



AIR 2005 SUPREME COURT 3353

Y.K. SABHARWAL, D. M. DHARMADHIKARI
AND TARUN CHATTERJEE, JJ.

Writ Petition (C) Nos. 496 with 570 of 2002, D/- 2-8-2005.

Salem Advocate Bar Association, Tamil Nadu, Petitioner v. Union of India, Respondent.

(A) Civil P. C. (5 of 1908), S. 26(2), O. 6, R. 15(4) (as inserted by Amendment Act of 1999) and R. 17 — Pleadings — To be accompanied by affidavit — Requirement of — Not unnecessary — Affidavit fixes an additional responsibility on deponent about truth of facts stated — Fresh affidavit is required on amendment — Affidavit so filed is however not evidence at trial. (Para 4)

(B) Civil P. C. (5 of 1908), O. 18, R. 4 (as substituted by Amendment Act of 2002) — Recording of evidence — Examination of witness — Examination-in-chief by affidavit — Cross-exam, by Commissioner — Procedure so provided by amendment is not beyond powers of legislature — Court in appropriate cases can order examination-in-chief, and cross-examination to be done by Court — Plea that Court would be deprived of benefit of watching demeanour of witness — Cannot be ground to defeat will of legislature. (Para 5)

(C) Civil P. C. (5 of 1908), O. 18, Rr. 4(3), 5 and R. 19 (as inserted by Amendment Act of 1999), O. 26, R. 4-A — Recording of evidence — Appealable cases — O. 18, R. 4(3) enabling examination by Commissioner — is not in conflict with O. 18, R. 5 — Non obstante clause in O. 18, R. 19 and O. 28, R. 4-A overrides O. 18, R. 5(a), (b). (Paras 7, 9, 10)

(D) Civil P. C. (5 of 1908), O. 18, R. 4, O. 26, Rr. 16, 1G-A, 17, 18 — Evidence Act (1 of 1872), 8, 154 — Hostile witness — Declaration as — Commissioner has no power to so declare — Concerned party has to obtain permission from Court — Only after grant of such permission Commissioner can allow a party to cross-examine his own witness. (Para 12)

(E) Civil P. C. (6 of 1908), O. 18, R. 17-A (as stood before its deletion by Amendment Act of 2002) — Additional evidence — R. 17-A did not create any new right but only clarified position — Its deletion does not disentitle production of evidence at a later stage. (Para 14)

(F) Civil P. C. (5 of 1908), O. 8, Rr. 1, 10 (as amended by Amendment Act of 2002) — Written statement — Limitation for filing — Upper limit of 90 days fixed by R. 1 — Is directory — Extension beyond 90 days however to be given in exceptionally hard cases only. Interpretation of Statutes — Mandatory or directory provision — Use of 'shall' — Not by itself sufficient to indicate mandatory nature.

The provision providing for maximum period of ninety days for filing written statement is not mandatory and, therefore, the Court is not altogether powerless to extend the time even in exceptionally hard case. (Paras 21, 22)



The use of the word 'shall' in O. 8, R. 1 by itself is not conclusive to determine whether the provision is mandatory or directory. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. Rule 1. in question, has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand of justice and not its mistress. In the present context, the strict interpretation of O. 8, R. 1 would defeat justice. (Para 21)

In construing O. 8, R. 1, support can also be had from O. 8, R. 10 which provides that where any party from whom a written statement is required under R. 1 or R. 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the Court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of O. 8, R. 1 and R. 10, the doctrine of harmonious construction is required to be applied. The effect would be that under R. 10 of O. 8, the Court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided O. 8, R. 1. There is no restriction in O. 8, R. 10 that after expiry of 90 days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of O. 8, R. 1 providing for upper limit of 90 days to file written statement is directory. (Para 22)

The Court however made it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. (Para 22)

(G) Civil P. C. (5 of 1908), 8. 39(4) (as inserted by Amendment Act of 2002), O. 21, Rr. 3, 4, 8 — Execution — Powers of Court passing decree — Restriction placed by S. 39(4) to not execute decree outside its jurisdiction — Does not dilute provisions of O. 21, Rr. 3 and 48 giving such power on compliance of conditions stipulated in those provisions. (Para 25)

(H) Civil P. C. (5 of 1908), S. 64(2) (Inserted by Amendment Act of 2002) — Attachment of property — Subsequent transfer — Protection to sale made pursuant to prior registered contract — No ambiguity in S. 64(2). (Para 26)

(I) Civil P. C. (5 of 1908), O. 6. R. 17 (as substituted by Amendment Act of 2002) — Amendment of pleadings — Application made after start of trial — Party to show that in spite of due diligence, such amendment could not have been sought earlier — Requirement prevents frivolous applications to delay trial — No illegality in provision. (Para 27)

(J) Civil P. C. (5 of 1908), O. 5. Rr. 9(3)(5), 9-A — Service of summons — Through Courier



— Problem in service of summons has been one of major cause of delay — There can, thus, be no valid objection to service through courier — High Courts to make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. (Para 29)

(K) Civil P. C. (5 of 1908), O. 17, R. 1. Proviso (as substituted by Amendment Act of 1999) and R. 2, Proviso—Adjournment — Restriction of three adjournments — Provision has to be read down — More than three adjournments can be granted when circumstances are beyond control of party — Provisos to Rr. 1 and 2 to be read together.

While examining the scope of proviso to O. 17, R. 1 that more than three adjournments shall not be granted, it is to be kept in view that proviso to O. 17, R. 2 incorporating Cls. (a) to (e) by Act 104 of 1976 has been retained. Cl. (b) stipulates that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party. The proviso to O. 17, R. 1 and O. 17, R. 2 have to be read together. So read, O. 17 does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no 'restriction on number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. To save proviso to O. 17, R. 1 from the vice of Art. 14 of the Constitution of India, it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost can grant adjournment beyond three.

(Paras 31,32)

(L) Civil P. C. (5 of 1908), O. 17, R. 2 — Adjournment — Costs — Imposition — Costs or higher costs awarded — Should be realistic and as far as possible actual Cost incurred by other party. (Para 32)

(M) Civil P. C. (5 of 1908), O. 18, R. 2(4) (as it stood before deletion by Amendment Act of 1999) — Examination of witness — At any stage — Deletion of R. 2(4) by 1999 Act— Does not take away Court's inherent power to call for any witness at any stage.

(Para 33)

(N) Civil P. C. (5 of 1908), O. 7, R. 14(4) (as substituted by Amendment Act of 1999) — Production of documents for cross-examination — Words "plaintiffs witnesses — Mentioned by mistake in O. 7

R. 14(4) — Words "plaintiffs witnesses to be read as defendant's witnesses" till legislature corrects mistake. (Paras 36, 37)

(O) Civil P. C. (5 of 1908), Ss. 35, 35-A, 35-B, 95 — Costs — Awarding of— Practice developed to award no costs or award nominal costs — Encourages filing of frivolous suits and defences — Realistic costs should be awarded — High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction. (Para 39)



(P) Civil P. C. (5 of 1908), S. 80 — Suit against Govt. — Prior notice to Govt. — Practice developed of either not replying or giving vague replies to notice — Defeats object of S. 80 — Govt. /other authorities directed to nominate one officer who would be responsible for replying to notices issued under S. 80 — Courts to award heavy costs against Govt. if no replies or evasive replies are given despite nomination — Appropriate action to be taken against nominated officer. (Para 41)

(Q) Civil P. C. (5 of 1908), S. 115(1), Proviso (As Amended by 1999 Act) — Revisional jurisdiction — Curtailment made by amendment Act 46 of 1999 — Does not take away constitutional jurisdiction of High Court under Arts. 227, 226.

Surya Dev Rai v. Ram Chander Rai, 2003 Am SCW 3872 : AIR 2003 SC 3044 : 2003 All LJ 2057, Foil. (Para 49)

(R) Civil P. C. (5 of 1908), S. 148 (as amended by Amendment Act of 1999), S. 151 — Time fixed by Court for doing any act — Enlargement — Restriction imposed by amendment — Does not take away inherent powers of Court to enlarge time beyond maximum of 30 days where sufficient cause exists. (Para 45)

(S) Civil P. C. (5 of 1908), O. 9, R. 5 — Issue of fresh summons — Seven days period fixed, — Is directory.

(T) Civil P. C. (5 of 1908), O. 11, R. 15 (as Amended by 1999 Act) — Inspection of documents — After settlement of issues — Can be allowed — R. 16 as amended is directory. (Para 49)

(U) Constitution of India, Art. 21 — Speedy trial — Establishment and maintenance of subordinate Courts — Burden to be shared between Central and State Govts. — Carrying out of Judicial impact assessment — Suggestions as to — Central Govt. directed to file report on suggestions made. (Paras 52, 54)

(V) Civil P. C. (5 of 1908), S. 89, O. 10, R. 1-A — (Inserted by Amendment Act of 1998) Alternative dispute resolution — Use of word 'may' in later part of S. 89 — Not in conflict with word 'shall' used in O. 10, R. 1-A — Word 'may' in S. 89 only governs aspect of reformulation of terms of settlement.

First part of S. 89 uses the word 'shall' when it stipulates that the 'Court shall formulate terms of settlement'. The use of the word 'may' in later part of S. 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting S. 89 is that where it appears to the Court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the Court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the Court shall refer them to one or other of the said modes. S. 89 uses both the word 'shall' and 'may' whereas O. 10, R. 1-A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in S. 89 only governs the aspect of the reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of S. 89.



(Para 59)

(W) Civil P.C. (5 of 1908), Ss. 89, 125, 0.10, R. 1-A—Arbitration and Conciliation Act (26 of 1996), Ss. 82, 84 — Legal Services Authority Act (39 of 1987), S. 20 — Alternative Dispute Resolution (ADR) — By arbitration, conciliation or through Lok Adalat — Neither 1996 Act nor 1987 Act contemplate situation where Court asks parties to choose one of ADR procedure — 1996 Act or 1987 Act therefore apply only from stage reference is made under S. 89 of Code — Procedure for option to ADRs is also not contemplated by 1996 Act or 1987 Act — High Court can thus frame rules under Part X of Code covering manner in which option to one of ADRs can be made. (Para 60)

(X) Civil P.C. (5 of 1908), S. 89(2)(d) — Alternative dispute resolution — Mediation — Role of Court — Court is not involved in actual mediation/conciliation — Terms of compromise are to be finalised by or before mediator — Court only passes a decree — In accordance with terms of settlement accepted by parties. (Para 61)

(Y) Civil P.C. (5 of 1908), S. 89 — Alternative dispute resolution — Through conciliation and mediation — Expenditure on conciliation or mediation — Central Govt. directed to consider whether it would bear the burden. (Para 62)

(ZA) Civil P.C. (5 of 1908), Ss. 89, 125 — 'Alternative Dispute Resolution — Rules framed for, under Code — To supplement rules framed under Family Courts Act. Family Courts Act (66 of 1984), S. 22. (Para 64)

Constitution of India, Art. 21 — Civil P.C. (5 of 1908), S. 89 — Speedy trial — Ensuring through — Alternative dispute resolution and case flow management — High Courts to adopt model ADR rules/case flow management rules or frame rules with or without modification — So that a step forward is taken to provide to litigating public a fair, speedy and inexpensive justice. (Para 71)

Cases Referred : Chronological Paras

Surya Dev Rai v. Ram Chander Rai, 2003 AIR SCW 3872 : AIR 2003 SC 3044 : 2003 All LJ 2057 : (2003) 6 SCC 675 (Foil) 44 Topline Shoes Ltd. v. Corporation Bank, 2002 AIR SCW 2794 : AIR 2002 SC 2487 : (2002) 6 SCC 33 20

Salem Advocates Bar Association, T.N. v. Union of India, 2002 AIR SCW 4627 : AIR 2003 SC 189 : (2003) 1 SCC 49 1, 5, 14 P. Anand Gajapati Raju v. P.V.G. Raju, 2000 AIR SCW 1489 : AIR 2000 SC 1 886 : (2000) 4 SCC 539 60

Raja Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur, AIR 1965 SC 895 18

Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882 46

Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 425 19

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Advocate T. L. V. Iyer, Sr. Advocate, Ms. Priya Puri, and Sanjeev Sachdeva, Advocates with him, for B.C. I.; Mrs. Kiran Suri, Hlmanshu Buttan and Mali Santosh, Advocates, for Intervenor in W.P. (C) No. 496/02.

Y. K. SABHARWAL, J. :— The challenge made to the constitutional validity of amendments made to the Code of Civil Procedure (for short, 'the Code') by Amendment Acts of 1999 and 2002 was rejected by this Court (*Saleem Advocates Bar Association, T.N. v. Union of India* (2003) 1 SCC 49), but it was noticed in the judgment that modalities have to be formulated for the manner in which Section 89 of the Code and, for that matter, the other provisions which have been introduced by way of amendments, may have to be operated. For this purpose, a Committee headed by a former Judge of this Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternate Disputes Resolution (ADR) referred to in Section 89. It was also observed that the model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to Section 89(2)(d) of the Code. Further, it was observed that if any difficulties are felt in the working of the amendments, the same can be placed before the Committee which would consider the same and make necessary suggestions in its report. The Committee has filed the report.

2. The report is in three parts. Report 1 contains the consideration of the various grievances relating to amendments to the Code and the recommendations of the Committee. Report 2 contains the consideration of various points raised in connection with draft rules for ADR and mediation as envisaged by Section 89 of the Code read with Order X Rules 1A, 1B and 1C. It also contains model Rules. Report 3 contains a conceptual appraisal of case management. It also contains the model rules of case management.
3. First, we will consider Report 1 which deals with the amendments made to the Code.

Report No.1:

Amendment inserting sub-section (2) to Section 26 and Rule 15(4) to Order VI Rule 15.

4. Prior to insertion of aforesaid provisions, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in Section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading (Order VI Rule 15(4)). It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings. We are unable to agree. The affidavit required to be filed under amended Section 26(2) and Order VI Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that



such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

Amendment of Order XVIII Rule 4

5. amendment provides that in every case, the examination-in-chief of a witness shall be on affidavit, the Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order XVIII Rule 4 Inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 has been examined and its validity upheld in Salem Advocates Bar Association's case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in Salem Advocates Bar Association's case, it has been held that the trial court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in Court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2)i is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witness. That may be so but, in our view, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order XVIII Rule 4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the



observations if made by the Commissioner.

6. The report notices that in some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. We would, however, leave it to the High Courts to examine this aspect and decide to adopt or not such a procedure. Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, we feel that generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than expenditure incurred for attending the Courts on various dates for recording evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden.
7. Amendment to Order XVIII Rule 5(a) and (b) was made in 1976 whereby it was provided that in all appealable cases evidence shall be recorded by the Court. Order XVIII Rule 4 was amended by Amendment Act of 1999 and again by Amendment Act of 2002. Order XVIII Rule 4(3) enables the commissioners to record evidence in all type of cases including appealable cases. The contention urged is that there is conflict between these provisions.
8. To examine the contention, it is also necessary to keep in view Order XVIII Rule 19 which was inserted by Amendment Act of 1999. It reads' as under:
"Power to get statements recorded on commission — "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 the Order XXVI."
9. The aforesaid provision contains a non-obstante clause. It overrides Order XVIII Rule 5 which provides the court to record evidence in all appealable cases. The Court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well.
10. Further, Order XXVI Rule 4-A inserted by Amendment Act of 1999 provides that notwithstanding anything contained in the 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 of any person resident within the local limits of the court's jurisdiction. Order XVIII Rule 19 and Order XXVI Rule 4-A, in our view, would override Order XVIII Rule 5(a) and (b). There is, thus, no conflict.
11. The next question that has been raised is about the power of the Commissioner to declare a witness hostile. Order XVIII Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. Order XVIII Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 of the Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission thereunder. The discretion to declare a witness hostile has not been



conferred on the Commissioner. Under Section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act to declare a witness hostile.

12. If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the commission so as to itself record remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.
13. Another aspect is about proper care to be taken by the Commission of the original documents. Undoubtedly, the Commission has to take proper care of the original documents handed over to him either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner, of the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in case long adjournments are granted and for taking back the documents before the adjourned date. Additional Evidence.
14. In Salem Advocates Bar Association's case, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e. 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

Order VIII Rule 1

15. Order VIII Rule 1, as amended by Act 46 of 1999 provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. The rigour of this provision was reduced by Amendment Act 22 of 2002 which enables the Court to extend time for filing written statement,



on recording sufficient reasons therefor, but the extension can be maximum for 90 days.

16. The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order VIII Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time even in an exceptionally hard case.
17. It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view.
18. In *Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur* (AIR 1965 SC 895), a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.
19. In *Sangram Singh v. Election Tribunal Kotah & Anr.* (AIR 1955 SC 425), considering the provisions of the Code dealing with the trial of the suits, it was opined that: "Now a code of procedure must be re-garded as such, it is procedure, something designated to facilitate justice and further its ends; not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that Justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural Justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there



must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

20. In *Topline Shoes Ltd. v. Corporation Bank* (2002) 6 SCC 33, the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.
21. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand-maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.
22. In construing this provision, support can also be had from Order VIII Rule 10 which provides that 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, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be



extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.

23. Section 39 (1) of the Code provides that the Court which passed a decree may, on the application of the decree-holder send it for execution to another court of competent jurisdiction. By Act 22 of 2002, Section 39(4) has been inserted providing that nothing in the section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The question is whether this newly added provision prohibits the executing court from executing a decree against a person or property outside its jurisdiction and whether this provision overrides Order XXI Rule 3 and Order XXI Rule 48 or whether these provisions continue to be an exception to Section 39(4) as was the legal position before the amendment.
24. Order XXI Rule 3 provides that where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure. Likewise, under Order XXI Rule 48, attachment of salary of a Government servant, Railway servant or servant of local authority can be made by the court whether the judgment-debtor or the disbursing officer is or is not within the local limits of the court's jurisdiction.
25. Section 39 does not authorise the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be effected by Section 39(4) of the Code.
26. Section 64(2) in the Code has been inserted by Amendment Act, 22 of 2002. Section 64, as it originally stood, has been renumbered as Section 64(1). Section 64(1), *inter alia*, provides that where an attachment has been made, any private transfer or delivery of property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. Sub-section (2) protects the aforesaid acts if made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. The concept of registration has been introduced to prevent false and frivolous cases of contracts being set up with a view to defeat the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid, if it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in sub-section (2) of Section 64.

Order VI Rule 17

27. Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment



Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

Service through Courier

28. Order V Rule 9, inter alia, permits service of summons by party or through courier. Order V Rule 9 (3) and Order V Rule 9-A permit service of summons by courier or by the plaintiff. Order V Rule 9(5) requires the court to declare that the summons had been duly served on the defendant on the contingencies mentioned in the provision. It is in the nature of deemed service. The apprehension expressed is that service outside the normal procedure is likely to lead to false reports of service and passing of ex parte decrees. It is further urged that courier's report about defendant's refusal to accept service is also likely to lead to serious malpractice and abuse.
29. While considering the submissions of learned counsel, it has to be borne in mind that problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process serving agencies in various courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier. There is, however, danger of false reports of service. It is required to be adequately guarded. The courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of person effecting service shall state as to who all were present at that time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be black-listed. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial courts by framing appropriate rules, order, regulations or practice directions.

Adjournments

30. Order XVII of the Code relates to grant of adjournments. Two amendments have been made therein. One that adjournment shall not be granted to a party more than



three times during hearing of the suit. The other relates to cost of adjournment. The awarding of cost has been made mandatory. Costs that can be awarded are of two types. First, cost occasioned by the adjournment and second such higher cost as the court deems fit.

31. While examining the scope of proviso to Order XVII, Rule 1 that more than three adjournments shall not be granted, it is to be kept in view that proviso to Order XVII, Rule 2 incorporating clauses (a) to (e) by Act 104 of 1976 has been retained. Clause (b) stipulates that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party. The proviso to Order XVII, Rule 1 and Order XVII, Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII, Rule 1.
32. In some extreme cases, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (Take the example of Bhopal Gas Tragedy, Gujarat earthquake and riots, devastation on account of Tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the Court would decide to grant or refuse adjournment. The provision for costs and higher costs has been made because of practice having been developed to award only a nominal cost even when adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic and as far as possible actual cost that had to be incurred by the other party shall be awarded where the adjournment is found to be avoidable but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason. Further, to save proviso to Order XVII, Rule 1 from the vice of Article 14 of the Constitution of India, it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances which are beyond the control of a party. Even in cases which may not strictly within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost in the discretion of the Court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case. We may, however, add that grant of any adjournment let alone first, second or third adjournment is not



a right of a party. The grant of adjournment by a court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments. Order XVIII, Rule 2

33. Order XVIII Rule 2(4) which was inserted by Act 104 of 1976 has been omitted by Act 46 of 1999. Under the said Rule, the Court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the status quo ante. This means that law that was prevalent prior to 1976 amendment, would govern. The principles as noticed hereinbefore in regard to deletion of Order XVIII, Rule 17(a) would apply to the deletion of this provision as well. Even prior to insertion of Order XVIII, Rule 2(4), such a permission could be granted by the Court in its discretion. The provision was inserted in 1976 by way of caution. The omission of Order XVIII, Rule 2(4) by 1999 amendment does not take away Court's inherent power to call for any witness at any stage either suo motu or on the prayer of a party invoking the inherent powers of the Court.
34. In Order XVIII, Rule 2, sub-rules (3A) to (3D) have been inserted by Act 22 of 2002. The object of filing written arguments or fixing time limit of oral arguments is with a view to save time of court. The adherence to the requirement of these rules is likely to help in administering fair and speedy justice.

Order VII, Rule 14

35. Order VII, Rule 14 deals with production of documents which are the basis of the suit or the documents in plaintiffs possession or power. These documents are to be entered in the list of documents and produced in the Court with plaint. Order VII, Rule 14(3) requires leave of Court to be obtained for production of the documents later. Order VII, Rule 14(4) reads as under : "Nothing in this rule shall apply to document produced for the cross examination of the plaintiffs witnesses, or, handed over to a witness merely to refresh his memory".
36. In the aforesaid Rule, it is evident that the words 'plaintiffs witnesses' have been mentioned as a result of mistake seems to have been committed by the Legislature. The words ought to be 'defendant's witnesses'. There is a similar provision in Order VIII Rule 1A(4) which applies to a defendant. It reads as under:
- "Nothing in this rule shall apply to documents—
- (a) produced for the cross-examination of the plaintiffs witnesses, or
 - (b) handed over to a witness merely to refresh his memory."
37. Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiffs witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, Instead of "defendant's witnesses", the words "plaintiffs witnesses" have been mentioned



in Order VII, Rule (4). To avoid any confusion, we direct that till the Legislature corrects the mistake, the words "plaintiffs witnesses" would be read as "defendant's witnesses" in Order VTI, Rule 4. We, however, hope that the mistake would be expeditious-ly corrected by the Legislature.

Costs

38. Section 35 of the Code deals with the award of cost and Section 35-A with award of compensatory costs in respect of false or vexatious claims or defences. Section 95 deals with grant of compensation for obtaining arrest, attachment or injunction on insufficient grounds. These three sections deal with three different aspects of award of cost and compensation. Under Section 95 cost can be awarded upto Rs. 50,000/- and under Section 35-A, the costs awardable are upto Rs. 3,000/-. Section 35-B provides for award of cost for causing delay where a party fails to take the step which he was required by or under the Code to take or obtains an adjournment for taking such step or for producing evidence or on any other ground. In circumstances mentioned in Section 35-B an order may be made requiring the defaulting party to pay to other party such costs as would, in the opinion of the court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the court on that date and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of the suit or the defence. Section 35 postulates that the cost shall follow the event and if not, reasons thereof shall be stated. The award of the cost of the suit is in the discretion of the Court. In Sections 35 and 35-B, there is no upper limit of amount of cost awardable.
39. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs as awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs as awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging. If any, or any other incidental cost besides the payment of the court-fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.

Section 80

40. Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim



order in which case the Court may not insist on the rigid rule of prior notice. The two month's period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

41. These provisions cast an implied duty on all concerned Governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned Governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him.
42. Section 115 of the Code vests power of revision in the High Court over courts subordinate to it. Proviso to Section 115(1) of the Code before the amendment by Act 46 of 1999 read as under :

"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."

43. Now, the aforesaid proviso has been substituted by the following proviso:

"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."

44. The aforesaid clause (b) stands omitted. The question is about the constitutional powers of the High Courts under Article 227 on account of omission made in Section 115 of the Code. The question stands settled by a decision of this Court in *Surya Dev Rai v. Ram Chander Rai and others* (2003(6) SCC 675) holding that the power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under Section 115 of the Code does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists, untrammelled by the amendment in Section 115 and is available to be exercised subject to rules of self-discipline and practice which are as well settled.

Section 148

45. The amendment made in Section 148 affects the power of the Court to enlarge time that may have been fixed or granted by the Court for the doing of any act prescribed or allowed by the Code. The amendment provides that the period shall not exceed 30 days in total. Before amendment, there was no such restriction of time. Whether the Court has no inherent power to extend the time beyond 30 days is the question. We have no doubt that the upper limit fixed in Section 148 cannot take away the inherent power of the Court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of Court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for the reasons beyond the control of the party. We are not dealing with a case where time for doing an act has been prescribed under the provisions of the Limitation Act which cannot be extended either under Section 148 or Section 151. We are dealing with a case where the time is fixed or granted by the Court for performance of an act prescribed or allowed by the Court.

46. In *Mahanth Ram Das v. Ganga Das* (AIR 1961 SC 882), this Court considered a case where an order was passed by the Court that if the Court-fee was not paid by a particular day, the suit shall stand dismissed. It was a self-operating order leading to dismissal of the suit. The party's application filed under Sections 148 and 151 of the Code for extension of time was dismissed. Allowing the appeal, it was observed:

"How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient.



Such procedural orders, though peremptory (conditional decree apart), are. In essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time, but was set upon and robbed by thieves the day previous, he could not ask for extension of time or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians."

47. There can be many cases where non-grant of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice. Section 148, therefore, deserves to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend time beyond 30 days.

Order IX, Rule 5

48. The period of seven days mentioned in Order IX, Rule 5 is clearly directory. Order XI, Rule 15
49. The stipulation in Rule 15 of Order XI confining the inspection of documents 'at or before the settlement of issues' instead of 'at any time' is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues.

Judicial Impact Assessment

50. The Committee has taken note of para 7.8.2 of Volume I of the Report of the National Commission to Review the Working of the Constitution which reads as follows:

"7.8.2 Government of India should not throw the entire burden of establishing the subordinate courts and maintaining the subordinate judiciary on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State Judiciary in each of the States."

51. The Committee has further noticed that:

"33.3 As pointed out by the Constitution Review Commission, the laws which are being administered by the Courts which are subordinate to the High Court are laws which have been made by,

- (a) Parliament on subjects which fall under the Entries in List I and List III of Schedule 7 to the Constitution, or
- (b) State Legislatures on subjects which fall under the Entries in List II and List III of Schedule 7 to the Constitution.

But, the bulk of the cases (civil, criminal) in the subordinate Courts concern the Law of Contract, Transfer of Property Act, Sale of Goods Act, Negotiable Instruments Act, Indian Penal Code, Code of Civil Procedure, Code of Criminal



Procedure etc., which are all Central Laws made under List III. In addition, the subordinate Courts adjudicate cases (in civil, criminal) arising under Central Laws made under List I.

33.4 The Central Government has, therefore, to bear a substantial portion of the expenditure on subordinate Courts which are now being established maintained by the States. (The Central Government has only recently given monies for the fast track courts but these courts are a small fraction of the required number).

33.5 Under Article 247, Central Government could establish Courts for the purpose of administering Central Laws in List I. Except a few Tribunals, no such Courts have been established commensurate with the number of cases arising out of subjects in List. I".

52. The Committee has suggested that the Central Government has to provide substantial funds for establishing courts which are subordinate to the High Court and the Planning Commission and the Finance must make adequate provisions therefor, noticing that it has been so recommended by the Constitution Review Committee.

53. The Committee has also suggested that:

"Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the Legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many Courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such a judicial impact assessment has never been made by any Legislature or by Parliament in our country."

54. Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report on this Court within four months. ,

Report No. 2.

55. We will now take up Report No. 2 dealing with Model Alternative Dispute Resolution and Mediation Rules.

56. Part X of the Code (Sections 121 to 131) contains provisions in respect of the Rules. Sections 122 and 125 enable the High Courts to make Rules. Section 128 deals with matters for which rules may provide. It, inter alia, states that the rules which are not inconsistent with the provisions in the body of the Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

57. The question for consideration is about framing of the rules for the purposes of Section 89 and Order' X, Rules 1A, 1B and 1C. These provisions read as under :



"89. Settlement of disputes outside the Court— (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 re-formulate 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 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

- (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 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to- the Lok Adalat;
- (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 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
- (d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

1A. Direction of the court to opt for any one mode of alternative dispute resolution.

— 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.

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

1C. Appearance before the Court consequent to the failure of efforts of conciliation — 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."

58. Some doubt as to a possible conflict has been expressed in view of use of the word



- 'may' in Section 89 when it stipulates that 'the Court may re-formulate the terms of a possible settlement and refer the same for' and use of the word 'shall' in Order X, Rule 1A when it states that 'the Court shall direct the parties to the suit to opt either mode of settlements outside the Court as specified in sub-section (1) of Section 89.'
59. As can be seen from Section 89, its first part uses the word 'shall' when it stipulates that the 'court shall formulate terms of settlement'. The use of the word 'may' in later part of Section 89 only relates to the aspect of re-formulating the terms of a possible settlement. The intention of the Legislature behind enacting Section 89 is that where it appears to the Court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or other of the said modes. Section 89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of re-formulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or re-formulated in terms of Section 89.
60. One of the modes to which the dispute can be referred 'Arbitration'. Section 89(2) provides that where a dispute has been referred for Arbitration or Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') shall apply as if the proceedings for Arbitration or Conciliation were referred for settlement under the provisions of 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to Arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju and others v. P.V.G. Raju (Dead) and others* (2000) 4 SCC 539, 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the Court asks the parties to choose one or other ADRs including Arbitration and the parties choose Arbitration as their option. Of course, the parties have to agree for Arbitration. Section 82 of the 1996 Act enables the High Court to make Rules consistent with this Act as to all proceedings before the Court under 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to Arbitration among four ADRs is not contemplated by the 1996 Act, and, therefore, Section 82 or 84 has no applicability where parties, agree to go for arbitration under Section 89 of the Code. As already noticed, for the purposes of Section 89 and Order X, Rules 1A, 1B and 1C, the relevant Sections in Part X of the Code enable the High Court to frame rules. If reference is made to Arbitration under Section 89 of the Code, 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties. On the same analogy, 1996 Act in relation to Conciliation would apply only after the stage of reference to Conciliation. The 1996 Act does not deal with a situation where



after suit is filed, the court requires a party to choose one or other ADRs including Conciliation. Thus, for Conciliation also rules can be made under Part X of the Code for purposes of procedure for opting for 'Conciliation' and upto the stage of reference to Conciliation. Thus, there is no impediment in the ADR rules being framed in relation to Civil Court as contemplated in Section 89 upto the stage of reference to ADR. The 1996 Act comes into play only after the stage of reference upto the award. Applying the same analogy, the Legal Services Authority Act, 1987 (for short '1987 Act') or the Rules framed thereunder by the State Governments cannot act as impediment in the High Court making rules under Part X of the Code covering the manner in which option to Lok Adalat can be made being one of the modes provided in Section 89. The 1987 Act also does not deal with the aspect of exercising option to one of four ADR methods mentioned in Section 89. Section 89 makes applicable 1996 Act and 1987 Act from the stage after exercise of options and making of reference.

61. A doubt has been expressed in relation to clause (d) of Section 89 (2) of the Code on the question as to finalisation of the terms of the compromise. The question is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, Arbitration, Conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be the action of persons or institutions outside the Court and not before the Court. Order X, Rule 1C speaks of the 'Conciliation forum' referring back the dispute to the Court, ki fact, the court is now involved in the actual mediation/conciliation. Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards if no settlement is arrived at between the parties.
62. The question also is about the payment made and expenses to be incurred where the court compulsorily refers a matter for conciliation/mediation. Considering large number of responses received by the Committee to the draft rules it has suggested that in the event of such compulsory reference to conciliation/mediation procedures if expenditure on conciliation/mediation is borne by the Government, it may encourage parties to come forward and make attempts at conciliation/mediation. On the other hand, if the parties feel that they have to incur extra expenditure for resorting to such ADR modes, it is likely to act as a deterrent for adopting these methods. The suggestion is laudable. The Central Government is directed to examine it and if agreed, it shall request the Planning Commission and Finance Commission to make specific financial allocation for the judiciary for including the expenses



involved for mediation/conciliation under Section 89 of the Code. In case, Central Government has any reservations, the same shall be placed before the court within four months. In such event, the Government shall consider provisionally releasing adequate funds for these purposes also having regard to what we have earlier noticed about many statutes that are being administered and litigations pending in the Courts in various States are central legislations concerning the subjects in List I and List III of Schedule VII to the Constitution of India.

63. With a view to enable the Court to refer the parties to conciliation/mediation, where parties are unable to reach a consensus on an agreed name, there should be a panel of well trained conciliation/mediation to which it may be possible for the Court to make a reference. It would be necessary for the High Courts and District Courts to take appropriate steps in the direction of preparing the requisite panels.
64. A doubt was expressed about the applicability of ADR rules for dispute arising under the Family Courts Act since that Act also contemplates rules to be made. It is, however, to be borne in mind that the Family Courts Act applies the Code for all 'proceedings before it. In this view, ADR rules made under the Code can be applied to supplement the rules made under the Family Courts Act and provide for ADR insofar as conciliation/mediation is concerned.
65. It seems clear from the report that while drafting the model rules, after examining the mediation rules in various countries, a fine distinction is tried to be maintained between conciliation and mediation, accepting the views expressed by British author Mr. Brown in his work on India that in 'conciliation' there is little more latitude and conciliator can suggest some terms of settlements too.
66. When the parties come to a settlement upon a reference made by the court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the Court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the Settlement is not filed in the Court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without decree. In such eventuality, nothing prevents them in informing the Court that the suit may be dismissed as a dispute has been settled between the parties outside the Court.
67. Regarding refund of the court-fee where the matter is settled by the reference to one of the modes provided in Section 89 of the Act, it is for the State Governments to amend the laws on the lines of amendment made in Central Court Fee Act by 1999 Amendment to the Code. The State Governments can consider making similar amendments in the State Court Fee legislations.
68. The draft rules have been finalised by the Committee. Prior to finalisation, the same were circulated to the High Courts, subordinate courts, the Bar Council of India,



State Bar Councils and the Bar Associations, seeking their responses. Now, it is for the respective High Courts to take appropriate steps for making rules in exercise of rule-making power subject to modifications, if any which may be considered relevant.

69. The draft Civil Procedure-Alternative Dispute Resolution and Mediation Rules as framed by the Committee read as under:

"Civil Procedure ADR and Mediation Rules

(These Rules are the final Rules framed by the Committee, in modification of the Draft Rules circulated earlier, after considering the responses to the Consultation paper)

Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003

In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of Section 89 of the said Code, the High Court of is hereby issuing the following Rules:

Part I

Alternative Dispute Resolution Rules

Rule 1: Title:

These Rules in Part I shall be called the 'Civil Procedure - Alternative Dispute Resolution Rules 2003'.

Rule 2: Procedure for directing parties to opt for alternative modes of settlement :

- (a) The Court shall, after recording admissions- and denials at the first hearing of the suit under Rule 1 of Order X, and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, formulate the terms of settlement and give them to the parties for their observations under sub-section (1) of Section 89, and the parties shall submit to the Court their responses within thirty days of the first hearing.
- (b) At the next hearing, which shall be not later than thirty days of the receipt of responses, the Court may re-formulate the terms of a possible settlement and shall direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in clauses (a) to (d) of sub-section (1) of Section 89 read with Rule 1A of Order X, in the manner stated hereunder : Provided that the Court, in the exercise of such power, shall not refer any dispute to arbitration or to judicial settlement by a person or institution without the written consent of all the parties to the suit.

Rule 3: Persons authorized to take decision for the Union of India, State Governments and others :

- (1) For the purpose of Rule 2, the Union of India or the Government of a State or Union Territory, all local authorities, all Public Sector Undertakings, all statutory corporations and all public authorities shall nominate a person or persons or



group of persons who are authorized to take a final decision as to the mode of Alternative Dispute Resolution in which it proposes to opt in the event of direction by the Court under Section 89 and such nomination shall be communicated to the High Court within the period of three months from the date of commencement of these Rules and the High Court shall notify all the subordinate courts in this behalf as soon as such nomination is received from such Government or authorities.

- (2) Where such person or persons or group of persons have not been nominated as aforesaid, such party as referred to in clause (1) shall, if it is a plaintiff, file along with the plaint or if it is a defendant file, along with or before the filing of the written statement, a memo into the Court, nominating a person or persons or group of persons who is or are authorized to take a final decision as to the mode of alternative dispute resolution, which the party prefers to adopt in the event of the Court directing the party to opt for one or other mode of Alternative Dispute Resolution.

Rule 4: Court to give guidance to parties while giving direction to opt :

- (a) Before directing the parties to exercise option under clause (b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely :
- (i) that it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one or other of these modes of settlement referred to in section 89 rather than seek a trial on the disputes arising in the suit;
 - (ii) that, where there is no relationship between the parties which requires to be preserved, it may be in the interest of the parties to seek reference of the matter of arbitration as envisaged in clause (a) of subsection (1) of section 89.
 - (iii) that, where there is a relationship between the parties which requires to be preserved, it may be in the interest of parties to seek reference of the matter to conciliation or mediation, as envisaged in clause (b) or (d) of sub-section (1) of section 89.

Explanation : Disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

- (iv) that, where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to Lok Adalat or to judicial settlement as envisaged in clause (c) of sub-section (1) of section 89.



- (v) the difference between the different modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement as explained below :

Settlement by 'Arbitration' means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes, an award by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996), insofar as they refer to arbitration. Settlement by 'Conciliation' means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) insofar as they relate to conciliation, and in particular, in exercise of his powers under sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or re-formulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by 'Mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.

Settlement in Lok Adalat means settlement by Lok Adalat as contemplated by the Legal Services Authority Act, 1987.

'Judicial settlement' means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the Legal Service Authority Act, 1987(39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the provisions of that Act.

Rule 5 : Procedure for reference by the Court to the different modes of settlement:

- (a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under clause (b) of Rule 2 and the Court shall, within thirty days of the said application, refer the matter to arbitration and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to arbitration under that Act, shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;
- (b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat or where one of the parties applies for reference



to Lok Adalat, the procedure envisaged under the Legal Services Act, 1987 and in particular by section 20 of that Act, shall apply.

- (c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within thirty days of the direction under clause (b) of Rule 2 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Services Authority Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to Lok Adalat under that Act, shall apply as if the proceedings were referred for settlement under the provisions of that Act;
- (d) Where none of the parties are willing to agree to opt or agree to refer the dispute to arbitration, or Lok Adalat, or to judicial settlement, within thirty days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.
- (e)(i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the application refer the matter to conciliation and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to conciliation under that Act, shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act;
- (ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.
- (f) Where under clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within thirty days of the direction under clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application, and
 - (i) in case all the parties agree for conciliation, the Court shall refer the matter to conciliation and thereafter, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act, shall apply.
 - (ii) in case all the parties agree for mediation the Court shall refer the matter to mediation in accordance with the Civil Procedure - Mediation Rules, 2003 in Part II shall apply.



- (iii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure-Mediation Rules, 2003, shall apply.
- (g)(i) Where none of the parties apply for reference either to arbitration, or Lok Adalat, or judicial settlement, or for conciliation or mediation, within thirty days of the direction under clause (b) of Rule 2, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on ' the question of making a reference either to conciliation or mediation.
- (ii) After hearing the parties or their representatives on the day so fixed the Court shall, if there exist elements of a settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, refer the matter to conciliation or mediation. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure-Mediation Rules 2003 shall apply.
- (h)(i) No next friend or guardian for the suit shall, without the leave of the Court, expressly recored in the proceedings of the Court, opt for any one of the modes of alternative dispute resolution nor shall enter into any settlement on behalf of a minor or person under disability with reference to suit in which he acts as mere friend or guardian.
- (ii) Where an application is made to the Court for leave to enter into a settlement initiated into the after native dispute resolution proceeding on behalf of minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file a certificate along with the said application to the effect that the settlement is in his opinion, for the benefit of the minor or other person under disability. The decree of Court based on the settlement to which the minor or other person under disability is a party, shall refer to the sanction of the Court there to and shall set out the terms of the settlement.

Rule 6 : Referral to the Court and appearance before the Court upon failure of attempts to settle disputes by conciliation or judicial settlement or mediation:

- (1) Where a suit has been referred for settlement for conciliation, mediation or judicial settlement and has not been settled or where it is felt that it would not



be proper in the interests of justice to proceed further with the matter, the suit shall be referred back again to the Court with a direction to the parties to appear before the Court on a specific date.

- (2) Upon the reference of the matter back to the Court under sub-rule (1) or under sub-section (5) of Section 20 of the Legal Services Authority Act, 1987, the Court shall proceed with the suit in accordance with law.

Rule 7 : Training in alternative methods of resolution of disputes, and preparation of manual :

- (a) The High Court shall take steps to have training courses conducted in places where the High Court and District Courts or Courts of equal status are located, by requesting bodies recognized by the high court or the Universities imparting legal education or retired Faculty Members or other persons who, according to the High Court are well versed in the techniques of alternative methods of resolution of dispute, to conduct training courses for lawyers and judicial officers.
- (b)(i) The High Court shall nominate a committee of judges, faculty members including retired persons belonging to the above categories, senior members of the Bar other members of the Bar specially qualified in the techniques of alternative dispute resolution, for the purpose referred to in cause (a) and for the purpose of preparing a detailed manual of procedure for alternative dispute resolution to be used by the Courts in the State as well as by the arbitrators, or authority or person in the case of judicial settlement or conciliators or mediators.
- (iii) The said manual shall describe the various methods of alternative dispute resolution the manner in which any one of the said methods is to be opted for, the suitability of any particular method for any particular, type of dispute and shall specifically deal with the role of the above persons in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.
- (c) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of alternative dispute resolution procedures throughout the State or States over which the High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers.
- (d) Persons who have experience in the matter of alternative dispute resolution procedures, and in particular in regard to conciliation and mediation, shall be given preference in the matter of empanelment for purposes of conciliation or mediation.

Rule 8 : Applicability to other proceedings:

The provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (66 of 1984), while



dealing with matrimonial, maintenance and child custody disputes, wherever necessary, in addition to the rules framed under the Family Courts Act (66 of 1984).

PART II

CIVIL PROCEDURE MEDIATION RULES

Rule 1 : Title :

These Rules in Part II shall be called the Civil Procedure Mediation Rules, 2003.

Rule 2 : Appointment of mediator:

- (a) Parties to a suit may all agree on the name of the sole mediator for mediating between them.
- (b) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.
- (c) Where parties agree on a sole mediator under clause (a) or where parties nominate more than one mediator under clause (b), the mediator need not necessarily be from the panel of mediators referred to in Rule 3 nor bear the qualifications referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5.
- (d) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

Rule 3 : Panel of mediators :

- (a) The High Court shall, for the purpose of appointing mediators between parties in suits filed on its original side, prepare a panel of mediators and publish the same on its Notice Board, within thirty days of the coming into force of these Rules, with copy to the Bar Association attached to the original side of the High Court.
- (b)
 - (i) The Courts of the Principal District and Sessions Judge in each District or the Courts of the Principal Judge of the City Civil Court or Courts of equal status shall, for the purposes of appointing mediators to mediate between parties in suits filed on their original side, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the same on their respective Notice Board.
 - (ii) Copies of the said panels referred to in clause (i) shall be forwarded to all the Courts of equivalent jurisdiction or Courts subordinate to the Courts referred to in sub-clause (i) and to the Bar associations attached to each of the Courts.
- (c) The consent of the persons whose names are included in the panel shall be obtained before empanelling them.
- (d) The panel of names shall contain a detailed Annexure giving details of the qualifications of the mediators and their professional or technical experience in



different fields.

Rule 4 : Qualifications of persons to be empanelled under Rule 3 :

The following persons shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 3, namely:

- (a) (i) Retired Judges of the Supreme Court of India;
- (ii) Retired Judges of the High Court;
- (iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status.
- (b) Legal practitioners with at least fifteen years' standing at the Bar at the level of the Supreme Court or the High Court; or the District Courts or Courts of equivalent status.
- (c) Experts or other professionals with at least fifteen years' standing; or retired senior bureaucrats or retired senior executives.
- (d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

Rule 5 : Disqualifications of persons : The following persons shall be deemed to be disqualified for being empanelled as mediators :

- (i) any person who has been adjudged as insolvent or is declared of unsound mind;
- (ii) or any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending; or
- (iii) any person who has been convicted by a criminal court for any offence involving moral turpitude;
- (iv) any person against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment;
- (v) any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing;
- (vi) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings;
- (vii) such other categories of persons as may be notified by the High Court.

Rule 6 : Venue for conducting mediation ;

The mediator shall conduct the mediation at one or other of the following places:

- (i) Venue of the Lok Adalat or permanent Lok Adalat.



- (ii) Any place identified by the District Judge within the Court precincts for the purpose of conducting mediation.
- (iii) Any place identified by the Bar Association or State Bar Council for the purpose of mediation, within the premises of the Bar Association or State Bar Council, as the case may be.
- (iv) Any other place as may be agreed upon by the parties subject to the approval of the Court.

Rule 7: Preference:

The Court shall, while nominating any person from the panel of mediators referred to in Rule 3, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

Rule 8: Duty of mediator to disclose certain facts :

- (a) When a person is approached in connection with his possible appointment as a mediator, the person shall disclose in writing to the parties, any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.
 - (b) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in clause (a).
- Rule 9 : Cancellation of appointment :** Upon information furnished by the mediator under Rule 8 or upon any other information received from the parties or other persons, if the Court, in which the suit is filed, is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator.

Rule 10 : Removal or deletion from panel:

A person whose name is placed in the panel referred to in Rule 3 may be removed or his name be deleted from the said panel, by the Court which empanelled him, If:

- (i) he resigns or withdraws his name from the panel for any reason;
- (ii) he is declared insolvent or is declared of unsound mind;
- (iii) he is a person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;
- (iv) he is a person who has been convicted by a criminal court for any offence involving moral turpitude;
- (v) he is a person against whom disciplinary proceedings on charges relating to moral turpitude have been initiated by appropriate disciplinary authority which are pending



or have resulted in a punishment;

- (vi) he exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;
- (vii) the Court which empanelled, upon receipt of information, if it is satisfied, after conducting such inquiry as it deem fit, is of the view, that it is not possible or desirable to continue the name of that person in the panel:

Provided that, before removing or deleting his name, under clauses (vi) and (vii), the Court shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order.

Rule 11 : Procedure of mediation :

- (a) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.
- (b) Where the parties do not agree on any particular procedure to be followed by the mediator, the mediator shall follow the procedure hereinafter mentioned, namely ;
 - (i) he shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all parties have to be present;
 - (ii) he shall hold the mediation conference in accordance with the provisions of Rule 6;
 - (iii) he may conduct joint or separate meetings with the parties;
 - (iv) each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties;
 - (v) each party shall furnish to the mediator, copies of pleadings or documents or such other information as may be required by him in connection with the issues to be resolved :

Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix.

- (vi) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.
- (c) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party that nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes.

Rule 12 : Mediator not bound by Evidence Act, 1872 or Code of Civil Procedure, 1908:



The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, but shall be guided by principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

Rule 13 : Non-attendance of parties at sessions or meetings on due dates:

- (a) The parties shall be present personally or may be represented by their counsel or power of attorney holders at the meetings or sessions notified by the mediator.
- (b) If a party fails to attend a session or a meeting notified by the mediator, other parties of the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs.
- (c) The parties not resident in India, may be represented by their counsel or power of attorney holders at the sessions or meetings.

Rule 14 : Administrative assistance :

In order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Rule 15 : Offer of settlement by parties :

- (a) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.
- (b) Any party to the suit may make a, "with prejudice" offer, to the other party at any stage of the proceedings, with notice to the mediator.

Rule 16 : Role of mediator :

The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them; he shall not impose any terms of settlement on the parties.

Rule 17 : Parties alone responsible for taking decision :

The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

Rule 18 : Time limit for completion of mediation :

On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the Court, which referred



the matter, either suo motu, or upon request by the mediator or any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

Rule 19 : Parties to act in good faith :

While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute, if possible.

Rule 20 : Confidentiality, disclosure and inadmissibility of information :

- (1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.
- (2) when a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding the documents or what is conveyed to him orally as to what transpired during the mediation.
- (3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the documents nor in regard to the oral information nor as to what transpired during the mediation.
- (4) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to :
 - (a) views expressed by a party in the course of the mediation proceedings;
 - (b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;
 - (c) proposals made or views expressed by the mediator;
 - (d) admission made by a party in the course of mediation proceedings;
 - (e) the fact that a party had or had not indicated willingness to accept a proposal;
- (5) There shall be no stenographic or audio or video recording of the mediation proceedings.

Rule 21 : Privacy

Mediation sessions and meetings are private; only the concerned parties or their counsel or power of attorney holders can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.



Rule 22 : Immunity :

No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

Rule 23 : Communication between mediator and the Court :

- (a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in clauses (b) and (c) of this Rule.
- (b) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.
- (c) Communication between the mediator and the Court shall be limited to communication by the mediator :
 - (i) with the Court about the failure of party to attend;
 - (ii) with the Court with the consent of the parties;
 - (iii) regarding his assessment that the case is not suited for settlement through mediation;
 - (iv) that the parties have settled the dispute or disputes.

Rule 24 : Settlement Agreement :

- (1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced to writing and signed by the parties or their power of attorney holder. If any counsel have represented the parties, they shall attest the signature of their respective clients.
- (2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the Court in which the suit is pending.
- (3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing.

Rule 25 : Court to fix a date for recording settlement and passing decree:

- (1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement, if it is not collusive.



- (2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.
- (3) If the settlement disposes of only certain issues arising in the suit, the Court shall record the settlement on the date fixed for recording the settlement and
 - (i) if the issues are severable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, the Court may pass a decree straightway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled.
 - (ii) if the issues are not severable, the Court shall wait for a decision of the Court on the other issues which are not settled.

Rule 26 : Fee of mediator and costs :

- (1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.
- (2) As far as possible a consolidated sum may be fixed rather than for each session or meeting.
- (3) Where there are two mediators as in clause (b) of Rule 2, the Court shall fix the fee payable to the mediators which shall be shared equally by the two sets of parties.
- (4) The expense of the mediation including the fee of the mediator, costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Court.
- (5) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.
- (6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in clauses (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the Court.
- (7) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or parties, direct the concerned parties to pay, and if they do not pay, the Court shall recover the said amounts as if there was a decree for the said amount.
- (8) Where a party is entitled to legal aid under Section 12 of the Legal Services Authority Act, 1987, the amount of fee payable to the mediator and costs shall be paid by the concerned Legal Services Authority under that Act.

Rule 27 : Ethics to be followed by mediator :

The mediator shall :



- (1) follow and observe these Rules strictly and with due diligence;
- (2) not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;
- (3) uphold the integrity and fairness of the mediation process;
- (4) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process;
- (5) satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;
- (6) disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;
- (7) avoid, while communicating with the parties, any impropriety or appearance of impropriety;
- (8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator;
- (9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;
- (10) recognize that mediation is based on principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;
- (11) maintain the reasonable expectations of the parties as to confidentiality;
- (12) refrain from promises or guarantees of results.

Rule 28 : Transitory provisions :

Until a panel of arbitrators is prepared by the High Court and the District Court, the Courts referred to in Rule 3, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 4 and is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute."

Report No. 3

70. Report No. 3 deals with the Case Flow Management and Model Rules. The case management policy can yield remarkable results in achieving more disposal of the cases. Its mandate is for the Judge or an officer of the court to set a time-table and monitor a case from its initiation to its disposal. The Committee on survey of the progress made in other countries has come to a conclusion that the case management system has yielded exceedingly good results.
71. Model Case Flow Management Rules have been separately dealt with for trial courts and first appellate subordinate courts and for High Courts. These draft Rules



extensively deal with the various stages of the litigation. The High Courts can examine these Rules, discuss the matter and consider the question of adopting or making case law management and model rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice.

72. The Model Case Flow Management Rules read as under:

"MODEL CASE FLOW MANAGEMENT RULES

(A) Model Case Management Rules for Trial Courts and First Appellate Subordinate Courts

I. Division of Civil Suits and Appeals into Tracks

II. Original Suits

1. Fixation of time limits while issuing notice
2. Service of Summons/notice and completion of pleadings
3. Calling of Cases (Hajri or Call Work or Roll Call)
4. Procedure on the grant of interim orders
5. Referral to Alternate Dispute Resolution
6. Procedure on the failure of Alternate Dispute Resolution
7. Referral to Commissioner for recordal of evidence
8. Costs
9. Proceedings for Perjury
10. Adjournments
11. Miscellaneous Applications.

III. First Appeals to Subordinate Courts

1. Service of Notice of Appeal
2. Essential Documents to be filed with the Memorandum of Appeal
3. Fixation of time limits in interlocutory matters
4. Steps for completion of all formalities (Call Work Hajri)
5. Procedure on grant of interim orders
6. Filing of Written submissions
7. Costs.

IV. Application/Petition under Special Acts

V. Criminal Trial and Criminal Appeals to Subordinate Courts



- (a) Criminal Trials
- (b) Criminal Appeals
- VI. Notice under section 80 of Code of Civil Procedure
- VII. Note
- (B) Model Case Flow Management Rules in High Court
 - I. Division of Cases into Tracks
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 - IV. First Appeals to High Court
 - V. Appeals to Division Bench
 - VI. Second Appeals.
 - VII. Civil Revisions
 - VIII. Criminal Appeals
 - IX. Note.

.....High Court Rules, 2003

In exercise of the power conferred by Part X of the Code of Civil Procedure 1908 (5 of 1908) and High Court Act, and all other powers enabling, the High Court hereby makes the following Rules, in regard to case flow management in the subordinate courts.

(A) Model Rules for Trial Courts and First Appellate Subordinate Courts

- I. Division of Civil Suits and Appeals into Tracks
 - 1. Based on the nature of dispute, the quantum of evidence to be recorded and the time likely to be taken for the completion of suit, the suits shall be channeled into different tracks. Track 1 may include suits for maintenance, divorce and child custody and visitation rights, grant of letters of administration and succession certificate and simple suits for rent or for eviction (upon notice under Section 106 of Transfer of Property Act). Track 2 may consist of money suits and suits based solely on negotiable instruments. Track 3 may include suits concerning partition and like property disputes, trademarks, copyrights and other intellectual property matters. Track 4 may relate to other matters. All efforts shall be taken to complete the suits in track 1 within a period of 9 months, track 2 within 12 months and suits in track 3 and 4 within 24 months.

This categorization is illustrative and it will be for the High Court to make appropriate categorization. It will be for the judge concerned to make an appropriate assessment as to which track any case can be assigned.



2. Once in a month, the registry/administrative staff of each Court will prepare a report as to the stage and progress of cases which are proposed to be listed in next month and place the report before the Court. When the matters are listed on each day, the judge concerned may take such decision as he may deem fit in the presence of counsel/parties in regard to each case for removing any obstacles in service of summons, completion of pleadings etc. with a view to make the case ready for disposal.
3. The judge referred to in clause (2) above, may shift a case from one track to another, depending upon the complexity and other circumstances of the case.
4. Where computerization is available, the monthly data will be fed into the computer in such a manner that the judge referred to in clause (2) above, will be able to ascertain the position and the stage of every case in every track from the computer screen. Over a period, all cases pending in his Court will be covered. Where computerization is not available, the monitoring must be done manually.
5. The judge referred to in clause (2) above, shall monitor and control the flow or progress of every case, either from the computer or from the register or data placed before him in the above manner or in some other manner he may innovate.

II. Original Suit:

1. Fixation of time limits while issuing notice :
 - (a) Wherever notice is issued in a suit, the notice should indicate that the Code prescribes a maximum of 30 days for filing written statement (which for special reasons may be extended upto 90 days) and, therefore, the defendants may prepare the written statement expeditiously and that the matter will be listed for that purpose on the expiry of eight weeks from the date of issue of notice (so that it can be a definite date). After the written statement is filed, the replication (If any, proposed and permitted), should be filed within six weeks of receipt of the written statement. If there are more than one defendant, each one of the defendant should comply with this requirement within the time-limit.
 - (b) The notice referred to in clause (a) shall be accompanied by a complete copy of the plaint and all its annexure/enclosures and copies of the interlocutory applications, if any.
 - (c) If interlocutory applications are filed along with the plaint, and if an ex parte interim order is not passed and the Court is desirous of hearing the respondent, it may, while sending the notice along with the plaint, fix an earlier date for the hearing of the application (than the date for filing



written statement) depending upon the urgency for interim relief.

2. Service of Summons/notice and completion of pleadings :

- (a) Summons may be served as indicated in clause (3) of Rule 9 of Order V.
- (b) In the case of service of summons by the plaintiff or a courier where a return is filed that the defendant has refused notice, the return will be accompanied by an undertaking that the plaintiff or the courier, as the case may be, is aware that if the return is found to be false, he can be punished for perjury or summarily dealt with for contempt of Court for abuse of the provisions of the Code. Where the plaintiff comes forward with a return of 'refusal', the provisions of Order 9A, Rule 4 will be followed by re-issue of summons through Court.
- (c) If it has not been possible to effect service of summons under Rule 9 of Order V, the provisions of Rule 17 of Order V shall apply and the plaintiff shall within 7 days from the date of its inability to serve the summons, to request the Court to permit substituted service. The dates for filing the written statement and replication, if any, shall accordingly stand extended.

3. Calling of Cases (Hajri or Call Work or Roll Call) :

The present practice of the Court-master or Bench-clerk calling all the cases listed on a particular day at the beginning of the day in order to confirm whether counsel are ready, whether parties are present or whether various steps in the suit or proceeding has been taken, is consuming a lot of time of the Court, sometimes almost two hours of the best part of the day when the judge is fresh. After such work, the Court is left with very limited time to deal with cases listed before it. Formal listing should be first before a nominated senior officer of the Registry, one or two days before the listing in Court. He may give dates in routine matters for compliance with earlier orders of Court. Cases will be listed before Court only where an order of the Court is necessary or where an order prescribing the consequences of default or where a peremptory order or an order as to costs is required to be passed on the judicial side. Cases which have to be adjourned as a matter of routine for taking steps in the suit or proceeding should not be unnecessarily listed before Court. Where parties/counsel are not attending before the Court-officer or are defiant or negligent, their cases may be placed before the Court. Listing of cases on any day before a Court should be based on a reasonable estimate of time and number of cases that can be disposed of by the Court in a particular day. The Courts shall, therefore, dispense with the practice of calling all the cases listed adjourned to any particular day. Cases will be first listed before a nominated senior officer of the Court, nominated for the purpose.

4. Procedure on the grant of interim orders :

- (a) If an interim order is granted at the first hearing by the Court, the



defendants would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

- (b) If the Court passes an ad interim ex parte order in an interlocutory application, and the reply by the defendants is filed, and if, thereafter, the plaintiff fails to file the rejoinder (if any) without good reason for the delay, the Court has to consider whether the stay or interim order passed by the Court should be vacated and shall list the case with that purpose. This is meant to prevent parties taking adjournment with a view to have undue benefit of the ad interim orders. The plaintiff may, if he so chooses, also waive his right to file a rejoinder. A communication of option by the plaintiff not to file a rejoinder, made to the Registry will be deemed to be the completion of pleadings in the interlocutory application.

5. Referral to Alternate Dispute Resolution :

(In the hearing before the Court, after completion of pleadings, time limit for discovery and inspection, and admission and denials, of documents shall be fixed, preferably restricted to 4 weeks each)

After the completion of admission and denial of documents by the parties, the suit shall be listed before the Court (for examination of parties under Order X of the Civil Procedure Code. A joint statement of admitted facts shall be filed before the said date.) The Court shall thereafter, follow the procedure prescribed under the Alternative Dispute Resolution and Mediation Rules, 2002.

6. Procedure on the failure of Alternate Dispute Resolution :

On the filing of report by the Mediator under the Mediation Rules that efforts at Mediation have failed, or a report by the Conciliator under the provisions of the Arbitration and Conciliation Act, 1996, or a report of no settlement in the Lok Adalat under the provisions of the Legal Services Authority Act, 1987 the suit shall be listed before the Registry within a period of 14 days. At the said hearing before the Registry, all the parties shall submit the draft issues proposed by them. The suit shall be listed before the Court within 14 days thereafter for framing of issues.

When the suit is listed after failure of the attempts at conciliation, arbitration or Lok Adalat, the Judge may merely inquire whether it is still possible for the parties to resolve the dispute. This should invariably be done by the Judge at the first hearing when the matter comes back on failure of conciliation, mediation or Lok Adalat.

If the parties are not keen about settlement, the Court shall frame the issues and direct the plaintiff to start examining his witnesses. The procedure of each



witness filing his examination-in-chief and being examined in cross or re-examination will continue, one after the other. After completion of evidence on the plaintiffs side, the defendants shall lead evidence likewise, witness after witness, the chief examination of each witness being by affidavit and the witness being then cross-examined or re-examined. The parties shall keep the affidavit in chief-examination ready whenever the witness's examination is taken up. As far as possible, evidence must be taken up day-by-day as stated in clause (a) of proviso to Rule 2 of Order XVII. The parties shall also indicate the likely duration for the evidence to be completed, and for the arguments to be thereafter heard. The Judge shall ascertain the availability of time of the Court and will list the matter for trial on a date when the trial can go on from day-to-day and conclude the evidence. The possibility of further negotiation and settlement should be kept open and if such a settlement takes place, it should be open to the parties to move the Registry for getting the matter listed at an earlier date for disposal.

7. Referral to Commissioner for recordal of evidence :

- (a) The High Court shall conduct an examination on the subjects of the Code of Civil Procedure and Evidence Act. Only those advocates who have passed an examination conducted by the High Court on the subjects of 'Code of Civil Procedure' and Evidence Act, — shall be appointed as Commissioners for recording evidence. They shall be ranked according to the marks secured by them.
- (b) It is not necessary that in every case the Court should appoint a Commissioner for recording evidence. Only if the recording of evidence is likely to take a long time, or there are any other special grounds, should the Court consider appointing a Commissioner for recording the evidence. The Court should direct that the matter be listed for arguments fifteen days after the Commissioner files his report with the evidence.

The Court may initially fix a specific period for the completion of the recording of the evidence by the Commissioner and direct the matter to be listed on the date of expiry of the period, so that Court may know whether the parties are co-operating with the Commissioner and whether the recording of evidence is getting unnecessarily prolonged.

- (c) Commissioners should file an undertaking in Court upon their appointment that they will keep the records handed over to them and those that may be filed before them, safe and shall not allow any party to inspect them in the absence of the opposite party/counsel. If there is delay of more than one month in the dates fixed for recording evidence, it is advisable for them to return the file to the Court and take it back on the eve of the adjourned date.

8. Costs :



So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory inasmuch as the liberal attitude of the Courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.

9. Proceedings for Perjury :

If the Trial Judge, while delivering the judgment, is of the view that any of the parties or witnesses have willfully and deliberately uttered blatant falsehoods, he shall consider (at least in some grave cases) whether it is a fit case where prosecution should be initiated for perjury and order prosecution accordingly.

10. Adjournments :

The amendments to the Code have restricted the number of adjournments to three in the course of hearing of the suit, on reasonable cause being shown. When a suit is listed before a Court and any party seeks adjournment, the Court shall have to verify whether the party is seeking adjournment due to circumstances beyond the control of the party, as required by clause. (b) of proviso to Rule 2 of Order XVII. The Court shall impose costs as specified in Rule 2 of Order XVII.

II. Miscellaneous Applications : The proceedings in a suit shall not be stayed merely because of the filing of Miscellaneous Application in the course of suit unless the Court in its discretion expressly thinks it necessary to stay the proceedings in the suit.

III. First Appeals to Subordinate Courts

1. Service of Notice of Appeal : First Appeals being appeals on question of fact and law, Courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected at the admission stage under Rule 11 of Order XLI. In view of the amended CPC, a copy of the memorandum of appeal is required to be filed in the subordinate Court. It has been clarified by the Supreme Court that the requirement of filing a copy of appeal memorandum in the subordinate Court does not mean that appeal memorandum cannot be filed in the Appellate Court immediately for obtaining interim orders.

Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party who



appeared in the subordinate Court so as to enable the respondents to appear if they so choose, even at the first hearing stage.

2. Essential Documents to be filed with the Memorandum of Appeal :

The Appellant shall, as far as possible, file, along with the appeal, copies of essential documents marked in the suit, for the purpose of enabling the appellate Court to understand the points raised or for purpose of passing interim orders.

3. Fixation of time limits in interlocutory matters :

Whenever notice is issued by the appellate Court in interlocutory matters, the notice should indicate the date by which the reply should be filed. The rejoinder, if any, should be filed within four weeks of receipt of the reply. If there are more parties than one who are Respondents, each one of the Respondent should comply with this requirement within the time limit and the rejoinder may be filed within four weeks from the receipt of the last reply.

4. Steps for completion of all formalities/ (Call Work) (Hajri) :

The appeal shall be listed before the registry for completion of all formalities necessary before the appeal is taken up for final hearing. The procedure indicated above of listing the case before a senior officer of the appellate Court registry for giving dates in routine matters must be followed to reduce the 'call work (Hajri) and only where judicial orders are necessary, such cases should be listed before Court.

5. Procedure on grant of interim orders ;

If an interim order is granted at the first hearing by the Court, the Respondents would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

If the Court passes an ad interim ex parte order, and if the reply is filed by the Respondents and if, without good reason, the appellant fails to file the rejoinder, Court shall consider whether it is a fit case for vacating the stay or interim order and list the case for that purpose. This is intended to see that those who have obtained ad interim orders do not procrastinate in filing replies. The appellant may also waive his right to file the rejoinder. Such choice shall be conveyed to the registry on or before the date fixed for filing of rejoinder. Such communication of option by the applicant to the registry will be deemed to be completion of pleadings.

6. Filing of Written submissions : Both the appellants and the respondents shall be required to submit their written submissions two weeks before the commencement of the arguments in the appeal. The cause-list should indicate



if written submissions have been filed or not. Wherever they have not been filed, the Court must insist on their being filed within a particular period to be fixed by the Court and each party must serve a copy thereof on the opposite side before the date of commencement of arguments. There is no question of parties filing replies to each other's written submissions.

The Court may consider having a Caution List/Alternative List to take care of eventualities when a case does not go on before a court, and those cases may be listed before a court where, for any reason, the scheduled cases are not taken up for hearing.

7. Costs :

Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude if the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the appellate Court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.

IV. Application/Petition under Special Acts

This chapter deals with applications/ petitions filed under Special Acts like the Industrial Disputes Act, Hindu Marriage Act, Indian Succession Act etc.

The Practise directions in regard to Original Suits should *mutatis mutandis* apply in respect of such applications/petitions.

V. Criminal Trials and Criminal Appeals to Subordinate Courts

(a) Criminal Trials

1. Criminal Trials should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment, rape and cases involving sexual offences or dowry deaths should be kept in Track I. Other cases where the accused is not granted bail and is in Jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy and food adulteration cases, etc. should be kept in Track III. Offences which are tried by special courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V — all other offences. The endeavour should be to complete Track I cases within a period of nine months, Track II and Track III cases within twelve months and Track IV within fifteen months.
2. The High Court may classify criminal appeals pending before it into different tracks on the same lines mentioned above.

(b) Criminal Appeals



3. Wherever an appeal is filed by a person in jail, and also when appeals are filed by State, as far as possible, the memorandum appeal may be accompanied by important documents, if any, having a bearing on the question of bail.
4. In respect of appeals filed against acquittals, steps for appointment of amicus curiae or State Legal Aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the registry/(State Legal Services Authority) immediately after completion of four weeks of service of notice. It shall be presumed that in such an event the accused is not in a position to appoint counsel.
5. Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the subordinate Court, so as to enable the other party to appear if they so choose even at the first hearing stage.

VI. Notice issued under S. 80 of Code of Civil Procedure :

Every public authority shall appoint an officer responsible to take appropriate action on a notice issued under S. 80 of the Code of Civil Procedure. Every such officer shall take appropriate action on receipt of such notice. If the Court finds that the concerned officer, on receipt of the notice, failed to take necessary action or was negligent in taking the necessary steps, the Court shall hold such officer responsible and recommend appropriate disciplinary action by the concerned authority.

VII. Note

Whenever there is any inconsistency between these rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure 1973 or the High Courts Act or any other Statutes, the provisions of such Codes and Statutes shall prevail.

(B) Model Case Flow Management Rules in High Court

.....High Court Rules, 2003

In exercise of the power conferred by Article 225 of the Constitution of India, and Chapter X of the Code of Civil Procedure, 1908 (5 of 1908) and Section .. of the .. High Court Act and all other powers enabling it, the High Court hereby makes the following Rules :

I. Division of Cases into different tracks :

1. Writ Petitions : The High Court shall, at the stage of admission or issuing notice before admission categorise the Writ Petitions other than Writ of Habeas Corpus, into three categories depending on the urgency with which the matter should be dealt with : the Fast Track, the Normal Track and the Slow Track. The petitions in the Fast Track shall invariably be disposed of within a period not exceeding six months while the petitions in the Normal Track should not take longer than a year. The petitions in the Slow Track, subject to the pendency



of other cases in the Court, should ordinarily be disposed of within a period of two years.

Where an interim order of stay or injunction is granted in respect of liability to tax or demolition or eviction from public premises etc. shall be put on the fast track. Similarly, all matters involving tenders Would also be put on the Fast Track. These matters cannot brook delays in disposal.

2. Senior officers of the High Court, nominated for the purpose, shall at intervals of every month, monitor the stage of each case likely to come up for hearing before each Bench (Division Bench or Single Judge) during that month which have been allocated to the different tracks. The details shall be placed before the Chief Justice or Committee nominated for that purpose as well as the concerned Judge dealing with cases.
3. The Judge or Judges referred to in Clause (2) above may shift the case from one track to another, depending upon the complexity, (urgency) and other circumstances of the case.
4. Where computerization is available, data will be fed into the computer in such a manner that the court or judge or judges, referred to in Clause (2) above will be able to ascertain the position and stage of every case in every track from the computer screen.
5. Whenever the roster changes, the judge concerned who is dealing with final matters shall keep himself informed about the stage of the cases in various tracks listed before him during every week, with a view to see that the cases are taken up early.
6. Other matters : The High Court shall also divide Civil Appeals and other matters in the High Court into different tracks on the lines indicated in sub-clauses (2) to (5) above and the said clauses shall apply, mutatis mutandis, to the civil appeals filed in the High Court. The High Court shall make a subject-wise division of the appeals/ revision application for allocation into different tracks.

(Division of criminal petitions and appeals into different tracks is dealt with separately under the heading 'criminal petitions and appeals'.)

II. Writ of Habeas Corpus :

Notices in respect of Writ of Habeas Corpus where the person is in custody under orders of a State Government or Central Government shall invariably be issued by the Court at the first listing and shall be made returnable within 48 hours. State Government or Central Government may file a brief return enclosing the relevant documents to justify the detention. The matter shall be listed after notice on the fourth working day after issuance of notice, and the Court shall consider whether a more detailed return to the Writ is necessary, and, if so required, shall give further time of a week and three days' time for filing a rejoinder. A Writ of Habeas Corpus



shall invariably be disposed of within a period of fifteen days. It shall have preference over and above fast-track cases.

III. Mode of Advance Service :

The Court rules will provide for mode of service of notice on the standing counsel for Respondents wherever available, against whom, interim orders are sought. Such advance service shall generally relate to Governments or public sector undertakings who have Standing Counsel.

FIRST APPEALS TO HIGH COURT

1. Service of Notice of Appeal :

First Appeals being appeals on questions of fact and law, Courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected under Order XLI Rule 11 at the admission stage. In view of the amended CPC, a copy of the appeal is required to be filed in the Trial Court. It has been clarified by the Supreme Court that the requirement of filing of appeal in the Trial Court does not mean that the party cannot file the appeal in the appellate Court (High Court) immediately for obtaining interim orders.

In addition to the process for normal service as per the Code of Civil Procedure, advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the Trial Court itself so as to enable them to inform the parties to appear if they so choose even at the first hearing stage.

2. Filing of Documents :

The Appellant shall, on the appeal being admitted, file all the essential papers within such period as may be fixed by the High Court for the purpose the High Court understanding the scope of the dispute and for the purpose of passing interlocutory orders.

3. Printing or typing of Paper Book : Printing and preparation of paper-books by the High Court should be done away with. After service of notice is effected, counsel for both sides should agree on the list of documents and evidence to be printed or typed and the same shall be made ready by the parties within the time to be fixed by the Court. Thereafter the paper book shall be got ready. It must be assured that the paper books are ready at least six months in advance before the appeal is taken up for arguments. (Cause lists must specify if paper books have been filed or not).

4. Filing of Written Submissions and time for oral arguments :

Both the appellants and the respondents shall be required to submit their written submissions with all the relevant pages as per the Court paper- book marked therein within a month of preparation of such paper-books, referred to in para 3 above.



Cause list may indicate if written submissions have been filed. If not, the Court must direct that they be filed immediately. After the written submissions are filed, (with due service of copy to the other side) the matter should be listed before the Registrar/Master for the parties to indicate the time that will be taken for arguments in the appeal. Alternatively, such matters may be listed before a judge in chambers for deciding the time duration and thereafter to fix a date of hearing on a clear date when the requisite extent of time will be available.

In the event that the matter is likely to take a day or more, the High Court may consider having a Caution List/Alternative List to meet eventualities where a case gets adjourned due to unavoidable reasons or does not go on before a court, and those cases may be listed before a court where, for one reason or another, the scheduled cases are not taken up for hearing.

5. Court may explore possibility of settlement :

At the first hearing of a First Appeal when both parties appear, the Court shall find out if there is a possibility of a settlement. If the parties are agreeable even at that stage for mediation or conciliation, the High Court could make a reference to mediation or conciliation for the said purpose.

If necessary, the process contemplated by Section 89 of CPC may be resorted to by the Appellate Court so, however, that the hearing of the appeal is not unnecessarily delayed. Whichever is the ADR process adopted, the Court should fix a date for a report on the ADR two months from the date of reference.

V. Appeals to Division Bench from judgment of Single Judge of High Court [Letters Patent Appeals (LPA) or similar appeals under High Courts Acts] :

An appeal to a Division Bench from Judgment of a Single Judge may lie in the following cases :

- (1) Appeals from interlocutory orders of the Single Judge in original jurisdiction matters including writs; (2) appeals from final judgments of a Single Judge in original jurisdiction; (3) other appeals permitted by any law to a Division Bench.

Appeals against interlocutory orders falling under category (1) above should be invariably filed after advance notice to the opposite counsel (who has appeared before the Single Judge) so that both the sides will be represented at the very first hearing of the appeals. If both parties appear at the first hearing, there is no need to serve the opposite side by normal process and at least in some cases, the appeals against interlocutory orders can be disposed of even at the first hearing. If, for any reason, this is not practicable, such appeals against interim orders should be disposed of within a period of a month.

In cases referred to above, necessary documents should be kept ready by the counsel to enable the Court to dispose of the appeal against interlocutory matter



at the first hearing itself.

In all Appeals against interim orders in the High Court, in writs and civil matters, the Court should endeavour to set down and observe a strict time limit in regard to oral arguments. In case of Original Side appeals/LPAs arising out of final orders in a Writ Petition or arising out of civil suits filed in the High Court, a flexible time schedule may be followed.

The practice direction in regard to First Appeal should *mutatis mutandis* apply in respect of LPAs/Original Side appeals against final judgments of the Single Judge. Writ Appeals/Letters Patent Appeals arising from orders of the Single Judge in a Writ Petition should be filed with simultaneous service on the counsel for the opposite party who had appeared before the Single Judge or on service of the opposite party.

Writ Appeals against interim orders of the Single Judge should invariably be disposed of early and, at any rate, within a period of thirty days from the first hearing. Before Writ Appeals against final orders in Writ Petitions are heard, brief written submissions must be filed by both parties within such time as may be fixed by the Court.

VI. Second Appeals : Even at the stage of admission, the questions of law with a brief synopsis and written submissions on each of the propositions should be filed so as to enable the Court to consider whether there is a substantial question of law. Wherever the Court is inclined to entertain the appeal, apart from normal procedure for service as per rules, advance notice shall be given to the counsel who had appeared in the first appeal letter Court. The notice should require the respondents to file their written submissions within a period of eight weeks from service of notice. Efforts should be made to complete the hearing of the Second Appeals within a period of six months.

VII. Civil Revision :

A revision petition may be filed under Section 115 of the Code or under any special statute. In some High Courts, petitions under Article 227 of the Constitution of India are registered as civil revision petitions. The practice direction in regard to LPAs and First Appeals to the High Courts, should *mutatis mutandis* apply in respect of revision petitions.

VIII. Criminal Appeals : Criminal Appeals should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment cases, rape, sexual offences, dowry death cases should be kept in Track I. Other cases where the accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy, food adulteration cases, offences of sensitive nature should be kept in Track III. Offences which are tried by special courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V — all other offences.



The endeavour should be to complete Track I cases within a period of six months, Track II cases within nine months. Track III within a year, Track IV and Track V within fifteen months.

Wherever an appeal is filed by a person in jail, and also when appeals are filed by State, the complete paper-books including the evidence, should be filed by the State within such period as may be fixed by Court. In appeals against acquittals, steps for appointment of amicus curiae or State Legal Aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the Registry/(State Legal Services Committee) immediately after completion of four weeks of service of notice. It shall be presumed that in such an event the accused is not in a position to appoint counsel, and within two weeks thereafter counsel shall be appointed and shall be furnished all the papers.

IX. Note

Wherever there is any inconsistency between these rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973 or the High Court Act, or any other statute, the provisions of such Codes and statutes shall prevail."

73. Before concluding, we wish to place on record our sincere gratitude and appreciation for the members of the Committee, I in particular Hon'ble Mr. Justice M. Jagannadha Rao, Chairman of the Committee and Law Commission of India who as usual has taken great pains in examining of the whole issue in detail and going into depth of it and has filed the three Reports above referred which we hope will go a long way in dispensation of effective and meaningful administration of justice to the litigating public. We hope that the High Courts in the country would be in a position to examine the aforesaid rules expeditiously and would be able to finalise the Rules within a period of four months.
74. Further, we place on record our deep appreciation for very useful assistance rendered by Senior Advocates Mr. K. Parasaran and Mr. Arun Mohan who on request from this court readily agreed to render assistance as Amicus Curiae. We also record our appreciation for useful assistance rendered by Mr. Gulam Vahnavati, learned Solicitor General on behalf of Union of India and the Attorney General of India and Mr. T.L.V. Iyer, Senior Advocate on behalf of Bar Council of India.
75. A copy of this judgment shall be sent to all the High Courts through Registrar Generals, Central Government through Cabinet Secretary and State Governments/ Union Territories through Chief Secretaries so that expeditious follow up action can be taken by all concerned. The Registrar Generals, Central Government and State/ Union Territories shall file the progress report in regard to the action taken within a period of four months.

Order accordingly.

□□□



(D.P Mohapatra & Brijesh Kumar, JJ.)

Civil Appeal No. 2660 of 2002 arising out of S.L.P (Civil) No. 20308 of 2000
(12.4.2002)

Vikas Aggarwal

....Appellant

vs.

Anubha

....Respondent

Code of Civil Procedure, 1908—Order X, rule 4—in a matrimonial suit the Court directed the husband to appear in person but he failed to appear despite several opportunities—Court struck off the defence of the husband—Order X of the Code, is an enabling provision providing that the Court at the first hearing of the suit shall ascertain from each party about their pleadings—it does not in any manner place any bar on the powers of the Court to seek clarification from any party in an appropriate case so as to advance the interest of justice—it would not be in violation of Order X CPC or in conflict thereof—order of the High Court upheld.

(Para 12)

(1987) 1 SCC 496; (1966) 3 SCR 856; 1962 Supp (1) SCR 450—**Referred to.**

Judgment

Brijesh Kumar, J.—Leave granted.

2. Heard learned counsel for the parties. This appeal has been preferred against the judgment and order dated 18.10.2000 passed by Delhi High Court dismissing the appeal challenging the order by which appellant's defence was struck off in the proceeding, suit No. 1966 of 1999 pending in Delhi High Court on the Original side.
3. The appellant and the respondent were married on 11.05.1999. Thereafter they went to USA. They do not seem to have pulled on well so much so that the appellant filed divorce petition in America as early as on 22.7.1999. The notice of the said proceedings was served on the respondent. She however, left America and somehow managed to come back to India. She filed a suit on 6.9.1999 in Delhi High Court being Suit No. 1966 of 1999 impleading the appellant Shri Vikas Agarwal as defendant and praying that a decree be passed declaring that the plaintiff is entitled to live separately, for maintenance amounting to 1500 dollars (Rs. 65,250/-) expenses *pendente lite* etc. and for such other, further orders, directions as the Court would deem fit and proper in the circumstances of the case, so as to meet the ends of justice. The learned Single Judge of Delhi High Court passed an interim order on 5.11.1999 in the following terms:—

“For the present in the interest of justice, and since no permanent prejudice is likely to be caused to the Defendants if the hearing in divorce case pending in the Superior Court, State of Connecticut, U.S.A. is deferred for a short period, I restrain the Defendant from proceeding further in the Superior Court, State at Connecticut, U.S.A. for a period of thirty days from today.”



4. The appellant however, moved an application on 12.11.1999 for recall of the order dated 5.11.1999. The Court was later on informed on 16.12.1999 that decree for divorce had been passed at Connecticut U.S.A. The learned Single Judge, on 9.3.2000 passed an order, directing the defendant to appear in person, under Order 10 C.P.C. The defendant preferred an I appeal against the Order dated 9.3.2000 I before the Division Bench which was withdrawn with a statement that an application will be moved before the learned Single Judge for recall of the order. It will not be necessary to mention about many other applications, which have been moved in that connection from time to time. The fact remains that ultimately by order dated 24.8.2000, the Court struck off the defence of the appellant: The operative part of the order reads as under :—

“It is quite clear that despite several opportunities granted to the defendant to appear before this Court he has resolutely refused to do so. The defence of defendant is therefore, struck off.”

5. An appeal preferred against the said order before the Division Bench of the High Court has also been dismissed which order has been impugned in the present appeal.
6. It appears that need to seek clarification from the defendant-appellant arose when it came to the notice of the learned Single Judge of Delhi High Court that on 23rd November, 1999 the Court in America passed decree of divorce despite the order of restraint against the defendant passed on 5.11.1999. The Court seems to have doubts if the order passed by it was truly communicated to the American Court since there was no mention at all about that fact in the order passed by the American Court. The appellant also moved an application for seeking exemption from appearing in the Court in Delhi, as he apprehended that on coming to India he may be arrested in pursuance of the proceedings initiated against him under Section 498-A of the Indian Penal Code. By order dated July 3, 2000 the learned Single Judge took care of the same and provided that the defendant would not be arrested in pursuance to any complaint or pending FIR filed by the plaintiff. The defendant was required to appear on August 24, 2000. He again failed to appear in the Court, instead an affidavit of the Attorney of the appellant in America was filed stating that he had brought the injunction order to the notice of the American Court, but the Court had refused to enforce any restraint order, as Indian Court had no jurisdiction over the U.S. Court's proceedings. Such information, if submitted on behalf of Respondent, as furnished through affidavit also leads to the inference that the interim order dated November 5, 1999 was not correctly placed at all before the American Court as the Delhi High Court had not passed any order putting any restraint on the American Court to proceed with the matter. The restraint order was against the defendant, namely the appellant before us. It is submitted on behalf of the Respondent that the defendant-appellant should also have moved appropriate application along with interim order before the court in America. In this background, the learned Single Judge ordered for presence of the defendant in Court under Order 10 CPC. On non-compliance of the said order, Ultimately the defence was struck off.



7. Shri Vikas Singh learned counsel appearing for the appellant has vehemently urged that Order X CPC would not be applicable at all and the order of the Delhi High Court in that respect is invalid. Our attention has been brought to Order X CPC which reads as under:—

Examination of parties by the Court.

1. *Ascertainment whether allegations in pleadings are admitted or denied*—at the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court shall record such admission and denials.
 2. *Oral examination of party, or companion of party.*—(1) At the first hearing of the suit, the court—
 - a) shall, with a view to elucidating matters in controversy in the suit examine orally such of the parties to the suit appearing in person or present in the court as it deems fit; and
 - b) may orally examine any person, able to answer any material question to the suit, by whom any party appearing in person or present in court or his pleader is accompanied.
 - (2) At any subsequent hearing the court may orally examine any party appearing in person or present in court, or any person, able to answer any material question relating to the suit, by whom such party or his pleader is accompanied.
 - (3) The court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party.
 3. *Substance of examination to be written.*—The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.
 4. *Consequence of refusal or inability of pleader to answer.*—(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.
 - (2) If such party fails without lawful excuse to appear in person on the day so appointed, the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."
8. On the basis of the above provision, it is submitted that a party can be examined under Order X CPC on the first hearing of the suit, but that stage has not yet reached in the present case. It is submitted that first hearing of the suit would not be any



date before a date fixed for settlement of issues. In that connection, he has placed reliance upon certain decisions in which first date of hearing has been indicated in reference to rent control disputes between landlord and tenant. The next contention is that under Rule 4 of Order X a party may be required to appear where the counsel or the person accompanying the pleader refuses to or is unable to answer any material question relating to the suit. In the present case, it is submitted that the information sought was furnished to the Court. There was no refusal on the part of the counsel or the person accompanying the counsel, namely father of the defendant appellant to answer the questions. Therefore, it was not necessary to order for personal attendance of the defendant. Yet another submission is that question in relation to which a party is required to be present to be examined should be an important or material question relating to the suit. It is submitted that the defendant was not required to give clarification to any such important or material question. It is submitted that for the above three reasons the order is bad. Yet another submission which has been made is that no order of injunction could be passed against a foreign court in view of the provisions contained under Section 41 (a) & (b) of the Specific Relief Act.

9. Shri Shanti Bhushan, learned Senior Counsel, appearing for the respondent submitted that the questions raised by the learned counsel for the appellant are not relevant, since undisputedly there is non-compliance of the order passed by the Court requiring the defendant to be personally present in the Court. It is submitted that the Section 41 (a) & (b) of the Specific Relief Act would not bar passing of an order as passed on 5.11.1999 by the learned Single Judge of Delhi High Court since such a bar is in relation to the superior Courts i.e. to say the Courts in India, it would not apply to Courts out side India and next that the restraint order is against the party namely, the defendant, who was restrained from proceedings in the matter for a period of one month, (reliance has been placed on 1987 (1) SCC 496, **Oil and Natural Gas Commission vs. Western Company of North America**). It has been held in an appropriate case, it is open to pass a restraint order against a party in proceedings pending in foreign courts. It is further submitted that the learned Single Judge had passed the injunction order on 5.11.1999 for a period of one month, but the decree was granted on 23.11.1999. The defendant was bound by the order and should not have taken any steps in furtherance of the proceedings pending in American Court. On the other hand, the decree of divorce shows that the decree was sought and passed on agreement (no fault divorce) between the parties which is described as fair and equitable. The agreement is also stated to be attached with the decree. It is also to be seen that columns meant for alimony etc. were left blank. The defendant was restrained by the learned Single Judge of Delhi High Court, at the instance of the wife, the respondent, from further proceeding in the divorce case. It is submitted that this itself shows that the divorce was far from one on the basis of agreement. In this view of the matter learned counsel for the respondent submits that the Court rightly felt need for personal appearance of the defendant for clarification. The defendant failed to appear on one ground or the other and lastly on the ground of apprehension of loosing job in America.



10. This Court also gave time to the learned counsel for the appellant to find out in case it would be possible for him to appear before the learned Single Judge of Delhi High Court. The learned counsel has placed before the Court a letter received from the appellant addressed to his counsel dated March 7, 2002 expressing his inability to visit for India for another 6 to 9 months due to financial and job constraints. He further informs that he is involved in many mission-critical projects. Therefore, granting of leave, would also not be possible, to him. It is also indicated that he has no property, no house, no bank account, no job and no place to live in India. These facts are hardly relevant for the purposes of present matter. We need not go into the other facts and circumstances, which have been placed by the learned counsel for the respondent to show the manner in which, within two months of the marriage, the appellant had filed "no fault divorce" in American Court and obtained decree on agreement in the teeth of injunction order dated 5.11.1999 passed by Delhi High Court and the appellant having abandoned the plaintiff-respondent in America and the difficulties with which she managed to return to India.
11. Shri Shanti Bhushan, learned senior counsel appearing on behalf of the respondent submits that in the facts and circumstances of the case as indicated above, the learned Single Judge of the Delhi High Court was quite justified in requiring the defendant-appellant to personally appear before the Court for his clarification. It is further submitted that the affidavit of the counsel for the appellant in America annexed with the affidavit filed in the trial court was not enough to clarify the position and the father of the appellant, as found by the trial court, could not throw further light in the matter, having not been present during the proceedings in America. So far the question regarding first date of hearing is concerned, it is too technical a ground to consider the matter like one in hand. The decisions which have been relied upon relate to the disputes between tenant and landlord and while interpreting the term "first date", the provisions of the Rent Control Statutes have also been taken into account. It is submitted that inherent powers of the Court under Section 151 C.P.C. can always be exercised to advance interests of justice and the technicalities will have no place in such matters. In this connection a reference has been made to decision of this Court reported in (1966) 3 S.C.R. 856 - **M/s. Ram Chand and Sons Sugar Mills Pvt. Ltd. vs. Kanhaya Lal Bhargava and others**. In this case also the defendant was required to attend the court to answer certain questions but flouted the order and did not appear, Ultimately the defence was struck off. The contention that inherent powers under Section 151 CPC could not be exercised was repelled and it was held that there was nothing in Order XXXIX of the Code which expressly or by necessary implication precluded the exercise of inherent power of Court under Section 151 CPC and it was open for the Court to pass a suitable consequential order under Section 151 CPC as may be necessary for ends of justice or to prevent the abuse of process of Court. A reference has also been made to a decision reported in 1962 Supp. (1) S.C.R. 450 - **Manohar Lal Chopra versus Rai Bahadur Rao Raja Seth Hiralal** so as to indicate the wide scope of Section 151 CPC where as per the majority view, in the facts and circumstances of the case, it was open to pass an



injunction order under Section 151 CPC where it may not be in conflict with any provision of Order XXXIX of the Code or other provision of law. The submission which has been advanced by the learned counsel for the respondent is that in the present case the learned trial court was totally justified in requiring the presence of the defendant and on his failure to comply with that order the trial court rightly struck of defence which order would be perfectly justified in view of inherent powers of the Court under Section 151 CPC besides other powers vested in it.

12. We would like to observe that Order X CPC in an enabling provision providing that the court at the first hearing of the suit shall ascertain from each party about their pleadings. It does not in any manner place any bar on the powers of the court to seek clarification from any party in an appropriate case, at any date earlier than one fixed for framing of issues so as to advance the interest of justice. It would not be in violation of Order X CPC or in conflict thereof. Considering the facts and circumstances of the case we agree with the submission made on behalf of the respondent and find that the appeal lacks merit so as to call for any interference by us under Article 136 of the Constitution.
13. In the result the appeal is dismissed with costs.

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