

# **Civil Procedure**

SIXTH EDITION

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This Edition is Dedicated to  
The Sacred Memory of  
My Parents

"The more you study the Civil Procedure Code, the more you realise what an admirable piece of legislation it is."

-Chief Justice M.C. Chagla

"The code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up."

-Justice Vivian Bose<sup>1</sup>

<sup>1</sup> Sangram Singh v. Election Tribunal, Kotah, (1955) 2 SCR 1 at p. 8: AIR 1955 SC 425 at p. 429.

## Preface

WE ARE EXTREMELY happy in placing before law students and junior advocates the Sixth Edition of "Civil Procedure". Though essentially the book has been written for students and junior members of the Bar, it has been warmly welcomed and highly appreciated even by lawyers and Judges. In several Universities, the book has been prescribed as a textbook or a leading work on the subject. It is also used as a "guide" in civil cases by Civil Judges.

Several amendments were made in the Code of Civil Procedure, 1908 by the Amendment Acts of 1976, 1999 and 2002. The Fifth Edition was published immediately after the Amendment Acts of 1999 and 2002. Though there was no case law on the point, radical and far- reaching changes affected in the Code were critically examined and analytically dealt with in that edition.

Now that about seven years have passed, several provisions have come up for consideration before various courts. Even constitutional validity of certain provisions came under challenge in Salem Advocate Bar Association (I) and (II) v. Union of India<sup>1</sup>. Those cases have been elaborately examined. Important decisions of 2009 have also been noted.

In this edition, we have included many new topics. The doctrine of res judicata, jurisdiction of courts, "forum shopping", amendment of pleadings, discovery, inspection and production of documents, interim orders, adjournments, first appeals, second appeals, cross-objections, revisions etc. have been dealt with in detail. The scheme has been improved and made much more informative, scientific and methodical. Extensive changes have been made in Part IV relating to "execution". Care has, however, been taken to ensure that the

<sup>1</sup> 1 (2003) 1 SCC 49; AIR 2003 SC 189 and (2005) 6 SCC 344; AIR 2005 SC 3353.

work does not lose its character as a "Students' Edition". Students, teachers, lawyers and Judges interested in a commentary and analytical discussion may refer to Authors' Code of Civil Procedure, 1908 (Lawyers' Edition).

We have been ably assisted in this work by our friends, colleagues and well-wishers. We are particularly thankful to our son Nirav, daughter-in-law Sangita, daughter Krina, and son-in-law Paritosh, who have highlighted problems of junior lawyers in understanding certain principles and applying them to concrete cases. Special care has, therefore, been taken to ensure that complicated concepts of law are explained in a lucid manner and simple language. We are grateful to the Maliks for taking keen interest in our work and also in making valuable suggestions. Staff of Eastern Book Company has expedited the publication of the work so that it is available at the earliest.

We may state with all humility that we have made every effort to make the book much more systematic, scientific and methodical. We hope and trust that like earlier editions, this edition also will be welcomed by students, Professors, Bench and the Bar. We will indeed be very happy in receiving suggestions from our readers so that they can be implemented in future editions.

—Justice CK Thakker

— Mrs M C Thakker

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# Part One

## Preliminary



# PART I

## 1

### Introduction

#### SYNOPSIS

1. PROCEDURAL LAW

LAWs CAN be divided into two groups: (1) Substantive law, and (2) Adjective or procedural law. Whereas substantive law determines rights and liabilities of parties, adjective or procedural law prescribes the practice, procedure and machinery for the enforcement of those rights and liabilities.<sup>1</sup>

In Halsbury's Laws of England, it has been stated, "There is at the outset a vital and essential distinction between substantive law and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. The function of procedural law is to provide the machinery or the manner in which the legal rights or status and legal duties may be enforced or recognised by a court of law or other recognised or properly constituted tribunal."<sup>2</sup>

Procedural laws prescribe procedure for the enforcement of rights and liabilities. The efficacy of substantive laws, to a large extent, depends upon the quality of procedural laws. Unless the procedure is simple, expeditious and inexpensive, substantive laws, however good are bound to fail in achieving their object and reaching the goal.

<sup>1</sup> See also, Glanville William  
<sup>2</sup> Halsbury's Laws of En

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eport at p. 18.



Procedural law is thus an adjunct or an accessory to substantive law. The two branches are complementary to each other and interdependent, and the interplay between them often conceals what is substantive law and what is procedural law. It is procedural law which puts life into substantive law by providing a remedy and implements the well- known maxim ubi jus ibi remedium.<sup>3</sup>

The Indian Contract Act, the Transfer of Property Act, the Industrial Disputes Act, the Indian Penal Code are instances of substantive law, while the Indian Evidence Act, the Limitation Act, the Code of Civil Procedure, the Code of Criminal Procedure are instances of procedural law.

The Code of Civil Procedure is an adjective law. It neither creates nor takes away any right. It is intended to regulate the procedure to be followed by civil courts.<sup>4</sup>

## 2. HISTORY OF THE CODE

Before 1859, there was no uniform Code of Civil Procedure. There were different systems of civil procedure in different parts of the country. The first uniform Code of Civil Procedure was enacted in 1859. But that Code was also not made applicable to the Supreme Courts in the Presidency Towns and to the Presidency Small Cause Courts. Some amendments were made therein and the Code was applied to the whole of British India, but there were many defects in it, and therefore, a new Code was enacted in 1877. Again, another Code was enacted in 1882, which was also amended from time to time.

In 1908, the present Code of Civil Procedure was enacted. It was amended by two important Amendment Acts of 1951 and 1956. On the whole, this Code worked satisfactorily, though there were some defects in it. The Law Commission in its various reports made many recommendations, and after carefully considering them, the Government decided to bring forward the Bill for the amendment of the Code of Civil Procedure, 1908, keeping in view, inter alia, the following considerations:<sup>5</sup>

- (1) a litigant should get a fair trial in accordance with the accepted principles of natural justice;
- (2) every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
- (3) the procedure should not be complicated, and should, to the utmost extent possible, ensure a fair deal to the poorer sections

<sup>3</sup> Ibid, at p. 11, para 3.

<sup>4</sup> Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46 at p. 56: AIR 1984 SC 1004 at p. 1010.

<sup>5</sup> Statement of Objects and Reasons of Amendment Act 104 of 1976.

of the community who do not have the means to engage a pleader to defend their cases.

Some of the important changes made by the Amendment Act, 1976 are as under:

- (i) The doctrine of res judicata is being made more effective.
- (ii) Power to transfer proceedings from one High Court to another is given to the Supreme Court.
- (iii) Freedom from attachment of a portion of salary to all salaried employees, is granted.
- (iv) Provision of giving notice under Section 80 before the institution of a suit against the Government or a public officer is made less stringent.
- (v) Restrictions are imposed on the right of appeal and revision.
- (vi) Provisions are being made to ensure that written statements and documents were filed without delay.
- (vii) New Order 32-A has been inserted to provide a special procedure in litigation concerning the affairs of a family.
- (viii) The practice to pass preliminary and final decree in certain suits is abolished.
- (ix) Scope of Summary Trials is substantially widened.
- (x) Important changes have been made to provide relief to poorer sections of the community.

The amendments made in 1976 were not found sufficient. With a view to dispose of civil cases expeditiously, Justice Malimath Committee was appointed by the Government. In pursuance of recommendations of the Committee, the Code was amended by the Amendment Acts of 1999<sup>6</sup> and 2002.<sup>7</sup>

Important amendments made by Acts of 1999 and 2002 may be summarised thus:

- (i) In several matters, such as issuing of summons, filing of written statement, amendment of pleadings, production of documents, examination of witnesses, pronouncement of judgments, preparation of decree, etc., a time-limit is prescribed;
- (ii) A new provision for settlement of disputes outside the court has been introduced;
- (iii) Number of adjournments have been restricted;
- (iv) A provision for recording of evidence by the Court Commissioner has been made;
- (v) Endless arguments are sought to be shortened by (a) empowering the court to fix a time-limit for oral arguments; and (b)

<sup>6</sup> Act 46 of 1999.

<sup>7</sup> Act 22 of 2002.

by permitting written arguments to be placed on record by the parties;

- (vi) A provision is made for filing of appeal in the court which passed the decree;
- (vii) Instituting of appeal against the judgment is allowed where the decree is not drawn up;
- (viii) Scope of First Appeal, Second Appeal, Letters Patent Appeal and Revision has been curtailed.

### 3. COMMENCEMENT

The Code of Civil Procedure, 1908 (5 of 1908) came into force with effect from 1 January 1909; while the Amendment Act (104 of 1976) came into force with effect from 1 February 1977. It may be stated that the Code of Civil Procedure (Amendment) Bill, 1974 was passed by Parliament on 23 August 1976. It received the assent of the President on 9 September 1976. It became Act 104 of 1976 and came into force from 1 February 1977 (except Sections 12, 13 and 50). Sections 12 and 50 came into force on 1 May 1977 and Section 13 came into force on 1 July 1977.

The Code of Civil Procedure (Amendment) Act, 1999 received the assent of the President on 30 December 1999 and came into force from 1 July 2002. The Code of Civil Procedure (Amendment) Act, 2002 received the assent of the President on 23 May 2002 and came into force on 1 July 2002.

### 4. CONSOLIDATION AND CODIFICATION

The Preamble of the Code states that the object of the Code is to consolidate and amend the laws relating to the procedure of Courts of Civil Judicature. To consolidate means to collect all the laws relating to a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act is enacted.<sup>8</sup>

The very object of codifying a particular branch of law is that, on any point specifically dealt with, the law should thenceforth be ascertained from the language used in that enactment and not from the preceding Act.<sup>9</sup>

The Code of Civil Procedure is a consolidated Code as to procedure to be followed by civil courts. As observed in *Prem Lala Nahata v. Chandi Prasad Sikaria*<sup>10</sup>, the Code consolidates and amends the laws

<sup>8</sup> *Administrator General of Bengal v. Prem Lal Mullick*, (1895) 22 Cal 788 at p. 798 (PC); *ILR (1894-95) 22IA107*; *Mahant Shantha Nand v. Mahant Basudevanand*, AIR 1930 All 225 at p. 230 (FB).

<sup>9</sup> *Norendra Nath Sircar v. Kamal Basini Dasi*, *ILR (1896) 23 Cal 563* at pp. 571-72 (PC); (1895-1896) 23 IA 18; *Gulabchand v. Kudilal Govindram*, AIR 1951 MB 1 (FB).

<sup>10</sup> (2007) 2 SCC 551: AIR 2007 SC 1247.

relating to the procedure of the Courts of Civil Judicature. No doubt it also deals with certain substantive rights. But its essential object is to consolidate the law relating to civil procedure.

#### 5. EXTENT AND APPLICABILITY

The Code extends to the whole of India, except (a) the State of Jammu and Kashmir; and (b) the State of Nagaland and the Tribal Areas. It also extends to the Amindivi Islands and the East Godavari and Vishakhapatnam Agencies in the State of Andhra Pradesh and the Union Territory of Lakshadweep. By the Amendment Act of 1976, the application of the provisions of the Code have been extended to Schedule Areas also.<sup>11</sup>

#### 6. OBJECT OF THE CODE

The object of the Code is to consolidate and amend the laws relating to the procedure of Courts of Civil Judicature. It is a consolidated Code collecting all the laws relating to the procedure to be adopted by civil courts. It is designed to facilitate justice and further its ends and is not a penal enactment for punishments and penalties, not a thing designed to trip up people.<sup>12</sup> Too technical a construction of sections which leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against, provided that justice is done to both the sides.<sup>12</sup> The provisions of the Code, therefore, should be construed liberally and technical objections should not be allowed to defeat substantial justice.<sup>13</sup> A "hypertechnical view"<sup>14</sup> should be avoided by the court.

As the Supreme Court stated, "A procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law."<sup>15</sup>(emphasis supplied)

<sup>11</sup> S. 1; see also, Ss. 157, 158.

<sup>12</sup> Sangram Singh v. Election Tribunal, AIR 1955 SC 425 at p. 429; (1955) 2 SCR 1 at p. 5; Chinnammal v. P. Arumugham, (1990) 1 SCC 513 at p. 520; AIR 1990 SC 1828 at p. 1833.

<sup>13</sup> Hukum Chand v. Kamalanand Singh, ILR (1906) 33 Cal 927.

<sup>14</sup> Ganesh Trading Co. v. Moji Ram, (1978) 2 SCC 91 at p. 96; AIR 1978 SC 484 at p. 488; Babu Lal v. Hazari Lal, (1982) 1 SCC 525 at p. 539; AIR 1982 SC 818 at p. 826.

<sup>15</sup> Saiyad Mohd. Bakar v. Abdulhabib Hasan, (1998) 4 SCC 343 at p. 349; AIR 1998 SC 1624 at p. 1627.