions 41, 42 above.].