

## Chapter V: Procedure/Proceedings

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# Chapter V

## PROCEDURE/PROCEEDINGS

### 1. CIVIL PROCEDURE

#### **Civil Procedure in India- An Overview:**

The procedural law regarding civil matters is contained in a very detailed manner in the Code of Civil Procedure, 1908. Prior to the enactment of the existing Code in 1908, varying systems of civil procedure existed in different parts of the country. The first uniform Code of Civil Procedure was enacted in the year 1859, but there were many defects in it, and thereafter, a new Code was enacted in 1877, which was modified from time to time. In the year 1908, the present Code of Civil Procedure (herein after referred to as “Code”) was enacted. On the whole, this Code has worked satisfactorily. Some important changes were made to it by way of Amendment Act of 1976.<sup>350</sup>

In 1999, new Bill<sup>351</sup> amending the Code was passed by the Parliament. The amendments to the Code, which are devised with the purpose of speeding up the tardy justice delivery system, which have not yet been implemented due to intense opposition to it from the lawyers. While the government feels that the amendments would benefit poor litigants, the lawyers hold the view that they would cause hardship to poor litigants.

#### **Court Procedure under the Code:**

The various stages through which a civil case runs in the courts is given as

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<sup>350</sup> *Manharlal v. Seth Hiralal* AIR 1962 SC 527

<sup>351</sup> Act 46 of 1999, Bill No. 50 of 1999, which received the assent of the President of India on December 30, 1999.

under:

- (i) Initiation of proceedings by filing a plaint or suit or an application;
- (ii) Issue of notice or summons by the court to the defendants or respondents;
- (iii) Appearance of the defendants and filing of written statement or reply by him/her;
- (iv) Framing of the points of controversy called 'issues' between the parties;
- (v) Recording of evidence of the petitioner, defendants or respondents; and
- (vi) Pronouncement of judgment by the court.

The aforesaid procedure is common in all the civil courts functioning in the country. The preliminary step in the process of adjudication of civil rights is institution of the suit by filing a plaint along with the list of relevant documents and requisite fee for the service of summons on the defendants within the time fixed by the court.<sup>352</sup> The plaint consists the name of the court in which suit is filed, the name, description and place of residence of the plaintiff and defendant; the facts constituting the cause of action, facts showing that the court has jurisdiction; value of the subject matter of the suit; the relief claimed; the precise amount claimed; description of property if suit relates to immovable property; the interest and liability of the defendant; and if the suit is not filed within the prescribed period of limitation, the cause of the delay,<sup>353</sup> and any other statement in concise form of the material facts.<sup>354</sup> The plaint is filed in the court from Monday to Friday between 10 a.m. to 5 p.m. by litigant himself or his advocate or recognized agent or a person duly authorized by him in that behalf. But if it happens to be the last day for filing of plaint then, even a judge is allowed to accept the plaint after office hours.<sup>355</sup> After this the particulars of the plaint are entered in a book known as register of civil courts.<sup>356</sup>

**Valuation of the suit:** As per the procedure, litigant has to make valuation of the suit.<sup>357</sup> Valuation decides forum of the suit as courts in India are separated into hierarchy of different pecuniary limits. Pecuniary jurisdiction goes on increasing as we

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<sup>352</sup> Code of Civil Procedure, 1908, (CPC) Order 7, Rule 9.

<sup>353</sup> *Id.*, Order 7, Rules 1-8.

<sup>354</sup> *Id.*, Order 6, Rule 2.

<sup>355</sup> *Id.*, Order 4, Rule 1.

<sup>356</sup> *Id.*, Order 4, Rule 2.

<sup>357</sup> *Id.*, Order 7 Rule 10.

move up in the ladder of hierarchy of courts. Litigant is not free to assign any arbitrary value to the suit for the purpose of choosing the forum. The court has power to require the litigant to prove that the valuation is proper.<sup>358</sup> However, in practice, most of the time the valuation made by litigant in respect to the suit is accepted.<sup>359</sup>

**Filing of plaint / suit when barred:** The courts of concurrent jurisdiction are barred from entertaining and adjudicating upon parallel litigation in respect of the same course of action, the same subject matter and the same relief. The suit once decided by the court of competent jurisdiction is binding in nature and other competent courts cannot entertain a petition seeking same relief on same grounds and from the same parties.<sup>360</sup> But, when the previous suit is not decided on merits or when it is dismissed for want of jurisdiction or on default of plaintiff's appearance or non-joinder of parties or because it was premature or due to some technical defect, then such dismissal does not bar filing of the same suit again seeking same relief.<sup>361</sup> Also a withdrawal of suit does not bar filing of the subsequent suit.<sup>362</sup> Furthermore, there is no bar on the power of civil courts to try a subsequently instituted suit if the previously instituted suit is pending in a foreign court.<sup>363</sup>

**The forum where a suit is to be filed:** It is mandatory to file a suit in the court of the lowest grade competent to try it.<sup>364</sup> When parties to the dispute have more than one forum available for filing a suit, it may select any particular forum by agreement or otherwise excluding other forums.<sup>365</sup> The allegations made in the plaint also decide the forum.<sup>366</sup> The provisions regarding the place of filing a suit is given as under:

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<sup>358</sup> *Balgonda v. Ramgonda* (1969) 71 BLR 582.

<sup>359</sup> *Commercial Aviation & Travel Co. v. Vimla Pannalal* (1988) 3 SCC 423.

<sup>360</sup> CPC, sec. 11.

<sup>361</sup> *Krishan Lal v. State of Jammu & Kashmir* (1994) 4 SCC 422.

<sup>362</sup> *Supra* note 25.

<sup>363</sup> CPC, 1908, explanation to sec. 10.

<sup>364</sup> CPC, 1908, sec. 15.

<sup>365</sup> *Hakam Singh v. Gammon (India) Ltd.* (1971) 1 SCC 286.

<sup>366</sup> *Abdulla v. Gallappa* (1985) 2 SCC 54

NATURE OF SUIT	JURISDICTION OF COURT
1. Every suit	Court of lowest grade competent to try it. <sup>367</sup>
2. Suits for recovery of; /partition of; /foreclosure, sale / redemption of mortgage of /charge upon; /determination of any right or interest in; /compensation for wrong to; Immovable property:	Courts within whose jurisdiction the immovable property is situated <sup>368</sup> .
3. Recovery of moveable property under actual distraint or attachment	Courts within whose jurisdiction the moveable property is situated <sup>369</sup> .
4. Relief in respect of or compensation for wrong to Immovable property held by or on behalf of the defendant; where the relief sought can be entirely obtained through his personal obedience:	Court within whose jurisdiction the immovable property is situate or the defendant resides or carries on business or personally works for gain <sup>370</sup> .
5. Relief in respect of or compensation for wrong to Immovable property situated within the jurisdiction of different courts:	Court within whose jurisdiction any portion of the property is situated, provided that the entire claim is within the pecuniary jurisdiction of such court <sup>371</sup> .
6. Where it is uncertain within the jurisdiction of which two or more courts any Immovable property is situated:	Any of those courts provided that the court has pecuniary jurisdiction and jurisdiction as regards the subject matter of the suit. <sup>372</sup>
7. Compensation for wrong to person or moveable property, if the wrong is done within the jurisdiction of one court and the defendant resides/ carries business/ personally works for gain within the jurisdiction of another court:	In either of the courts at the option of the plaintiff <sup>373</sup> .
8. Any other suit:	Where the cause of action wholly or partly resides / the defendant resides / carries on business / personally works for gain / where there are two or more defendants and any of them resides,

<sup>367</sup> CPC, Sec. 15.

<sup>368</sup> *Id*, Sec. 16(a) to (e).

<sup>369</sup> *Id*, Sec. 16(f).

<sup>370</sup> *Id*, proviso to Sec. 16.

<sup>371</sup> *Id*, Sec. 17.

<sup>372</sup> *Id*, Sec. 18.

<sup>373</sup> *Id* Sec. 19.

	carries on business or personally works for gain. <sup>374</sup>
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Besides the matters falling within the exclusive jurisdiction of Revenue Courts are dealt with by special tribunals under the relevant statutes like Industrial Tribunal, Income Tax Tribunal, Election Tribunal, Revenue Tribunal, Rent Tribunal, etc. or by the domestic tribunals such as Bar Council, Medical Council, etc. are expressly barred from the cognizance of a civil court.<sup>375</sup>

**Procedure followed in some special suits:** Separate procedure is being followed in some special suits listed below:

**Suits by / against government or public officers:** Before instituting such suits, notice has to be given to the defendant – opponent by the litigant – plaintiff, except where an urgent or immediate relief is required to be obtained.<sup>376</sup> Notice in writing is required to be delivered to or left at the office of person authorised by the government in that behalf. The plaint can be filed only after the expiration of two months, containing a statement that the notice as required has been delivered, failing which courts reject the plaint<sup>377</sup>. Also in such suits plaint as well as written statement is required to be signed and verified by any person appointed by Government who is acquainted with the facts of the case.<sup>378</sup> Reasonable time to file the written statement is given to the government and the counsel for the government is not required to file *Vakalatnama*.<sup>379</sup>

**Suits involving substantial question of law:** In a suit or appeal in which substantial question of law as to the interpretation of the Constitution is involved, the courts do not proceed with such suits and appeals till the notice to the Attorney-General of India is given if the question of law concerns the Central Government and to the Advocate-General, in case the question of law concerns the state government<sup>380</sup>. These persons are sometimes made party to the suit or appeal.<sup>381</sup>

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<sup>374</sup> *Id* Sec. 20.

<sup>375</sup> C.K.Takwani, *Civil Procedure*, 32 (Eastern Book Company, 1997).

<sup>376</sup> Sec. 80(1) and (2), the CPC, 1908

<sup>377</sup> *State of A.P v. Suryanarayana* AIR 1965 SC11.

<sup>378</sup> CPC, Order 27, Rules 1,2,4,6,8,8-B.

<sup>379</sup> A form submitted by the advocate of the party to the court signed by both party as well as advocate indicating to the court that the advocate is appointed by the party to conduct its case in the court.

<sup>380</sup> CPC, Order 27-A, Rules 1 and 4.

<sup>381</sup> *Id*, Order 27-A, Rule 2.

**Suit by or against foreign and alien rulers:** A foreign state and alien enemies residing in India with the permission of the court, are competent to sue in any competent court for enforcement of private right vested in such ruler or any officer of such state in his public capacity, in the name of his state.<sup>382</sup> However, no person can file a suit against a foreign state or its officers, envoys, ambassadors without the consent of the Central Government. And no decree can be executed against the property of any foreign state, except with the consent of the Central Government.<sup>383</sup>

**Suits by or against corporations:** A corporation, incorporated under the law of the country can be sued and sue in its name and, any pleading may be signed on behalf of the corporation by secretary or the director or other principal officer of the corporation competent to depose the facts of the case.<sup>384</sup>

**Suits by or against minors and lunatics:** Every suit by a minor is required to be instituted in his name by his next friend. Where the defendant is minor, the court appoints a proper person to be the guardian for the suit who is known as *guardian ad litem* for such minor.<sup>385</sup>

**Suits by indigent persons:** The Code has made provisions to enable the indigent persons to institute and prosecute suits without payment of any court fee.<sup>386</sup> A person who is very poor is exempted from such court fee to be paid at the first instance and he is allowed to prosecute his suit in *forma pauperies* if it is proved to the court that he does not hold sufficient means to enable him to pay the fee prescribed by law.<sup>387</sup> A court appointed pleader may represent such a person.<sup>388</sup> The state and central government both are empowered to provide free legal services to the indigent persons.<sup>389</sup>

**Parties to the suit:** More than one person may join in a suit as plaintiff or defendant, if<sup>390</sup>

1. the right to relief alleged exists in each of them arises out of the same

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<sup>382</sup> *Id*, Sec. 83, 84 and 87.

<sup>383</sup> *Id*, Sec. 86.

<sup>384</sup> *Id*, Order 29, Rule 1- 3.

<sup>385</sup> *Id*, Order 32.

<sup>386</sup> *Id*, Order 33.

<sup>387</sup> *Id*, Order 33, Rule 1.

<sup>388</sup> *Id*, Rule 9-A, Order 33.

<sup>389</sup> *Id*, Rule 18, Order 33.

<sup>390</sup> *Id*, Order 1, Rule 1 and 3.

act or transaction,

2. the case is of such a character that, if such persons brought separate suit, any common question of law or fact would arise so that the matters involved therein are finally adjudicated upon and fresh litigation over the same is avoided. However, one or more of them can act as representatives on behalf of themselves and others, with permission of the court<sup>391</sup>.

If a party suing in representative capacity fails to proceed the suit / defence with due diligence, the court substitutes it with any other person having the same interest in the suit.<sup>392</sup> Courts are empowered to make addition and substitution of the parties to the suit after the action has been brought<sup>393</sup> or strike out the name of any party improperly joined at any stage of the proceedings either upon application of the parties or *suo-motu* in appropriate cases and on such terms and conditions as appear to be just.<sup>394</sup> In the absence of necessary parties no decree can be passed.<sup>395</sup>

**Documents to be presented along with the plaint:** Parties to the dispute / pleaders are under a duty to produce all the documentary evidence in their possession/power on which they rely.<sup>396</sup> The documents that ought to be presented alongwith the plaint cannot be produced or entertained later without permission of the court.<sup>397</sup> However, the court may receive any document at a later stage if the genuineness of document is beyond doubt and it is relevant for deciding the real issue in controversy<sup>398</sup> or if it is necessary for the just decision of the case. The document admitted in evidence forms part of the record of the suit.<sup>399</sup> It is returned to the party after disposal of the suit or even during the pendency of the suit on furnishing necessary undertaking.<sup>400</sup> The court impounds any document in cases of forgery and apprehension that the document may be destroyed or altered.<sup>401</sup>

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<sup>391</sup> *Id*, Order 1 Rule 8.

<sup>392</sup> *Id*, Order 4 Rule 8(5).

<sup>393</sup> *Id*, Rule 10(1).

<sup>394</sup> *Id*, Rule 10(2).

<sup>395</sup> *U.P.Awas Evam Vikas Parishad v. Gyan Devi* (1995) 2 SCC 326.

<sup>396</sup> *Supra* note 32, Order 13, Rule 1-2.

<sup>397</sup> *Id*, Order 7, Rules 14-17.

<sup>398</sup> *Billa v. Billa* (1994) 4 SCC 659

<sup>399</sup> CPC, Order 13, Rule 7.

<sup>400</sup> *Id*, Order 13, Rule 9.

<sup>401</sup> *Id*, Order 13, Rule 8.



An officer appointed by the court receives the plaint and examines it thoroughly and in case of deficiencies, calls upon the Plaintiff to do away with the objections.

After the filing of a plaint, the court issues a notice with the seal of the court, signed by the judge, to the defendants, directing a person to appear before a particular judge in the designated court, on a day and time specified therein.<sup>402</sup> It is served on the defendant, by delivering or tendering a copy thereof,<sup>403</sup> either to the person to whom it is directed / his agent / if none is found, by affixing a copy of the same on the outer door of the house in which he resides / in some circumstances by an advertisement in a newspaper.<sup>404</sup> After issuing such notice to the defendant(s), adequate time and opportunity is given to them to file their reply which is called as written statement. This written statement enables the court to know the position of the defendant. And is filed in the court concerned before first hearing of the suit or within such time as the court allows.<sup>405</sup>

Before filing a written reply if the defendant raises preliminary objections as to maintainability of the suit for reasons such as lack of jurisdiction in the court entertaining plaint or the plaint does not disclose cause of action or relief claimed is undervalued by the litigant in order to avoid court fees or the plaint is written on a paper insufficiently stamped or suit is not filed within the limitation period,<sup>406</sup> etc., the court resolves such preliminary issue or objection and if the same is proved true, the court either returns the plaint for presenting it to the proper court<sup>407</sup> or dismisses the suit or rejects the application. All orders regarding impleadment of parties, maintainability of a suit, jurisdiction of the court, etc., once passed are not re-opened in the same proceedings. Only correctness of such order is challenged by regular appeals,<sup>408</sup> or by instituting a fresh suit on the same cause of action.<sup>409</sup> The suit is dismissed on other reasons as well like time barred by limitation / cause of action has been decided earlier by the court / the plaint discloses no cause of action / motivated case / plea raised at the

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<sup>402</sup> *Id*, Order 5, Rules 1-2.

<sup>403</sup> *Id*, Order 5, Rule 16.

<sup>404</sup> *Id*, Order 5, Rules 17-20.

<sup>405</sup> *Id*, Order 8, Rule 1, see also *Food Corporation of India v. Yadav* (1982) 2 SCC 499.

<sup>406</sup> *Id*, Order 7, Rule 11.

<sup>407</sup> *Id*, Order 7, Rule 10(1).

<sup>408</sup> *Prahalad Singh v. Sukhdev Singh* (1987) 1 SCC 727

<sup>409</sup> *Supra* note 8, Order 7, Rule 13.

hearing of the suit was different from those mentioned in the plaint, etc.<sup>410</sup>

If the defendant fails to file a written statement within the time permitted by the court, the court in its discretion pronounces judgment on the basis of the plaint or makes any appropriate order as to costs.<sup>411</sup> If the written statement admits wholly or partly the claim as made in the plaint, a decree on admission is passed, otherwise, the court determines the issue or points of dispute between the parties.

After filing of written reply, the stage of framing and settlement of issues comes. Such framing of issues facilitates the applicant to lead necessary evidence in support of the claim and the relief prayed enlightens the court conducting proceedings to appreciate the same in proper perspective.<sup>412</sup> The day, on which such issues are framed, is the first hearing of the suit.<sup>413</sup> At first hearing of the suit court ascertains from each party or his pleader, whether he admits or denies such allegations of facts as are made in the plaint or written statement.

In case any party to the suit requires some information from the adversary as to the facts or documents in possession, relevant to the suit, the same is submitted before the judge in the suit who, if considers them proper, compels the other side to answer them on oath before trial.<sup>414</sup>

**Admissions by the parties in trial or proceedings:** According to Indian Evidence Act, 1872, the facts admitted need not be proved. After filing of the suit in the court following kinds of admissions can be made:

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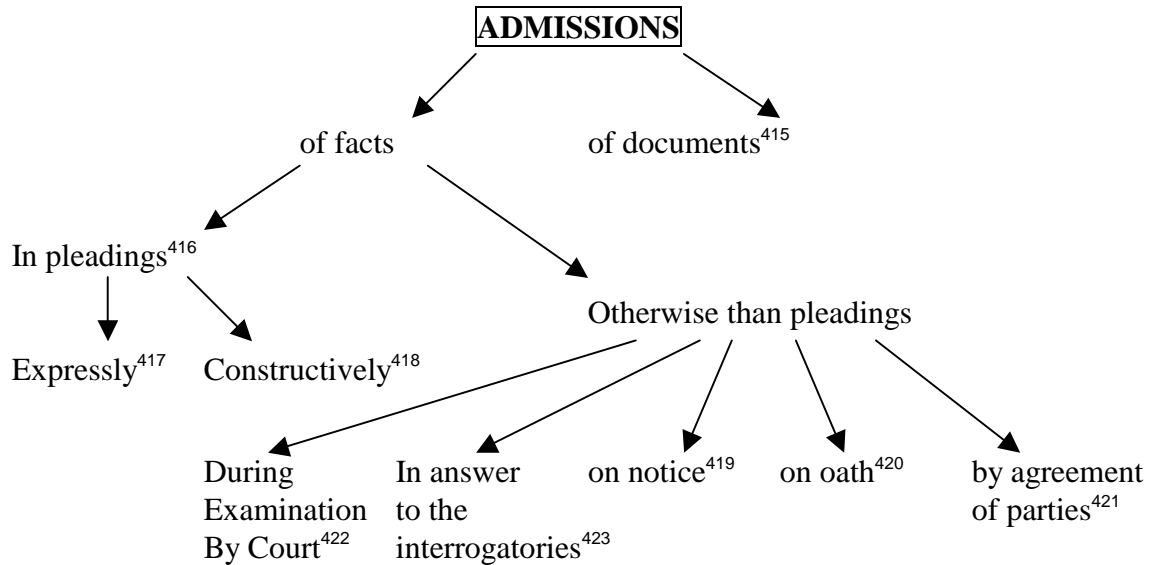
<sup>410</sup> C.K.Takwani, *Civil Procedure* 287 (Eastern Book Company, 1997).

<sup>411</sup> CPC, 1908, Order 8, Rule 5(2).

<sup>412</sup> *State of Gujarat v. Jaipal Singh* 1994 (35) Guj Law Reporter 258.

<sup>413</sup> CPC, Order 14, Rule 1.

<sup>414</sup> *Id*, Order 11



At any stage of the proceedings whether in trial/first appeal/final appeal/revision in a proceeding before the Supreme Court or any other court, on the request of a party, the court allows amendment to the plaint<sup>424</sup> for reasons like fresh arrival of information/ interrogatories are fully answered by the opponent / documents whose existence was unknown are disclosed which necessitates amendment of the claim.

Generally, the courts do not require compulsory appearance of the parties except in special circumstances.<sup>425</sup> A person by himself / his recognized agent / his pleader may represent the suit.<sup>426</sup> Where court orders for their appearance in person and

1. Both / plaintiff-litigant do not appear; if sufficient cause for default of appearance is not shown, the suit is dismissed.<sup>427</sup>

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<sup>415</sup> *Id.*, Order 12, Rule 2.

<sup>416</sup> *Id.*, Order 7 & 8.

<sup>417</sup> *Id.*, Order 7, Rule 11, see also Order 11, Rule 22.

<sup>418</sup> *Id.*, Order 8, Rule 3-5 and Order 12, Rule 2-A.

<sup>419</sup> *Id.*, Order 12, Rule 4.

<sup>420</sup> *Id.*, Order 10, Rule 2 and Order 18, Rule 3.

<sup>421</sup> *Id.*, Order 23, Rule 3.

<sup>422</sup> *Id.*, Order 10, Rule 1-2.

<sup>423</sup> *Id.*, Order 11, Rule 8, 22.

<sup>424</sup> *Id.*, Order 6 Rule 17.

<sup>425</sup> *Id.*, Order 3 Rule 1.

<sup>426</sup> *Id.*, Order 9 Rule 1.

<sup>427</sup> *Id.*, Order 9 Rule 3.

2.The litigant –plaintiff alone does not appear and defendant appears and admits claim in part, the court passes a decree against the defendant upon such admission.<sup>428</sup>

3.Defendant alone does not appear nor does he show any sufficient cause for non-appearance, the court proceeds *ex-parte*,<sup>429</sup> if the plaintiff proves service of summons on the defendant.<sup>430</sup>

There are four remedies against an *ex-parte* decree; (i) to apply to the court which has passed such decree for setting it aside on the grounds of irregularity in serving of summons / if there was any other sufficient and good cause that prevented the defendant from appearing when the suit was called for hearing;<sup>431</sup> (ii) to prefer an appeal against it;<sup>432</sup> (iii) to apply for review;<sup>433</sup> and (iv) to file a suit if such order was obtained by fraud. No *ex-parte* decree is set-aside without notice to the opposite party and once it is set aside the suit is restored as it stood before. Appeal can be filed against an Order rejecting an application to set aside an *ex-parte* decree.<sup>434</sup>

After framing of issues by the court, a stage is reached where parties in the suit are in a position to know the facts and documents they need to prove. At this stage parties apply to the court for summoning and getting attendance of witnesses. If party needs assistance of the court to secure presence of witnesses, whom it proposes to call to give evidence / to produce documents, it files a list of witnesses on / before the date given by the court and not later than 15 days after the issues are framed<sup>435</sup>. The court has machinery at its disposal to enforce attendance of any person to whom summons are issued and for the same purpose it can issue a warrant of arrest / attach / sell property / impose a fine / order to furnish security for appearance and in default to commit to the civil prison.<sup>436</sup> The legislature has not prescribed any time limit within which the witnesses should be produced and examined. The adjournment is generally sought many a times on flimsy or frivolous grounds. This had resulted in undue delay in

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<sup>428</sup> *Id*, Order 9 Rule 8.

<sup>429</sup> *Id*, Order 9 Rule 12.

<sup>430</sup> *Id*, Order 9 Rule 6.

<sup>431</sup> *Id*, Order 9 Rule 13.

<sup>432</sup> *Id*, sec 96(2).

<sup>433</sup> *Id*, Order 47, Rule 1.

<sup>434</sup> *Id*, Order 43, Rule 1(d).

<sup>435</sup> *Id*, Order 16, Rule 1.

<sup>436</sup> *Id*, sec. 32Order 16 Rule 10.

disposal of the cases. Be that as it may where the party wants to produce his witnesses without assistance of the court, it is free to bring in any witnesses at any stage of the suit / proceedings.<sup>437</sup> Even courts summon any person as a witness if the ends of justice require so. However, the courts exercise such powers only in compelling necessities.<sup>438</sup> Unless the court otherwise directs, the person summoned is required to attend the court on the day of hearing.<sup>439</sup> Non-appearance without sufficient cause attracts penalties not exceeding rupees 500.<sup>440</sup>

When a witness appears he is examined first by the party that called him and thereafter by other party. In cases of court witness also, both the parties get an opportunity to cross-examine the witness. The evidence is either recorded verbatim or in a summary form depending on the kind of proceedings.

**Appointment of Receiver:** The civil courts appoint a receiver who is known as the officer of the court, to receive and preserve property/fund in litigation, to institute and defend suits, to realize, manage, protect, preserve the property, to collect, apply and dispose of the rents and profits, to execute documents and to do any other thing for which he has been empowered by the court.<sup>441</sup>

**Judgement by the Court:** After final hearing of the suit, the court pronounces judgment in an open court, either at once / on some future day, after giving due notice to the parties and their pleaders. The judgment is recorded by giving findings on each issue and ultimately the conclusion is recorded and is called as decree.

Only in exceptional circumstances, to administer justice, courts hold a trial in camera, for example in matrimonial or espionage cases, etc.<sup>442</sup>

### **Appeal procedure:**

Normally against each judgment or decree, there are appeals, provided by the Code.<sup>443</sup> There is intra-court appeal within the same subordinate court or within the High Court and an appeal may lie in the Supreme Court either as a right or by way of special leave to appeal. All orders regarding impleadment of parties, maintainability of a suit, jurisdiction of the court, etc., once passed are not reopened in the same proceedings.

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<sup>437</sup> *Id*, Order 16, Rule 1-A.

<sup>438</sup> *Id*, sec. 30(b) Order 16 Rule 14.

<sup>439</sup> *Id*, Order 16 Rule 16-17.

<sup>440</sup> *Id*, Order 16 Rule 11,12,13.

<sup>441</sup> *Id*, Order 40 Rule 1(1) (d).

<sup>442</sup> *Id*, Order 32-A Rule 14.

Only correctness of such order is open to be challenged by regular appeals.<sup>444</sup>

Every person aggrieved by the decree / judgment / order of the court, according to the rules of the court, files memorandum of appeal. A memorandum of appeal sets forth the grounds of objection to the decree appealed from, signed by the appellant / his pleader, presented to the court / to such officer appointed in that behalf, along with certified copies of the judgment unless the court dispenses with it<sup>445</sup> and in case of appeal from a money decree, the decretal amount or security in respect thereof is also submitted.<sup>446</sup> The memorandum of appeal acts as a notice to the respondent of the case he has to meet at the hearing of the appeal. Appellant is not allowed to urge, except with prior permission of the court, any grounds of objection not set forth in the memorandum of appeal.<sup>447</sup> Where the memorandum of appeal is not in a proper form, the court may reject it or return it to the appellant for the purpose of being amended.<sup>448</sup> After presentation of the memorandum of appeal, the appellate court fixes a day and issues a notice for hearing of the appeal giving sufficient time to the respondent to appear and answer the appeal on such day.<sup>449</sup> This notice to the respondent contains a statement declaring that, if respondent fails to appear on the date fixed by the court for hearing of the appeal, it will be heard *ex-parte*.<sup>450</sup> The lower court whose decree is challenged by way of appeal, dispatches all material papers in the suit or such papers as are asked by the appellate court, to be deposited with the appellate court.<sup>451</sup> On the day fixed for hearing the appeal, the appellant is heard in support of the appeal. On hearing him, if the court finds no substance in the appeal, it dismisses the appeal at once without calling the respondent to reply.<sup>452</sup> But if the appellate court does not dismiss the appeal at once, it hears the respondent against the appeal and the appellant is entitled to reply.<sup>453</sup> If appellant appears and respondent fails to appear, the appeal is heard *ex-parte*.<sup>454</sup>

If a bench of two or more judges hears the appeal, it is decided according to the

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<sup>443</sup> *Shankar v. Krishnaji* (1969) 2 SCC 74

<sup>444</sup> *Prahlad Singh v. Sukhdev Singh* (1987) 1 SCC 727.

<sup>445</sup> CPC, 1908, Order 41 Rule 1(1).

<sup>446</sup> *Id.*, Order 41 Rule 1(3).

<sup>447</sup> *Id.*, Order 41 Rule 2.

<sup>448</sup> *Id.*, Order 41 Rule 3.

<sup>449</sup> *Id.*, Order 41, Rule 12.

<sup>450</sup> *Id.*, Order 41, Rule 15.

<sup>451</sup> *Id.*, Order 41, Rule 13(2).

<sup>452</sup> *Id.*, Order 41, Rule 16(1).

<sup>453</sup> *Id.*, Order 41, Rule 16(2).

opinion of majority of such judges.<sup>455</sup> Where the majority, does not concur in a judgment, in varying or reversing it, the decree from which it is appealed is confirmed.<sup>456</sup> In case appeal is heard by a bench consisting of even number of judges of a court having more judges than the bench, and bench differs on a point of law, the appeal is then heard upon points, on which they differ, by other judges than that of Bench and is decided according to the opinion of the majority of such judges.<sup>457</sup>

Decree is not reversed or varied or remanded in appeal just because of mis-joinder or non-joinder of parties or cause of action or error or defect, irregularity in any proceeding in the suit, if the same is not affecting merits of the case or jurisdiction of the court.<sup>458</sup> Mere filing of appeal does not suspend the operation of a decree. After an appeal is presented, the appellate court grants the order of stay of proceedings under the decree or execution of such decree,<sup>459</sup> if (1) the appeal is filed without unreasonable delay, (2) substantial loss is going to accrue to the appellant and (3) security for due performance of the decree or order is submitted in the court by the appellant.<sup>460</sup> The courts even make *ex-parte* order for stay of execution pending the hearing of the application.<sup>461</sup> Order of stay becomes effective from the date of communication to the court of first instance and not prior thereto.<sup>462</sup> The court of first instance acts upon an affidavit sworn by the appellant, stating that the appellate court has made an order for the stay of execution of a decree.<sup>463</sup> Where an order is made for the execution of a decree from which an appeal is pending, on sufficient cause being shown by the appellant, the court that passed the decree either *suo motu* or on directions from appellate court, takes security from the decree holder for restitution of property taken in execution and for due performance of decree or order of appellate court.<sup>464</sup>

Against the decision of the first appeal second appeal is provided in the majority of cases. This second appeal is filed in the appropriate court (High Court or

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<sup>454</sup> *Id*, Order 41, Rule 17(2).

<sup>455</sup> *Id*, Sec. 98(1).

<sup>456</sup> *Id*, Sec. 98(2).

<sup>457</sup> *Id*, Sec. 98(3).

<sup>458</sup> *Id*, Sec. 99.

<sup>459</sup> *Id*, Order 41, Rule 5(1).

<sup>460</sup> *Id*, Order 41, Rule 5(3).

<sup>461</sup> *Id*, Order 41, Rule 5(5).

<sup>462</sup> *Id*, explanation to Order 41, Rule 5(1).

<sup>463</sup> *Id*, Explanation to Order 41, Rule 5(1).

<sup>464</sup> *Id*, Order 41, Rule 6(1).

Supreme Court) within a period of 90 days from the date of decree appealed against.<sup>465</sup> However, second appeal is admitted only if the issue has not been determined by both the subordinate courts or has been wrongly determined by them.<sup>466</sup> Procedure for filing and hearing the second appeal is same as that of first appeal.

In addition to appeal, high courts in the country have been given revision powers. Accordingly, high courts call for the record of any case decided by any court subordinate thereto, from which no appeal lies to it if it appears that such subordinate court has exercised jurisdiction not vested in it by law or has failed in exercising a jurisdiction vested in it or has acted in the exercise of its jurisdiction illegally or with material irregularity and makes any appropriate order thereon as it thinks fit.<sup>467</sup>

Apart from the above, appellate court frames issues and refers them to court of first instance, when the latter has omitted framing and trying of any issue / determination on any question of fact essential for proper decision of the suit upon merits.<sup>468</sup> For the same purpose it directs the lower court to take any additional evidence. The lower court returns the evidence and findings within the time fixed by the court, which forms part of the record of the suit. Either party to the suit is competent to raise objections against these findings.

The judgment of the appellate court is in writing and contains, points for determination, the decision thereon, reasons for the decision and decree of the lower court, along with fact that it is reversed / varied / confirmed, and the relief to which parties are entitled, signed by the judges concurring therein.<sup>469</sup> Dissenting judge is not obliged to sign the decree.<sup>470</sup> Certified copies of the judgment and decree in appeal are furnished to the parties at their expense and to the court against whose decree / judgment decision was rendered by the higher court and is filed in the court along with original proceedings in the suit and an entry of the judgment of the appellate court is made in the register of civil suits.<sup>471</sup>

**Transfer of a case from one court to another:** Any party to the suit by showing sufficient grounds can plead before the concerned high court for transfer a case

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<sup>465</sup> Limitation Act, 1963, Art 116.

<sup>466</sup> *Id*, sec. 103.

<sup>467</sup> *Id*, sec. 115.

<sup>468</sup> *Id*, sec. 107(1) (c).

<sup>469</sup> *Id*, Order 41, Rules 31 and 32.

<sup>470</sup> *Id*, proviso to Rule 35, Order 41.



from one civil court to another within its jurisdiction, for example reasonable apprehension in the mind of the litigant that he might not get justice in the court in which it is instituted since the judge is prejudiced or interested party etc.<sup>472</sup> The supreme court of India has power to transfer any suit, appeal / other proceeding from one high court to another and from one civil court to another in any other state, if the same is expedient in the ends of justice<sup>473</sup> for example if the court is situated at a long distance from the place of the residence of the applicant. Though the Code has elaborate provisions as to the grounds for transfer of a case. Besides the judiciary has also set certain parameters in this regard.<sup>474</sup>

**Interim orders:** The civil courts generally pass interim and interlocutory orders during the pendency of a suit or proceeding. Such orders do not finally determine the substantive rights and liabilities of the parties in respect of the subject matter of the suit or proceedings.<sup>475</sup> These interim orders are generally in the form of:

**(1) Issuing of commissions:**<sup>476</sup> The courts relax the rule of attendance in court if the person sought to be examined as a witness resides beyond the local limits of the jurisdiction of the court / when the witness is a man of high rank and position in the Constitution / he is unable to attend the court on grounds of sickness or infirmity. In such a case commission is issued and are given powers to examine such person, make local investigation, examine accounts, make partition, hold scientific investigation, conduct sale or perform a ministerial act<sup>477</sup>, to issue summons for procuring the attendance of parties and their witnesses, to call for documents and examine them, to proceed ex- parte, etc.<sup>478</sup> A date is fixed for return of a commission. The expenses of this commission are either met by the party requiring the commission or out of court funds<sup>479</sup>. The courts issue commissions either *suo-motu* or on the application of any party to the

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<sup>471</sup> *Id*, Order 41, Rules 37.

<sup>472</sup> *Manak Lal v. Prem Chand* AIR 1957 SC 425, see also *Indian Overseas Bank v. Chemical Construction Co.* (1979) 4 SCC 358; *Gujarat Electricity Board v. Atmaram* (1989) 2 SCC 602; *Arvee Industries v. Ratan Lal* (1977) 4 SCC 363; *Union of India v. SGPC* (1986) 3 SCC 600.

<sup>473</sup> CPC, 1908, sec. 25.

<sup>474</sup> *Sharref v. Hon'ble Judges of the Nagpur High Court*, AIR 1955 SC 19, see also, *Maneka Gandhi v. Rani Jethmalani* (1979) 4 SCC 167; *Manohar Lal v. Seth Hiralal* AIR 1962 SC 567

<sup>475</sup> CPC, 1908, sec. 94(e).

<sup>476</sup> *Id*, sec. 75.

<sup>477</sup> *Id*, sec. 75.

<sup>478</sup> *Id*, Order 26, Rule 16-18.

<sup>479</sup> *Id*, Order 26, Rule 15.

suit.<sup>480</sup> The evidence collected by commission forms part of the record.<sup>481</sup>

**(2) Arrest before judgment:**<sup>482</sup> When the court itself is in doubt about the integrity of the litigant – defendant, and it has reasons to believe that justice will not be otherwise met to the plaintiff, it orders for the arrest of defendant. If later, it is proved that the arrest was made on the insufficient grounds, court order litigant – plaintiff to pay compensation of maximum of 1000/- rupees to the defendant for the injury of reputation caused to him.<sup>483</sup>

**(3) Attachment before judgement:**<sup>484</sup> Attachment before judgement is ordered where the court on an application is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that can be passed against him, is about to dispose of the whole or any part of his property or is about to remove the same from the local limits of the jurisdiction of the court. It is a sort of guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree<sup>485</sup>. An attachment practically takes away the power of alienation and as such a restriction is placed on the right of ownership of the defendant.<sup>486</sup> However, this order of attachment can be withdrawn if the defendant furnishes security or the suit is dismissed<sup>487</sup>.

**(4) Temporary Injunctions** are granted by the court with respect to disputes involving immovable property.<sup>488</sup> Instances wherein the courts grant temporary injunctions included:<sup>489</sup>

- (a) the property in dispute is in danger of being wasted, damaged / alienated by any party to the suit / wrongfully sold in execution of a decree;
- (b) the defendant threatens to / intends to remove / dispose of his property with a view to defraud his creditors / dispossess the plaintiff / causes injury to the plaintiff in relation to any property in dispute in the suit;
- (c) to restrain repetition / continuation of breach of contract / injury of the

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<sup>480</sup> *Id*, Order 26, Rule 2 and 6.

<sup>481</sup> *Id*, Order 26, Rule 7.

<sup>482</sup> *Id*, Order 38, Rule 1-4.

<sup>483</sup> *Id*, sec 95.

<sup>484</sup> *Id*, Order 38, Rule 5-12.

<sup>485</sup> *Sardar Govind Rao v/s Devi Sahai* 1982(1) SCC 237.

<sup>486</sup> *Jai Prakash v. Basant Kumari* (1911) 15 IC 604.

<sup>487</sup> CPC, 1908, Order 38, Rule 9.

<sup>488</sup> *Id*, Order 39 Rule 1.

like kind.

The courts detain any person in a civil prison for violation of the order of an injunction for a term not exceeding 3 months.<sup>490</sup> The courts do not grant temporary injunction without giving notice to the opposite party.<sup>491</sup> Only in exceptional circumstances when irreparable/serious mischief will ensue to the plaintiff and its delay would defeat the ends of the justice, that the courts in India grant *ex-parte* injunctions for a limited period of time, by recording reasons for the same.<sup>492</sup> However, if later it is found by the court that the injunction was granted on insufficient grounds, or where suit of the litigant-plaintiff fails, the courts in some cases order for compensation of the defendant by an amount not exceeding rupees 1000/-.<sup>493</sup>

**Withdrawal of a suit:** At any time after the institution of the suit, the plaintiff can abandon his suit / any part of his claim against all / any of the defendant without permission of the court. The court however, can order the plaintiff to compensate / award such costs to the defendant as it thinks fit.<sup>494</sup> The granting of the permission to withdraw the suit with liberty to file a fresh suit with an aim to rectify the mistakes committed in the earlier suit removes the bar of *res judicata*. It restores the plaintiff to the position, which he would have occupied had he brought no suit at all. Withdrawal of the suit with the permission of the court with liberty to file a fresh suit is governed by the law of limitation in the manner as if first suit was not brought at all.<sup>495</sup> If more than one litigant files suit, any one of them, is capable of withdrawing without consent of others from the suit to the extent of his interest in it.<sup>496</sup>

**Compromise:** The courts permit compromise between parties after the institution of the suit.<sup>497</sup> However, the courts inquire whether the terms of the agreement are lawful and enforceable against all the parties to the compromise and then, pass the order in accordance with it.<sup>498</sup> Prior to the Amendment of the Code in 1976, a compromise decree could be passed only so far as it relates to the suit, but after the

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<sup>489</sup> *Id*, Order 39 Rules 1 & 2.

<sup>490</sup> *Id*, Order 39 Rule 2-A.

<sup>491</sup> *Id*, Order 39 Rule 3.

<sup>492</sup> *Id*, proviso to Order 39 Rule 3, see also *Morgan Stanley v. Kartik Das* (1994) 4 SCC225.

<sup>493</sup> *Id*, sec. 95.

<sup>494</sup> *Id*, Order 23 Rule 1(4).

<sup>495</sup> Limitation Act, 1963, sec. 14 (3), see also *supra* note 164 Order 23 Rule 2.

<sup>496</sup> CPC, 1908, Order 23 Rule 1(5).

<sup>497</sup> *Id*, Order 23 Rule 3.

amendment, every compromise that is lawful, is converted into the decree of the court. This decree is non-appealable<sup>499</sup> and cannot be set aside by a separate suit, except on the ground of fraud, undue influence or coercion<sup>500</sup>, which invalidates an agreement.<sup>501</sup>

**Death of a party:** The death of any of the party to a suit creates various difficulties. If, during the pendency of a suit, a party dies, a number of consequences ensue:

SITUATION	CONSEQUENCES
1. Where one of the several plaintiffs or defendants dies and the right to sue survives in favour of the surviving plaintiffs/ plaintiff alone or defendants/defendant alone.	The court records such fact and proceeds with the suit.
2. where one of the several plaintiffs/defendants dies and the right to sue does not survive in favour of surviving plaintiffs / defendants alone.	On an application being made, the court makes legal representatives of the deceased plaintiff / defendant a party and proceeds with the suit.
3. Where a sole surviving plaintiff /defendant dies and the right to sue survives.	On an application being made, the court makes legal representatives of the deceased plaintiff / defendant a party and proceeds with the suit. If no such application is made within the prescribed period given by law of limitation, the suit is abated so far as the deceased is concerned.
4. Either party dies between the conclusion of the hearing and the pronouncement of the judgment.	Suit does not abate whether the cause of action survives or not.

**Insolvency of a party:** The insolvency of a plaintiff does not cause the suit to abate and is continued by his assignee / receiver for the benefit of his creditors. But if the assignee or receiver declines to continue the suit / to give security for costs as ordered by the court, the court on the application of the defendant dismiss the suit and award costs to the defendant for defending the suit to be paid as a debt against the

<sup>498</sup> *Banwari Lal v. Chando Devi* (1993) 1 SCC 581.

<sup>499</sup> CPC, 1908, Order 23 Rule 3-A.

<sup>500</sup> *Id*, sec 96(3).

<sup>501</sup> *Ruby Sales and Services v. State of Maharashtra* (1994) 1 SCC 531.

plaintiff's estate.<sup>502</sup> In case the defendant becomes an insolvent, the court stays the suit or proceedings pending against him.<sup>503</sup>

**Burden of proof:** The Indian Evidence Act, 1870 deals with burden of proof. As a general rule, the plaintiff has to prove his claim and therefore the plaintiff has right to begin unless the defendant admits the fact alleged by the plaintiff and contends on point of law / on some additional facts alleged by him, in which case, the defendant has right to begin. The party having right to begin states its case and produces evidence. Only afterwards, other party can state its case and produce evidence to support it.<sup>504</sup> If the party having right to begin is absent / his counsel arrives late, then this right is transferred to other party.<sup>505</sup>

**Adjournment:** Once court starts hearing of a suit, it is continued till the final disposal of the suit, day to day and the adjournment is granted only for unavoidable reasons.<sup>506</sup> The grant or refuse of adjournment is in the discretion of the court. There are no guidelines laid down by the Code in this regard, but courts<sup>507</sup> grant adjournments in cases of: sickness of a party, his witness or his counsel, non-service of summons, reasonable time for preparation of a case, withdrawal of appearance by a counsel at the last moment, liability of the counsel to conduct a case, inability of a party to engage another counsel, etc. However, if the party fails to appear even on the adjourned day, the court either proceed to dispose of the suit *ex-parte* / dismiss the suit in case of the plaintiff / fix any other day for proceedings with the suit / proceed with a case even in absence of a party where evidence of such party has already been recorded as if such party were present / make any other suitable order<sup>508</sup>.

**Rules regarding recording of evidence:** generally witnesses are examined at the time of hearing of the suit. However, when witness is about to leave the jurisdiction of the court, his evidence is taken immediately without waiting further. In special circumstances witness is examined on commission.<sup>509</sup> If the evidence is recorded by the judge who dies / transferred / is prevented from conducting the trial due to some other

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<sup>502</sup> CPC, 1908, Order 22 Rule 8.

<sup>503</sup> C.K.Takwani, *Civil Procedure*, 224 (Eastern Book Co. 1997).

<sup>504</sup> CPC, 1908, Order 18 Rule 1-3.

<sup>505</sup> *Sheela Barse v. Union of India* (1988) 4 SCC 226

<sup>506</sup> CPC, 1908, proviso to Rule 1, Order 17.

<sup>507</sup> *CIT v. Express Newspapers Ltd.*, (1994) 2 SCC 374.

<sup>508</sup> CPC, 1908, Order 17 Rule 2.

<sup>509</sup> *Id.*, Order 18 Rule 16.

reason, before judgment is passed, his successor deals with such evidence as if it was recorded by him and proceeds with the suit from the stage at which it was left.<sup>510</sup>

**Judgement:** Judgment other than those of a court of small causes contains a concise statement of the case, the points for determination and the decision thereon along with reasons for such decision. The judgment of a court of small causes contains only points for determination and decision thereon.<sup>511</sup>

**Rules regarding awarding of costs by the court:** So far as costs in civil proceedings are concerned, it is in the discretion of the court to award such costs as it thinks fit. No hard and fast rules are laid down for awarding such costs. However, the rule has come to be established that the loser pays costs to the winner. Even successful party is not awarded costs if the court finds it guilty of misconduct.<sup>512</sup> The courts award four types of costs with regard to the proceedings in the court:

- (1) **General costs**, awarded to a litigant to secure him the expenses incurred by him in the litigation.<sup>513</sup>
- (2) **Miscellaneous costs:** The Code empowers the civil courts to award costs in respect of certain expenses incurred in giving notices, typing charges, inspection of records, producing witnesses and obtaining copies<sup>514</sup>.
- (3) **Compensatory costs** for the vexatious claims or defences: If the court is satisfied that the litigation was inspired by vexatious motive and altogether groundless, it can take deterrent action. But such action can be taken only in suits and proceedings before the court of first instance and, not in the appeals or revision. The maximum cost that can be awarded is rs.3000.<sup>515</sup>
- (4) **Costs for causing delay**, are awarded to check upon the delaying tactics of the litigating parties. It empowers the court to impose compensatory costs on the parties who are responsible for causing delay at any stage of the litigation. Such costs are awarded irrespective of the

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<sup>510</sup> *Id*, Order 18 Rule 15.

<sup>511</sup> *Id*, Order 20 Rules 4,5 and 6.

<sup>512</sup> *Saroj v. Sudarshan* (1984) 4 SCC 90.

<sup>513</sup> *Id*, under sec. 35.

<sup>514</sup> Order 20-A.

<sup>515</sup> *Id*, sec. 35- A.

outcome of the litigation.<sup>516</sup>

The courts determine by whom and out of what property and to what extent such costs are to be awarded by the party.<sup>517</sup> However parties are directed to bear their costs where law is settled for the first time / litigation has arisen because of ambiguity in the statute / the court itself has been in error / appellant does not press part of his claim / case involves important question of law for decision / case is a test case / involves any question related to interpretation of recent statute / court clarifies a judicial decision. Costs are taxed according to the rules framed by the high court.

**Summary procedure:** The general rule is, after a plaint has been presented in the court, summons is served on the defendant-opponent who is given the right to defend his suit. However, in the summary procedure after the summons of the suit is issued to the defendant, he has to appear in the court and the plaintiff serves for a summons for a judgement on the defendant.<sup>518</sup> The defendant is not given the right to defend the suit against him unless he appears in the court. In default of this, the plaintiff is entitled to a decree, to be executed forthwith.

**Suits relating to public nuisance:** The Code authorizes filing of a suit for declaration and injunction or for some other appropriate relief in respect of public nuisance by the Advocate- General or by two or more persons with the leave of the court.<sup>519</sup>

Apart from above special procedures in the Code, there are special rules formed with respect to suits relating to public charities<sup>520</sup>, interpleader suits<sup>521</sup>, suits relating to mortgages, sale, redemption, foreclosure of immovable property and to enforces charges thereon<sup>522</sup>, suits concerning family matters<sup>523</sup>, suits relating to trustees, executors and administrators<sup>524</sup> and, suits relating to firms.<sup>525</sup> Further there exists rules regarding appeal, review, revision, remand, etc.

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<sup>516</sup> *Id*, sec. 35- B.

<sup>517</sup> *Id*, sec. 35.

<sup>518</sup> *Id*, Order 37, Rules 2-3.

<sup>519</sup> *Id*, sec. 91.

<sup>520</sup> CPC, sec. 92.

<sup>521</sup> *Id*, sec. 88, Order 35.

<sup>522</sup> *Id*, Order 34.

<sup>523</sup> *Id*, Order 32-A.

<sup>524</sup> *Id*, Order 31.

**Appeal:** Lies to a superior court, not necessarily a High court Lies only from the decree and appealable orders. Appeal is a substantive right conferred by the statute Lies on any question of law or fact or both.

**Reference:** Is always made to the high court. Made use by courts in non-appealable cases.<sup>526</sup> Lies on any question of law / usage having force of law.

**Review:** Lies to the same court that passed decree or order. It is practically rehearing of a case by the same judge who has decided it. Lies on grounds of discovery of new and important matter / evidence/ mistake / error apparent on the face of the record/ any other sufficient reason.<sup>527</sup>

**Revision:** The high courts in the country are given the powers of revision under the Code by which it can call for the record of any case decided by any court subordinate thereto from which no appeal lies to it, if it appears to the high court that such subordinate court; (i) has exercised jurisdiction not vested in it by law, (ii) has failed in exercising a jurisdiction vested in it (iii) has acted in the exercise of its jurisdiction illegally or with material irregularity.<sup>528</sup> The high court then, makes any appropriate order thereon as it thinks fit.<sup>529</sup> The revision jurisdiction keeps subordinate courts within the bounds of their authority and to make them act according to the procedure established by law.<sup>530</sup> Courts in India convert an appeal in a case in which no appeal lies to revision and vice versa.<sup>531</sup>

**Decree & execution thereof:** A decree is executed either by the court, which passed it / to which it is sent for execution by the appellate court<sup>532</sup>, by filing of an application for execution<sup>533</sup>. The court, which originally passed the decree, does not lose its jurisdiction to execute it, by reason of subject matter thereof being transferred subsequently to the jurisdiction of another court.<sup>534</sup>

A judgment debtor is liable for arrest and detention in a civil prison in

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<sup>525</sup> *Id*, Order 30.

<sup>526</sup> C.K.Takwani, *Civil Procedure* 320 (Eastern Book Co., 1997).

<sup>527</sup> CPC, Order 47 Rule 1.

<sup>528</sup> *Id*, sec. 115.

<sup>529</sup> *Id*, sec. 115.

<sup>530</sup> *Lakshmi Dyeing Works v. Rangaswami* AIR 1980 SC 1253.

<sup>531</sup> *Reliable Water Supply Services v. Union of India* (1972) 4 SCC 168

<sup>532</sup> CPC, sec. 39.

<sup>533</sup> *Desh Bandhu v. Anand* 1994 (1) SCC 131

<sup>534</sup> CPC, Explanation to sec. 37.



execution of a decree.<sup>535</sup> His arrest is made between sunrise and sunset, only if the decretal amount exceeds Rs.500<sup>536</sup> only for the period till judgment debtor does not pay the decretal amount and costs of arrests to the officer. Not every application of the decree holder for the arrest of the judgment debtor for not complying with the decree is accepted forthwith. The courts issue notice to the judgment debtor calling upon him to appear before it and show cause as to why he should not be detained in a civil prison in execution of a decree.<sup>537</sup> Where the judgment debtor appears before the court in obedience of such notice and satisfies to the court his inability to pay the decretal amount, the courts reject application made by the decree holder for his arrest.<sup>538</sup> But if the court is not satisfied of his inability to pay, it makes an order of detention.<sup>539</sup> And where the judgment debtor does not appear in the court in obedience to the notice given to him under the code, the court on the request of the decree holder issues a warrant for the arrest of the judgment debtor.<sup>540</sup> In case of money decree which is unsatisfied for a period of 30 days, the court on the application of the decree holder orders the judgment debtor to produce an affidavit stating his assets. The latter has to comply with the order or face the detention up to period of 3 months<sup>541</sup>. However, following class of persons cannot be arrested or detained in civil prison: A woman; judicial officers, while going to, presiding in, or returning from their courts; the parties their pleaders, recognized agents, their witnesses acting in obedience to a summons, while going to or attending or returning from the court; member of the legislative bodies; any person or class of persons, whose arrest, might be attended with danger or inconvenience to the public.

A judgment debtor is released before the expiry of the period of detention on any one of the grounds mentioned below<sup>542</sup>: on the amount mentioned in the warrant being paid / decree against him being otherwise fully satisfied / on the request of the decree-holder / omission of the decree holder to pay subsistence allowance / due to his illness<sup>543</sup>.

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<sup>535</sup> *Id*, sec. 55.

<sup>536</sup> *Id*, sec. 58(1-A).

<sup>537</sup> *Id*, Order 21 Rule 37.

<sup>538</sup> *Id*, Order 21 Rule 40(1).

<sup>539</sup> *Id*, Order 21 Rule 40(3).

<sup>540</sup> *Id*, Order 21 Rule 37(2).

<sup>541</sup> *Id*, Order 21 Rule 41(2) and (3).

<sup>542</sup> *Id*, sec. 58.

<sup>543</sup> *Id*, sec. 59.

All saleable property (movable or immovable) belonging to the judgment debtor or over which he has a disposing power which he can exercise for his own benefit, are liable to attachment in execution of a decree against him.<sup>544</sup> The procedure for attachment of different types of moveable and immovable properties is depicted below:

<b>Type Of Property</b>	<b>Mode Of Attachment</b>
Movable Property other than Agricultural Produce in possession of the Judgment Debtor	By actual seizure thereof. But if such property is subject to speedy and natural decay, or the expense of keeping it is likely to exceed its value, it may be sold. <sup>545</sup>
Movable Property not in possession of the Judgment Debtor	By an order prohibiting the person in possession thereof from giving it to the judgment debtor <sup>546</sup>
Negotiable instrument neither deposited in a court nor in the custody of a public officer	By actual seizure and bringing it into court <sup>547</sup>
Debt not secured by a negotiable instrument	By an order prohibiting the creditor from recovering the debt and the debtor from paying the debt <sup>548</sup>
Share in the capital of a corporation	By an order prohibiting the person in whose name the share stands from transferring it or receiving dividend thereon <sup>549</sup>
Share or interest in Movable Property belonging to the Judgment Debtor and another as co-owners	By a notice to the judgment debtor prohibiting him from transferring or charging it <sup>550</sup>
Salary or allowance of a public servant or a private employee	By an order that the amount shall be withheld from such salary or allowance either in one payment or by monthly installments <sup>551</sup>

<sup>544</sup> *Balkrishna Gupta v. Swadeshi Polytex Ltd.* (1985) 2 SCC 1470

<sup>545</sup> CPC, Order 21 Rule 43.

<sup>546</sup> *Id.*, Order 21 Rule 46(1) (c).

<sup>547</sup> *Id.*, Order 21 Rule 51.

<sup>548</sup> *Id.*, Order 21 Rule 46(1) (a).

<sup>549</sup> *Id.*, Order 21 Rule 46(1) (b).

<sup>550</sup> *Id.*, Order 21 Rule 47.

<sup>551</sup> *Id.*, Order 21 Rule 48 & 48-A.

Partnership property	By making an order – 1. charging the interest of the partner in the partnership property; 2. appointing a receiver of the share of the partner in profits; 3. directing accounts and inquiries and 4. ordering sale of such interests <sup>552</sup>
Property in custody of court or public officer	By notice to such court or officer, requesting that such property, and any interest or dividend thereon, may be held subject to the order of the court <sup>553</sup>
Decree for payment of money or sale in enforcement of a mortgage or charge – (a) passed by the court executing the decree - (b) passed by another court – decree other than that mentioned above -	By an order of such court <sup>554</sup> By issuing notice to such court requesting it to stay execution thereof <sup>555</sup> By issuing a notice (a) to the decree holder prohibiting him from transferring it or charging it in any way; (b) to the executing court from executing it until such notice is cancelled. <sup>556</sup>
Agricultural produce	By (a) affixing a copy of the warrant, in case of growing crop, on land on which such crop has grown and in case of ready crop, the place at which it is lying; (b) by affixing a copy on the house in which the judgment debtor ordinarily resides, carries on business or personally works for gain, or last resided, carried on business or personally worked for gain <sup>557</sup>
Immovable property	By an order prohibiting the judgment debtor from transferring it or charging it in any way and all persons from taking any benefit from such transfer or charge. <sup>558</sup>

The court which passed the decree can order any other court within whose jurisdiction property of the judgment debtor is situate, to attach any property specified in

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<sup>552</sup> *Id*, Order 21 Rule 49.

<sup>553</sup> *Id*, Order 21 Rule 52.

<sup>554</sup> *Id*, Order 21 Rule 53(1) (a).

<sup>555</sup> *Id*, Order 21 Rule 53(1) (b).

<sup>556</sup> *Id*, Order 21 Rule 53(4).

<sup>557</sup> *Id*, Order 21 Rule 44.

<sup>558</sup> *Id*, Order 21 Rule 54.

the order in pursuant to the decree.<sup>559</sup> However no such attachment is effected, if the property is outside India.<sup>560</sup> Any court executing the decree can order any property attached by it to be sold to satisfy the decree and proceeds of such sale are paid to the party entitled under the decree to receive the same.<sup>561</sup> An officer of the court in public auction conducts every such sale in execution of a decree<sup>562</sup>. Every proclamation of a sale is made by beat of drum or other customary mode. Such proclamation is published in the Official Gazette and or in the local newspaper, on the directions of the court.<sup>563</sup> Every sale can be stopped, if before the property is knocked out, debts and costs are tendered to the officer conducting the sale or paid into the court.<sup>564</sup> A decree-holder / a mortgagee of immovable property / any officer / other person having any duty to perform in connection with any execution sale, cannot either directly or indirectly bid for, acquire or attempt to acquire any interest in the property sold in execution, except with the permission of the court, which courts seldom grant.<sup>565</sup> The Code contains elaborate and exhaustive provisions for execution of decrees and orders, takes care of different types of situations and provides effective remedies not only to the decree holders and judgment debtors but also to the objectors and third parties.<sup>566</sup>

Powers with respect to foreign judgment: the conclusiveness of a foreign judgment between parties is provided for, except when it is not pronounced by a court of competent jurisdiction / not given on the merits of the case / it is founded on incorrect view of international law / is obtained by fraud / it sustains a claim founded on breach of any law in force in the country. A foreign judgment is enforced in India in 2 ways: by instituting a suit on such foreign judgment and by instituting executing proceedings.<sup>567</sup>

Caveat: The Code also provides for lodging of caveat, which is nothing but an entry made in the books of the offices of a registry or court to prevent a certain step being taken without previous notice to the person entering the caveat. It is a precautionary step taken against the grant of probate or letters of administration, by the

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<sup>559</sup> *Id*, Sec. 46.

<sup>560</sup> *Supra* note 177, p. 393

<sup>561</sup> *Id*, Order 21 Rules 64.

<sup>562</sup> *Id*, Order 21 Rules 65.

<sup>563</sup> *Id*, Order 21 Rule 67(2).

<sup>564</sup> *Id*, Order 21 Rule 69(3).

<sup>565</sup> *Id*, Order 21 Rule 72 – 73.

<sup>566</sup> *Id*, Order 21.

<sup>567</sup> *Id*, Sec. 44-A.

person lodging the caveat.<sup>568</sup> Where an application is expected to be made, in a suit or proceeding instituted/ about to be instituted, any person claiming right to appear before the court for hearing of such application lodges a caveat in respect thereof.<sup>569</sup> The notice of the same is also given to the person by whom application is made/ about to be made.<sup>570</sup> The court when application comes for hearing serves a notice to the caveator of the same.<sup>571</sup> Applicant at the expense of caveator furnishes him the copy of the application along with copies of any paper or document, which he is going to file.<sup>572</sup> All notices are given by registered post. A caveat lodged remains in force for 90 days from the date of its filing<sup>573</sup>.

Besides powers expressly conferred by the Code on Indian Civil courts, every court possesses inherent powers to do justice between the parties.<sup>574</sup>

Exemption on the basis of Sovereign Immunity: Civil Courts in India cannot entertain suits against a class of persons such as foreign rulers, ambassadors and other officers, except with the consent of the central government, or if such a party voluntarily submits to the jurisdiction of the court. no foreign state can be sued in any court otherwise competent to try the suit except with the consent of the central government certified in writing by a secretary of that government.

## STATISTICAL DATA:

### IN RAJASTHAN HIGH COURT

ORIGINAL CIVIL PETITIONS		
Year	Admitted	Disposed of
1998	1188	NA
1999	1484	NA
2000	361(up to June)	NA
CIVIL WRIT PETITIONS		
Year	Admitted	Disposed of
1998	5001	5065
1999	5214	5877

<sup>568</sup> *Id*, sec. 148-A.

<sup>569</sup> *Id*, sec. 148-A(1).

<sup>570</sup> *Id*, sec. 148-A(2).

<sup>571</sup> *Id*, sec. 148-A(3).

<sup>572</sup> *Id*, sec. 148-A(4).

<sup>573</sup> *Id*, sec. 148-A(5).

<sup>574</sup> *Id*, sec. 151.

2000	2094(up to June)	2790(up to June)
<b>CIVIL APPEALS</b>		
<b>Year</b>	<b>Admitted</b>	<b>Disposed of</b>
1998	2740	1371
1999	3335	1378
2000	1204(up to June)	802(up to June)
<b>CIVIL TRANSFER PETITIONS</b>		
<b>Year</b>	<b>Admitted</b>	<b>Disposed of</b>
1998	25	21
1999	20	8
2000	6(up to June)	17(up to June)
<b>REVIEW PETITIONS</b>		
<b>Year</b>	<b>Admitted</b>	<b>Disposed of</b>
1998	105	104
1999	105	95
2000	27(up to June)	22(up to June)

## 2. CRIMINAL PROCEDURE/PROCEEDINGS

### **Criminal Procedure in India:**

**An Overview:** In India criminal jurisprudence existed since the days of Manu.<sup>575</sup> Manu recognized assault, theft, robbery, false evidence, slander, breach of trust, cheating, adultery and rape as punishable offences. Different laws came into existence in the reins of various rulers. At present the criminal procedure is contained in three extensive statutes, viz., the Code of Criminal Procedure, 1973 (here in after referred to as the Code), the Indian Evidence Act, 1872, and the Indian Penal Code, 1860, given to the country by its colonial masters from Britain who ruled the country for almost 200 years. During those times, there used to be variations in the procedural law adhered to in the presidency towns from that of the *mofussils*. Not only this, the procedural law practiced in the presidency towns and *mofussil* areas lacked uniformity *inter se*. Steps were taken in the 19<sup>th</sup> century to introduce uniformity in the procedural law in the presidency towns. In 1852 the laws of the presidency towns were first of all consolidated by the Criminal Procedure Supreme Courts Act, 1852.<sup>576</sup> This enactment

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<sup>575</sup> Period of ancient Hindu India: 6<sup>th</sup> century B.C to 6<sup>th</sup> century A.D.

<sup>576</sup> CPC, Act XIV of 1852.

was superseded by the High Court Criminal Procedure Act, 1865.<sup>577</sup> On the other side, the law applying in the provinces was replaced by Criminal Procedure Code, 1861.<sup>578</sup> The 1861 enactment was further replaced by Act X of 1872. This too was not uniform Act for the whole of India. Later on Criminal Procedure Code of 1882<sup>579</sup> was enacted that gave uniformity in the procedure for the whole of India, both in presidency towns and *mofussils*. It was replaced by the Code of 1898.<sup>580</sup>

The Code of Criminal Procedure is essentially a procedural law with the object of providing machinery for punishment of offenders under the substantive criminal law. It lays down the procedure to be followed in every investigation, inquiry and trial, for every offence under the Indian Penal Code or under any other law. The concern for speedy trial is the main premise underlying the Code, both with regard to investigation and trial.

The main objective of legal reform is to promote justice after the offence is committed. It is in this background that reforms in the procedure were incorporated from time to time.<sup>581</sup> After independence, the first Law Commission in 1958,<sup>582</sup> made extensive recommendations on the reform of criminal justice system specially on the subjects of organization of criminal courts, police investigation, prosecuting agencies, delays in criminal trials, committal proceedings, criminal appeals, revisions and inherent powers, procedure for trial of perjury cases, etc. As a result, the Code of Criminal Procedure, 1898 was modified to give effect to some of the recommendations. Again, the Fifth Law Commission undertook a detailed study of the Code from where the previous commission had concluded its report and rendered the 41<sup>st</sup> Report representing a comprehensive review of the Code in 1969. Consequent to this report, Parliament enacted the Code of Criminal Procedure, 1973, which came into effect on April 1, 1974, repealing the old Code. With a view to do away with certain difficulties experienced in its working, the Code of 1973 underwent following amendments in 1974, 1978, 1980, 1983, 1988, 1990, 1991 and 1993 for specific purposes:

1. In 1976 in pursuant to 41<sup>st</sup> Report of Law Commission of India, major

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<sup>577</sup> *Id.*, Act XIII of 1865.

<sup>578</sup> *Id.*, Act XXV of 1861.

<sup>579</sup> *Id.*, Act X of 1882.

<sup>580</sup> *Universal's Criminal Manual*, 1 (Universal Law Publishing Co. Pvt. Ltd. 1999).

<sup>581</sup> Law Commission of India, 84<sup>th</sup> Report, 20(April 1980).

<sup>582</sup> The First Law Commission, *Reform of Judicial Administration*, 14<sup>th</sup> Report, Vol. II, 714 – 849

amendments were brought to the Code. Some of them included, the committal proceedings were omitted, state government was given power to declare any area as metropolitan area if the population of the same exceeds one million.<sup>583</sup>

2. In 1978 additional duty was imposed on the police officer of reporting and transporting the seized property to the court or any person on bond who undertakes to produce the same before area Magistrate. Prior to this amendment the police officer seizing any property had to report to the officer in-charge of the police station. Some additions were made to the Code to enable the Magistrate to detain the accused for a period over 15 days if adequate ground exists. Further to the general rule that 'complaint must be made by the aggrieved person', an exception was introduced by allowing in specific circumstances complaint from his near relations if he or she is lunatic or idiot or incapable of complaining because of some sickness or due to any other valid reason. The Code empowered state government for speedy disposal of petty cases and in this context, gave power to the Magistrate to impose fine on the accused of petty offences and release him. In the same year defamation was made a compoundable offence. Besides minimum imprisonment of 14 years was prescribed for accused convicted of an offence punishable with death.

3. In 1980 the Code empowered the court and the police officer to release the accused on bail in a bailable case except when he is guilty of an offence punishable with life imprisonment / death / has been previously convicted of the same. The Executive Magistrate was authorized to keep peace in his area.

4. In 1983, keeping in view the increasing number of dowry deaths in the country, and also in conformity with the provisions incorporated under the Indian Penal Code<sup>584</sup> and the Indian Evidence Act, 1870<sup>585</sup> a provision was made for inquest by executive magistrates for conducting post-mortem in all cases where a woman died within 7 years of her marriage under unnatural circumstances. Further to end police torture leading to deaths of accused inside the jails/prisons the same amendment provided for inquest by nearby Magistrate in case of death of a person in police custody. Further, the Code allowed trial of cases relating to rape and other offences against

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(26 September, 1958).

<sup>583</sup> Indian Penal Code, 1860, sec 8.

<sup>584</sup> *Id*, sec 304-B.

<sup>585</sup> Indian Evidence Act, 1870, sec 114-B.



women *in-camera*.

5. In 1990 by way of amendment, two new provisions were added to facilitate ongoing investigations in the matter of kickbacks and commissions by a foreign gun factory A. B. BOFORS of Sweden finalizing sale of its product to the Ministry of Defence, Government of India. The necessity of such a provision was felt because the money paid was deposited in the accounts of the accused persons in the banks of Switzerland.

6. The Amendment Act of 1993 enlarged the list of all those who are under duty to report to the police / magistrate if they happen to be aware of the commission of any offence or intention of any person to commit offence, by including the offence of kidnapping for ransom within its ambit.

7. In 1994, the Government introduced the Code of Criminal Procedure (Amendment) Bill, 1994 incorporating many amendments in the Code. The Bill is at present pending before the Parliamentary Standing Committee.

#### **Various Stages of Procedure:**

Law enforcement and management of law and order, security, crime prevention and crime detection are essentially enforced and performed by the police authorities. The Indian Penal Code (IPC), 1860, is the general penal law for the country. It identifies the acts and omissions that constitute the offences and provides punishments for them. The Code of Criminal Procedure (Cr.P.C.), 1973 prescribes procedure to be followed by the police and other state authorities once the commission of crime comes to its notice. Criminal proceedings are divided into three stages viz. Investigation, inquiry and trial.

**Investigation** is a preliminary stage conducted by the police and usually starts after recording of FIR in the police station. If from statement of FIR or when the magistrate directs<sup>586</sup> or otherwise, the officer-in-charge of a police station suspects the commission of an offence, he / other subordinate officer (known as ASI, i.e., Assistant Sub-Inspector) proceeds to the spot to investigate facts and circumstances of the case and if necessary, take measures for the discovery and arrest of the offender. Investigation primarily consists in the ascertainment of facts and circumstances of the case. It includes all the efforts of a police officer for collection of evidence. Investigation consists of following steps: proceeding to the spot; ascertainment of the facts and circumstances of

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<sup>586</sup> IPC, sec 159.

the case; discovery and arrest of the suspected offender; collection of evidence relating to the commission of offence which may consist of - the examination of various persons including accused and taking their statements in writing<sup>587</sup> and the search of places or seizure of things considered necessary for the investigation and to be produced at the trial; formation of opinion as to whether on the material collected there is a case to place the accused before a magistrate for trial and if so, taking the necessary steps for the same for the filing of charge-sheet.<sup>588</sup> Investigation ends in a police report to the magistrate.

The organization and structure of police in India, is given below:<sup>589</sup>

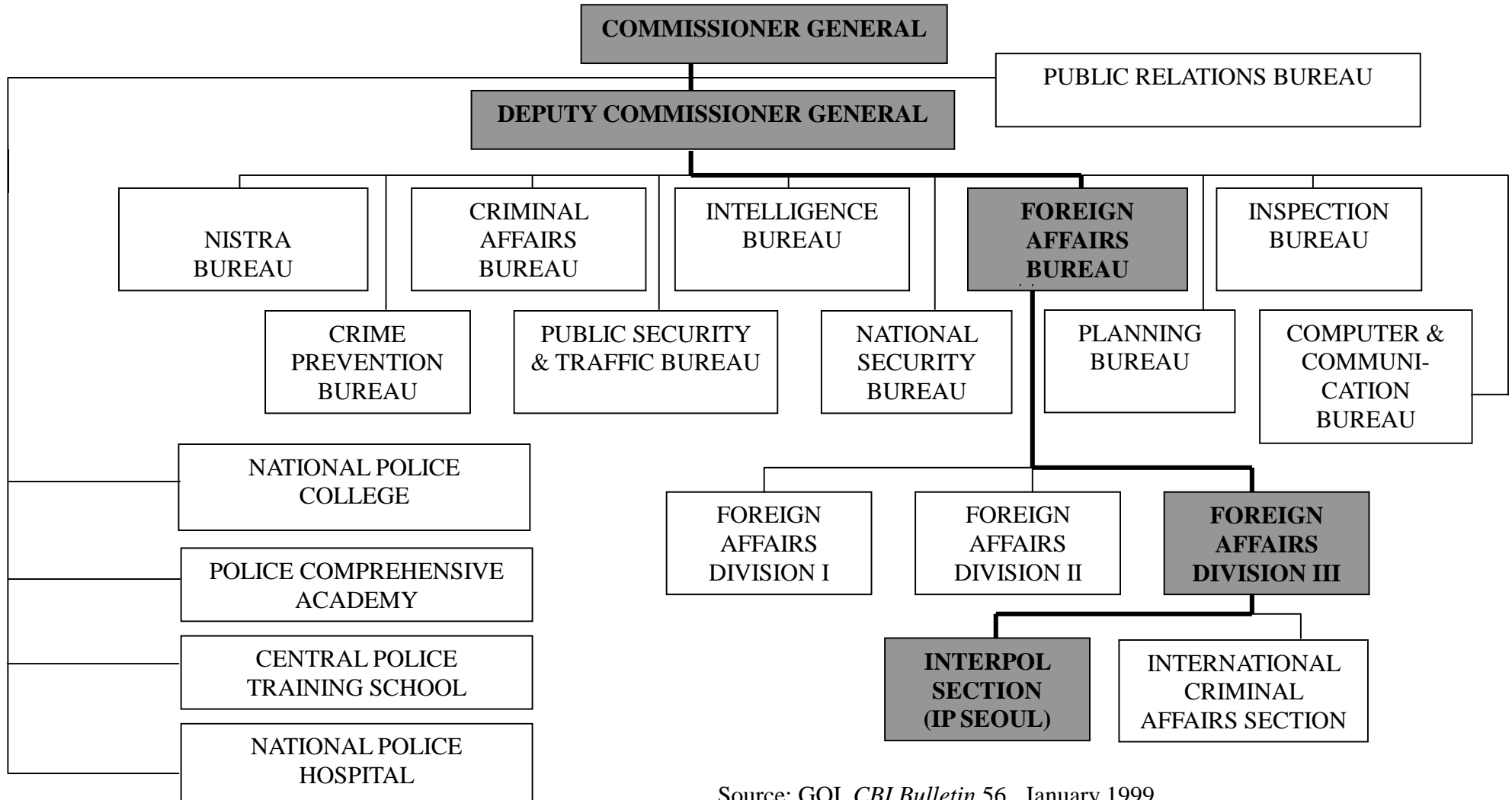
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<sup>587</sup> Cr.P.C, sec 161.

<sup>588</sup> Cr.P.C, sec 173.

<sup>589</sup> G.O.I., *Crime in India*, (National Crime Records Bureau, 1997).

**POLICE ORGANISATION CHART**



Source: GOI, *CBI Bulletin*, 56, January 1999

The Code gives powers to police officers regarding various acts. For instance, powers to arrest,<sup>590</sup> means for getting arrest,<sup>591</sup> power of searching the place and person suspected of any crime,<sup>592</sup> power to seize any objectionable and offensive object in the possession of any person,<sup>593</sup> power to discharge the accused if no case is made out against him, release accused on bail in non-cognizable offence/arrest him without prior permission of the magistrate in cognizable offence.<sup>594</sup>

**Inquiry and trial** are two stages in a criminal proceeding before a court. Trial starts after the charge has been framed and the stage preceding it is called inquiry. An inquiry is conducted by the magistrate / court for satisfying itself about any fact. Inquiry is done by the magistrate either on receiving a police report<sup>595</sup> / complaint by any other person.<sup>596</sup> After the inquiry, the charge is prepared and after the formulation of the charge trial of the accused starts. A charge is nothing but formulation of the accusation made against a person who is to face trial for specified offence. It sets out the offence that is committed by the accused. After the charge is framed either the accused is convicted / acquitted.

**Arrest:** The Code provides a two-fold classification of the offences mentioned in the Indian Penal Code, having regard to their nature and seriousness viz., bailable and non- bailable and the other is cognizable and non-cognizable. A cognizable offence is one in which a police officer is authorized to arrest a person without a warrant.<sup>597</sup> In a non-cognizable offence, the police officer cannot arrest a person, without a warrant. In case of bailable offences, the person arrested has to be released on bail either by the police or by the magistrate if he is ready to furnish bail. In case of non-bailable offences, it lies in the discretion of the court. Besides, the police also have the power to make preventive arrests under the Code and various other legislations.<sup>598</sup> It is mandatory for the police officials to produce the arrested before a magistrate having jurisdiction in the

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<sup>590</sup> Cr.P.C, sec 41.

<sup>591</sup> *Id*, sec 46(2).

<sup>592</sup> *Id*,sec 47, 51.

<sup>593</sup> *Id*, sec 52.

<sup>594</sup> *Id*, sec 2.

<sup>595</sup> *Id*,sec 157.

<sup>596</sup> *Id*,sec 200- 202.

<sup>597</sup> *Id*, sec 41.

<sup>598</sup> B.P.Jeevan Reddy, "Reforming the arrest law", *The Hindu* (18 –11 – 2000).

case, within 24 hours of arrest, excluding the time necessary for the journey from the place of arrest to the Magistrate's court. But if it appears that the investigation could not be completed within the period of 24 hours and there are grounds for believing that the accusation or information is well founded, the officer-in-charge of police station (SHO) or police officer making the investigation (IO) has to transmit to the nearest judicial magistrate a copy of the entries in the diary, relating to the case (like FIR, Daily Diary Report, etc.) and at the same time produce the accused before such magistrate. The trial court if forms an opinion that the accused concerned has committed the offence, which he is competent to try, it frames charges in writing against the accused. But if it decides to discharge the accused, it is obligatory to record reasons.<sup>599</sup>

The Supreme Court in *Joginder Kumar v. State of Uttar Pradesh*<sup>600</sup> after examining the Report of Sir Cyril Phillips Committee (Report of the Royal Commission on Criminal Procedure) and the Royal Commission's Enunciation of Guidelines laid down following guidelines for making arrests reconciling two conflicting interests, the need for arrest and the right to personal liberty in Article 21 of the Constitution were enunciated: (i) an arrested person held in custody is entitled to consult one friend, relative or other person known to him or likely to take an interest in his welfare; (ii) the police officer should inform the arrested person of this right; (iii) an entry to be made in the diary as to who was informed of the arrest. Further the Supreme Court in its epoch making judgment in *D. K. Basu v. State of West Bengal*<sup>601</sup> wherein the Court has formulated detailed guidelines which are referred to as "Commandments" to be followed by the police during arrest and detention.

**Bail:** Bail in essence means security for the appearance of the accused person on giving which he is released pending investigation / trial. The law relating to the bail constitutes an important branch of the procedural law and dovetails two conflicting interests namely, the requirements of shielding the society from the hazards of those committing crimes and the fundamental principle of criminal jurisprudence, namely, the presumption of innocence of an accused till he is found guilty<sup>602</sup>. With a view to fulfilling the above objectives, the legislature has provided directions for granting or

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<sup>599</sup> T.Padmanabha Rao, "SC ruling on framing of charges by trial courts", *The Hindu*, (6-1-2000).

<sup>600</sup> Crimes 1994(2) 106 at 107

<sup>601</sup> AIR 1997 SC 610.

<sup>602</sup> *Supdt., & Remembrancer of Legal Affairs v. Kumar Roy Choudhury* (1974) 78 Cal W.N. 320, 325.

refusing bail. Where law allows discretion in the grant of bail, it is to be exercised according to the guidelines provided therein; further the courts have evolved certain norms for the proper exercise of such discretion.<sup>603</sup> Cr.P.C. prescribes a statutory time frame for conclusion of investigation and filing of charge- sheet, failing which the accused in custody is liable to be released on bail.<sup>604</sup> Certain state governments, particularly government of West Bengal, have provided that if investigation is not completed within prescribed time frame, the magistrate will not take cognizance of such offences. In *Rajdeo Sharma case*<sup>605</sup> the Supreme Court of India observed that while determining whether undue delay has occurred, one must have regard to all the attendant circumstances, including nature of offences, number of accused and witnesses, the workload of the court concerned, prevailing social conditions and so on, that is what is called, the systematic delays. Further he Supreme Court in *Moti Ram v. State of M.P.*<sup>606</sup> held that bail covers release on one's own bond, with or without securities. Grave offences, namely, offences punishable with imprisonment for 3 years / more have been treated as non-bailable offences.

A person accused of a bailable offence is entitled to be released on bail as a matter of right if he is arrested or detained without a warrant. But if the offence is non-bailable, depending upon the facts and circumstances of the case, the court has discretion. The courts while granting/refusing bail in non-bailable offences consider, enormity of the charge; nature of the accusation; severity of the punishment which the conviction will entail; nature of the evidence in support of accusation; danger of the accused person absconding if he is released on bail; danger of witnesses being tampered with; protracted nature of the trial; opportunity to the applicant for preparation of his defence and access to his counsel; health, age and sex of the accused; nature and gravity of the circumstances in which the offence is committed; position and status of the accused with reference to the victim, witnesses and probability of accused committing more offences if released on bail, etc. These considerations are by no means exhaustive. Factors such as previous convictions, criminal records of the accused, etc., are also

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<sup>603</sup> Cr. P. C, sec. 2(a)

<sup>604</sup> *Id*, sec 167

<sup>605</sup> 1998(8) SCALE.

<sup>606</sup> (1978) 4 SCC 47

taken into account while deciding the question of bail.<sup>607</sup>

The Code incorporated provisions for grant of anticipatory bail,<sup>608</sup> and has laid down the following conditions for the grant of anticipatory bail:<sup>609</sup> (i) the person applying for anticipatory bail must believe that he will be arrested. Mere 'fear' of arrest will not suffice. (ii) filing of FIR (first information report before the police) is not a condition precedent to the granting of anticipatory bail; (iii) anticipatory bail can be granted after arrest; (iv) no extensive order of anticipatory bail is to be passed by any court.

**Bail procedure:** In Delhi and in many other states the general procedure is that the court releases the accused on bail after a local person is willing to stand surety, the guarantor has to produce documents to the Court to prove his domicile and solvency. This is done by producing a ration card or a passport. In addition, a power-of-attorney attested by a Notary Public, a motor vehicle registration document, a bank fixed deposit receipt or a certificate from the Income Tax Department is required to be submitted to authenticate the guarantor's solvency.

**Pre-trial Detention:** The purpose of pre-trial detention is not punishment. A survey of decided cases reveals that law favours release of accused on bail, which is the rule, and refusal is the exception.<sup>610</sup> The plight of under trial prisoners was vividly brought out in *Hussainara Khatoon-I v. Home Secretary*.<sup>611</sup> The case disclosed a dismal state of affairs in the state of Bihar in regard to administration of criminal justice. It held that the prisoner, in appropriate cases, should be released on his bond without sureties and without any monetary obligation. In *R.D. Upadhyay v. State of Andhra Pradesh*<sup>612</sup>

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<sup>607</sup> See, *Rao Harnarain Singh v. State* AIR 1958 123; *State v. Captain Jagjit Singh* AIR 1962 SC 253; *Gurcharna Singh v. State* (Del. Admn.) (1978) 1 SCC 118; *Gudikanth Narasimhulu v. Public Prosecutor* (1978) 1 SCC 240, *Bhagirati Singh v. Judeja* AIR 1984 SC 372; *Johny Wilson v. State of Rajasthan* 1986 Cri. L.J. 1235 (Raj).

<sup>608</sup> Cr. P.C., sec 438. However Uttar Pradesh legislature has repealed the provision for anticipatory bail. West Bengal legislature enacted amendments in 1990 incorporating following limitations on the power to grant anticipatory bail: (i) mere filing of application in the high court or court of session for grant of anticipatory bail does not debar the police from apprehending the offenders; (ii) the high court or the court of session are required to dispose of an application for anticipatory bail within thirty days from the date of such application and (iii) in offences punishable with death, imprisonment for life / imprisonment for a term not less than 7 years, no final Order shall be made without giving the state a minimum of seven days' notice to present its case.

<sup>609</sup> Cr. P.C., sec 438.

<sup>610</sup> *Supra* note 259.

<sup>611</sup> *Hussainara Khatoon [I] v. Home Secretary*, (1980) 1 SCC 81.

<sup>612</sup> Report of the Legal Aid Committee (1971) quoted in *Moti Ram v. State of M.P.* *supra* note 259.

the Supreme Court issued, specific directions for expediting the trial of under trials accused of serious offences as murder, attempt to murder etc. under I.P.C., Arms Act, Customs Act, Narcotic Drugs and Psychotropic Substances Act, Official Secrets Act, Extradition Act, Terrorist and Disruptive Activities Act and Dowry Prohibition Act etc. The Court also issued directions for release on bail without the necessity of applications for bail in cases where under trials are charged with attempt to murder and cases are pending for more than two years. In cases where under trials are charged with the offence of kidnapping, theft, cheating, counterfeiting, rioting, hurt, grievous hurt or any of the offences under the Arms Act, Customs Act, in detention for more than one year, they should be released on bail without application of bail. The Supreme Court in *Common Cause v. Union of India*<sup>613</sup> directed criminal courts to release the accused on bail / on personal bond subject to conditions, as are necessary when:

1. Accused is charged with the offences under I.P.C. / any other law in force which is punishable with imprisonment not exceeding three years with / without fine and trial is pending for one year / more and the concerned accused is in jail for a period of six months or more.<sup>614</sup>

2. Accused is charged with the offences under I.P.C. / any other law in force which is punishable with imprisonment not exceeding 5-years with / without fine and trial is pending for one year / more and the concerned accused is in jail for a period of 2-years /more,<sup>615</sup> and the concerned accused is in jail for a period of 6-months / more.<sup>616</sup>

3. Accused is charged with the offences under I.P.C. / any other law in force which is punishable with imprisonment seven years or less, with / without fine and trial is pending for 2 year / more and the concerned accused is in jail for a period of one year or more.<sup>617</sup>

However the aforesaid directions are not applicable in subsequent offences committed by the same offenders or against whom more than one case is pending or when a person has been convicted for more than one case.

**Summons cases, warrant cases, summary trial – Procedure:** In respect of offences other than those tried at the session courts, two broad divisions are made, viz.,

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<sup>613</sup> 1996 (4) SCALE, 129.

<sup>614</sup> Cr. P.C, sec 437.

<sup>615</sup> *Id*, sec 437.

<sup>616</sup> *Id*, sec 437.

<sup>617</sup> *Id*, Sec 437.



summons cases and warrant cases.

A **warrant-case** relates to offences punishable with death, imprisonment for life/ imprisonment for a term exceeding 2-years.<sup>618</sup> The Code provides for two types of procedure for the trial of warrant cases by the Magistrate, viz., those instituted upon a police report and those instituted upon complaint.<sup>619</sup> In respect of cases instituted on police report, the Code provides for the discharge of the accused by the Magistrate upon consideration of the police report, documents sent with it and making such examination. In respect of the cases instituted otherwise than on police report, the Magistrate, hears the prosecution and takes the evidence.<sup>620</sup> If evidence makes no case, accused is discharged.<sup>621</sup> If the accused is not discharged, the Magistrate holds regular trial after framing of charge, etc.<sup>622</sup>

**Summons-case** means a case relating to an offence, not being a warrant case, thereby implying that all cases relating to offences punishable with imprisonment not exceeding 2 - years<sup>623</sup> falls in the category of summons cases.<sup>624</sup> In respect of summons cases there is no need to frame a charge.<sup>625</sup> In this class of cases arising on a private complaint /on a police report, the evidence of both sides is recorded at a single sitting followed by a judgment without any delay. The trial is thus designed to occupy the minimum amount of time. In both summons case and warrants case, in the absence of the complainant, accused is discharged or acquitted.<sup>626</sup> Also the court has the power to convert summons case into warrant case, if the Magistrate thinks that in the interest of justice requires so.<sup>627</sup>

**Summary trials:** Magistrates of first class can be empowered by the high court to try in a summary way any of the offences mentioned therein.<sup>628</sup> When in the course of summary trial it appears to the magistrate that the nature of the case is such that it is undesirable to try summarily, he recalls the witnesses and proceeds to rehear the

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<sup>618</sup> *Id*, sec 2 (x).

<sup>619</sup> *Id*, chapter XIX.

<sup>620</sup> *Id*, sec 244.

<sup>621</sup> *Id*, sec 245.

<sup>622</sup> *Id*, sec 246 and 247.

<sup>623</sup> *Id*, sec 256.

<sup>624</sup> *Id*, sec 2(w).

<sup>625</sup> *Id*, chapter XX.

<sup>626</sup> *Id*, sec 249 and 256.

<sup>627</sup> *Id*, sec 259.

<sup>628</sup> *Id*, chapter XXI.

case.<sup>629</sup> Second class magistrate can try summarily an offence, punishable only with fine/imprisonment for a term not exceeding six months.<sup>630</sup> In summary trial no sentence of imprisonment for a term exceeding 3 months is passed in any conviction.<sup>631</sup> Particulars of the summary trial are entered in the record of the court.<sup>632</sup> In every case tried summarily in which accused does not plead guilty, the magistrate records the substance of the evidence and a judgment containing a brief statement of the reasons for the finding.<sup>633</sup>

**Examination of Accused:**<sup>634</sup> The court examines the accused at any stage of any inquiry /trial for the purpose of enabling the accused to explain any circumstances in the evidence appearing against him.<sup>635</sup> It is mandatory for the court to question the accused after the examination of evidence of the prosecution and before he enters on his defence.<sup>636</sup> The Code gives a reasonable opportunity to accused to explain incriminating facts and circumstances in the case. The accused in compliance with the provision, can file written statements with the permission of the court.<sup>637</sup>

**Compounding of Offences:** The Code contains detailed provisions for compounding of offences. It lists various compoundable offences under the Indian Penal Code, of which 21 may be compounded by the specified aggrieved party without the permission of the court<sup>638</sup> and 36 that can be compounded only after securing the permission of the court.<sup>639</sup>

**Enquiry and trial of persons of unsound mind:** The right to be informed of the accusation and an opportunity to consult his counsel is recognised under the Cr. P.C. The Cr. P.C., provides for postponement of the inquiry proceedings or trial of a person, who is incapable of defending himself due to unsoundness of mind.<sup>640</sup> The Code provides no time limit for which the postponement will subsist and the only safeguard against indefinite confinement is the obligation to send six monthly medical reports on

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<sup>629</sup> *Id*,sec260(2).

<sup>630</sup> *Id*,sec 261.

<sup>631</sup> *Id*,sec 262 (2)

<sup>632</sup> *Id*, sec 263

<sup>633</sup> *Id*, sec 264

<sup>634</sup> *Id*,sec 313

<sup>635</sup> *Id*, sec 313(1) (a).

<sup>636</sup> *Id*,sec 313(1) (b).

<sup>637</sup> *Id*, sec 313

<sup>638</sup> *Id*,sec 320(1)

<sup>639</sup> *Id*,sec 320(2)

the mental condition of the accused. This is demonstrated by *Veena Sethi v. State of Bihar*,<sup>641</sup> wherein it was unearthed from the jails of Bihar cases of individuals whose trials were postponed because they were incapable of defending themselves. Subsequent to postponement of their trials they were lodged in Hazari Bagh Central Jail wherein they were detained for periods ranging from 19 to 37 years. This detention continued even after the accused regained sanity. During the resumption of the trial, the accused is released on surety of safe conduct. However, if the case is not fit for the grant of bail / if no surety for the release of the accused is offered, the accused is detained in safe custody which can be that of a jail or a mental hospital.

**Appeal, revision and reference:**<sup>642</sup> A criminal appeal lies to the high court under the Code, in a limited number of cases. Any person convicted on a trial held by a sessions judge or an additional sessions judge or on a trial held by any other court in which sentence of imprisonment of more than 7 years has been passed, an appeal lies to the high court.<sup>643</sup> There are certain statutory limitations on the right of appeal.<sup>644</sup> The state government can, in any case of conviction on a trial held by any court other than a high court, direct the public prosecutor to present an appeal to the high court against the sentence on the ground of its inadequacy and, in certain cases this power of appealing to the high court can be exercised by the central government.<sup>645</sup> Subject to certain limitations, government may direct the public prosecutor to present an appeal to the high court from an original or appellate order of acquittal passed by any court other than the high court.<sup>646</sup> This appeal cannot be entertained except with the leave of the high court<sup>647</sup>. In case of an order of acquittal passed in any case instituted upon complaint, the complainant can present an appeal against acquittal to the high court after obtaining

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<sup>640</sup> *Id*, sec 342

<sup>641</sup> AIR 1983 SC 339, see also, "Acquitted after 32 Years" *Indian Express* (Delhi ed., May 1, 1996) (Sixty five year old A.N. Ghosh, was arrested in 1964 on charges of murdering his brother. A city court in Calcutta found him to be insane and asked the jail authorities to keep him for treatment. Though Ghosh regained his mental balance after some time, he continued to languish behind the bars awaiting trial. He was released from the Presidency jail in Calcutta after his case was taken by a local NGO, Antara.)

<sup>642</sup> Law Commission of India, *delay & arrears in high courts & other appellate courts* 57 (79<sup>th</sup> Report, 1979).

<sup>643</sup> Cr. P.C. sec 374(2).

<sup>644</sup> *Id*, sec 375 and 376.

<sup>645</sup> Cr. P.C., sec 377.

<sup>646</sup> *Id*, sec 378 Code of Criminal Procedure, 1973.

<sup>647</sup> *Id*, sec 378(3).

special leave of the high court.<sup>648</sup>

There has been a tendency in some courts of dismissing first appeals against judgments of conviction *in limini* with a one word order – dismissed. Many such orders are reversed on further appeal and the cases are remanded.<sup>649</sup> So far as the courts of session and of the chief judicial magistrate are concerned, there already exists a provision in the code that such courts, while dismissing an appeal summarily, should record reasons for doing so.<sup>650</sup>

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<sup>648</sup> *Id*, sec 378(4).

<sup>649</sup> *Supra* note 295.

<sup>650</sup> Cr. P.C., sec 384(3).

**STATISTICS:**

**ALL INDIA CRIME STATISTICS – 1997:**

<b>IPC CRIMES</b>	17.19 lakhs
<b>SLL CRIMES</b>	46.91 lakhs
<b>COGNIZABLE CRIMES REPORTED IN ONE MINUTE</b>	12
<b>SLL CRIMES REPORTED IN ONE MINUTE</b>	9
<b>IPC CRIMES REPORTED IN ONE MINUTE</b>	3
<b>RATE OF INVESTIGATION OF IPC CRIMES</b>	75.8%
<b>RATE OF CHARGE-SHEET IN IPC CRIMES</b>	77.5%

<b>STATE/UT</b>	<b>Incidence of IPC crimes</b>	<b>Disposal rate by police</b>	<b>Charge-sheet rate by police</b>	<b>Disposal rate by courts</b>	<b>Conviction rate</b>	<b>Policemen per lakh of population</b>
<b>Andhra Pradesh</b>	114,963	70.6	87.2	31.6	37.3	101
<b>Arunachal Pradesh</b>	1,876	71.8	59.9	8.1	46.6	394
<b>Assam</b>	36,562	49.4	55.4	22.6	22.6	193
<b>Bihar</b>	117,401	63.2	73.8	18.2	26.2	88
<b>Goa</b>	2,395	74.7	47.9	19.3	23.9	182
<b>Gujarat</b>	117,823	86.5	78.3	13.1	35.0	138
<b>Haryana</b>	31,981	79.2	79.9	19.0	37.0	162
<b>Himachal Pradesh</b>	10,242	80.5	85.4	15.9	29.1	188
<b>Jammu &amp; Kashmir</b>	17,192	77.7	63.5	20.9	36.0	446
<b>Karnataka</b>	114,863	78.0	75.5	31.0	15.8	117
<b>Kerala</b>	92,523	79.6	89.8	27.1	32.5	114
<b>Madhya pradesh</b>	205,026	95.4	81.3	19.1	47.0	110
<b>Maharashtra</b>	185,122	78.5	71.7	10.7	18.1	155
<b>Manipur</b>	2,974	40.2	4.6	43.2	0.1	614
<b>Meghalaya</b>	1,978	50.4	53.8	8.8	56.5	333
<b>Mizoram</b>	2,120	30.2	84.1	15.3	93.9	783
<b>Nagaland</b>	1,477	38.2	46.8	9.3	82.8	1,102
<b>Orissal</b>	51,359	81.4	85.9	17.1	11.8	99

<b>Punjab</b>	15,069	67.3	83.8	23.5	37.0	297
<b>Rajasthan</b>	165,469	95.9	80.6	22.0	50.8	117
<b>Sikkim</b>	623	70.1	64.3	37.4	73.1	604
<b>Tamil Nadu</b>	141,867	75.5	91.1	42.8	64.0	124
<b>Tripura</b>	3,444	69.5	54.2	25.9	10.1	354
<b>Uttar pradesh</b>	152,779	85.1	71.0	21.1	51.4	103
<b>West Bengal</b>	65,481	66.0	54.1	6.8	21.9	106
<b>A&amp;N Islands</b>	477	59.2	78.0	9.3	64.7	725
<b>Chandigarh</b>	2,181	71.6	47.9	25.4	61.1	497
<b>D&amp;N Haveli</b>	347	80.5	67.3	15.8	27.3	128
<b>Daman &amp;Diu</b>	267	64.9	66.6	22.5	19.8	256
<b>Delhi</b>	60,883	32.1	73.4	8.7	38.0	392
<b>Lakshwadeep</b>	26	54.7	23.4	33.3	33.3	511
<b>Pondicherry</b>	2,530	97.7	87.4	65.5	92.6	NA

### **DISPOSAL OF IPC CRIME CASES BY POLICE DURING 1961-1991,1995-1997**

<b>YEAR</b>	<b>TOTAL NUMBER OF CASES FOR INVESTIGATION</b>	<b>NUMBER OF CASES INVESTIGATED</b>			
		<b>FOUND False/ Non Cognizable /Mistake of Fact</b>	<b>CHARGE- SHEETED</b>	<b>TOTAL TRUE (cases charge- sheeted ,final y reported)</b>	<b>TOTAL (Excluding cases where investigaton was refused)</b>
1961	6,96,155	54,128	2,85,059	5,32,151	5,86,279
1971	11,38,588	83,663	4,28,382	8,10,691	8,94,354
1981	16,92,060	1,27,655	7,40,881	12,08,339	13,35,994
1991	20,75,718	1,18,626	10,91,579	15,30,861	16,49,487
1995	21,53,628	1,14,072	11,68,251	15,72,137	16,86,209
1996	21,66,618	1,,12,560	12,04,346	15,65,893	16,78,453
1997	21,95,848	1,16,616	11,98,529	15,47,050	16,63,666

**DISPOSAL OF IPC CRIME CASES BY COURTS (ALL INDIA)  
DURING 1961-1991,1995-1997**

YEAR	TOTAL NUMBER OF CASES FOR TRIAL (Including pending cases)	NUMBER OF CASES	
		TRIED (Excluding withdrawn/ compounded cases)	CONVICTED
1961	800784	242592	157318
1971	943394	301869	187072
1981	2111791	505412	265531
1991	3964610	667340	319157
1995	5042744	763944	321609
1996	5297662	843588	318965
1997	5461004	879928	336421

**Special and Local Laws (SLL) CASES PENDING TRIAL IN 1997**

CRIME HEAD	PENDING TRIAL
Arms Act	222187
NDPS Act	81462
Gambling Act	195252
Excise Act	294946
Prohibition Act	1432447
Explosives & explosive substance Act	18904
TADA	2500
Essential Commodities Act	24834
<b>TOTAL</b>	<b>3625072</b>

### **3. DOMESTIC PROCEDURE**

Domestic procedure regulates the service rights of any employee and prescribes procedure to be followed in disciplinary proceedings taken against employee while in service. The Central Civil Services (Classification, Control and Appeal) Rules, 1965;

Central Civil Services (Conduct) Rules, 1964; The All India Services (Conduct) Rules, 1968; The All India Services (Discipline and Appeal) Rules, 1969; The Administrative Tribunal Act 1985; The Railway Servants (Discipline and Appeal) Rules, 1968; the Bar Council of India Rules, 1962; etc. are some of the statutory instruments elaborating the procedure to be followed by domestic tribunals constituted to conduct disciplinary proceedings.

The domestic tribunals in the country, though not regular courts of law, adjudicate upon the rights of persons *vis-a-vis* the rights of the employers or other bodies deriving authority from the statute. These are eminently non-judicial bodies, like - statutory bodies or corporations, clubs, universities, unions, departments, officers of the government and so on.<sup>651</sup>

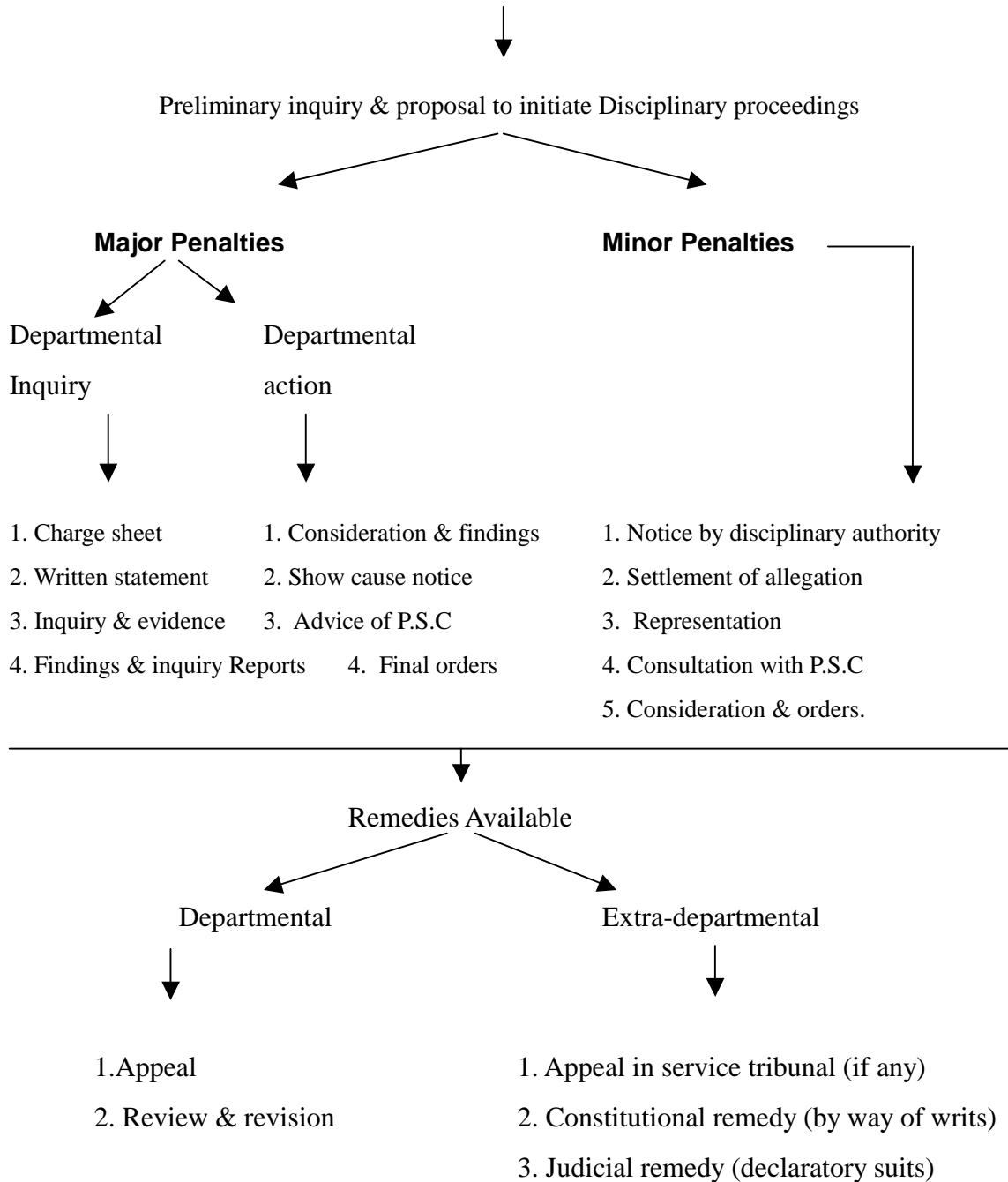
The many service rules, which are now in force, contain greater details of procedure for conducting these inquiries. The graphic description of the procedure given in the Central Civil Services (Classification, Control and Appeal) Rules, 1965 is illustrated below with the help of following chart:

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<sup>651</sup> *Dipa Pal v. University of Calcutta* AIR 1952 Cal 594.



## Complaint or information of accusation



A domestic inquiry is generally considered as a managerial function and the Enquiry officer is more often a man from the establishment. Ordinarily he combines the role of a presenting–cum–prosecuting officer, an enquiry officer, a judge and prosecutor rolled into one. It is held in the establishment office or part of it. Witnesses are generally employees of the employer who directs an inquiry into misconduct.

The law governing the method as well as safeguards to be followed in departmental proceeding against the civil servants in India is contained in Articles 309 to 313 of the Constitution of India. Article 309 provides for recruitment and conditions of service of persons serving the union or a state. Article 310 for the terms of office of such persons. Article 311 for the mode of dismissal, removal or reduction in rank of persons employed in civil capacities under the union or under a state and, Article 312 deals with All India services.

These provisions do not govern public servants who are not civil servants. But they are provided with the same protection under Articles 14, 16 and 21 of the Constitution and by rules provided by the Department of Public Undertakings or similar authorities which are similar to the rules governing civil servants. Public companies, private companies and other employers apply rules framed by them which conform to the principles of natural justice as interpreted by the judiciary and / or as required by standing orders and other regulations framed in accordance with the prevailing laws governing the relationship between the employers and employees, such as Industrial Tribunal Act, the Labour Laws and other Labour welfare regulations. Even amongst the civil servants, who are governed by Article 311 of the constitution, separate rules have been framed under Article 309 and 313 viz., the rules governing the All India Services, the Foreign Service, the Railway Service, the Civil services and civil posts under the states. The basic structure of these procedural rules is the same whether they are intended for the inquiries to be held against a civil servant, a public servant, who is not a civil servant and employees of public sector undertakings, local or other authorities, which are considered as instrumentality of the state under Article 12 of Constitution, and the employees in private sector. The domestic procedure followed by any body whether government or private has to conform to the constitutional requirement of Articles 14, 19 and 311 of Constitution of India and to the principles of natural justice.

**The source of power vested in employer:** The source of the power of associations like clubs, lodges, universities, bar associations, medical professionals, etc. to expel their members is the contract on the basis of which they become members.<sup>652</sup> This contractual origin of the rule of expulsion has its corollary in the cognate rule that in expelling a member the conditions laid down in the rule must be strictly complied

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<sup>652</sup> Restated by Lord Morton in *Bonsor v. Musician's Union* 1956 AC 104.

with.<sup>653</sup> The doctrine of strict compliance with rules implies that every minute deviation from the rules, whether substantial or not, would render the act of such body void depends upon the nature of the rule infringed; whether a rule is mandatory or directory depends upon each rule, the purpose for which it is made and the setting in which it appears.<sup>654</sup> A person who joins an association governed by rules, under which he may be expelled, has no legal right of redress if he is expelled according to the rules.<sup>655</sup>

**Application of Evidence Act:** If domestic tribunals follow the principles of natural justice then they are not bound to follow procedure, which prevails in a court of law.<sup>656</sup>

**Domestic procedure followed in case of public servants:**

Public servants are entitled to protection against arbitrary action by the employer and consequently no major penalties as defined above in the chart, can be imposed, except after providing reasonable opportunity to defend themselves. Employees in the private sector are also protected from arbitrate action in view of the principles of natural justice. The Inquiry system is, an important part of Indian Domestic procedure. The findings of the Inquiring authority do not result in a decision of the case, but they are subject to the acceptance or rejection by the Disciplinary Authority.<sup>657</sup> A departmental proceeding is just one continuous proceeding though there are two stages in it. The first being coming to a conclusion on the evidence as to whether the charges levelled are established or not and the second stage, is reached only if charges are established in earlier stage, and deals with the action to be taken against the concerned government servant.<sup>658</sup> The procedure does not require that the authority empowered to dismiss or remove an official should itself initiate or conduct the inquiry proceedings. The only right guaranteed is that the employee cannot be removed by an authority lower in rank to the appointing authority by virtue of constitutional provision.<sup>659</sup> The Supreme Court of India, in as early as in 1979 gave directions regarding the procedure to be

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<sup>653</sup> *Maclean v. Workers' Union* 1929-Ch 602 623

<sup>654</sup> *T.P Daver v. Lodge Victoria* AIR 1963 SC 1144.

<sup>655</sup> *Supra* note 306.

<sup>656</sup> *Union of India v. T.R.Varma* AIR 1957 SC 882

<sup>657</sup> A.S.Ramachandra Rao, *Law Relating to Departmental Enquiries for Government Servants*, 20 (Universal, 1997).

<sup>658</sup> *Bachittar Singh v. State of Punjab* AIR 1963 SC 395.

<sup>659</sup> Constitution of India, Art 311(2), see also *State of Madhya Pradesh v. Shardul Singh* (1970) 3 SCR 302.

adopted in domestic proceedings and it held that “you must act on relevant considerations properly before you and not on rumour or hearsay assertions or inscrutable hunch.”<sup>660</sup> In the departmental proceedings scrupulous care has to be exercised by the enquiring authority, the disciplinary authority, and the Appellate/ Revisional authorities.<sup>661</sup>

**Domestic tribunals are mainly of two kinds:**

1. Government disciplinary authorities such as Central Administrative Tribunals(CAT), state administrative tribunals, etc.
2. Non-government disciplinary authorities, which includes Heads of Departments and Heads of offices.

**THE GIST OF RULES FORMULATED BY ALL INDIA SERVICES (DISCIPLINE AND APPEAL) RULES, 1969**

A member of the service in respect of, or against, whom an investigation, inquiry or trial relating to a criminal charge is pending may, at the discretion of the Government may be placed under suspension until the termination of all proceedings relating to that charge, if the charge is connected with his position as a member of the Service or is likely to embarrass him in the discharge of his duties or involves moral turpitude.<sup>662</sup> As soon as a member of the service is placed under suspension, this fact is communicated to the concerned department telegraphically and a detailed report of the case may be furnished within 15 days as provided for in the rules.<sup>663</sup> An officer (under suspension) is entitled to receive subsistence allowance at the rate equal to leave salary, which he would have drawn while on leave on half average pay or half pay as the case may be, for the first twelve months. If after the expiry of that period, the competent authority does not find it necessary to increase or decrease the amount, the officer (under suspension) will continue to receive the same amount of subsistence allowance and it is

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<sup>660</sup> *D. Nataraja Mudaliar v. State Transport Authority, Madras AIR 1979 SC 114.*

<sup>661</sup> *Ibid.*

<sup>662</sup> Rule 3(b) (3) Ins. by DP & AR Notification No. 6/9/72-AIS (III), dated 8th July, 1975 i.e. O.S.R. 872 dated 19th July, 1975, All India Services ( Discipline and Appeal ) Rules, 1969.

<sup>663</sup> D.P. & A.R.letter No. 11018/1/76-AIS (III), daled I1th February, 1976

not necessary to issue fresh orders in this regard.<sup>664</sup> If member of the service who has been dismissed, removed or compulsorily retired has been reinstated as a result of appeal or review, he will have to be paid full pay and allowance to which he would have been entitled had he not been dismissed, removed, compulsorily retired or suspended<sup>665</sup> and he is reinstated without holding any further inquiry, his period of absence from duty is regularised subject to the directions, of the Court.<sup>666</sup>

The penalties imposed on a member of the service on his being found guilty are of two types:

**(1) Minor penalties and (2) Major penalties.**<sup>667</sup>

**Minor Penalties:** censure, withholding of promotions, recovery from pay of the whole, or part of any pecuniary loss caused to Government / a company / association / body of individuals, by negligence / breach of orders, withholding of increments of pay.

**Major Penalties:** reduction to a lower grade in the time scale of pay for a specified period.<sup>668</sup>

No order imposing any of the major penalties is made except after an inquiry held in the manner provided. Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any Imputation of misconduct or misbehaviour against a member of the service, it appoints an authority to inquire into the truth thereof. Where a Board is appointed as the inquiring authority it has to consist of not less than two senior officers. However, at least one member of such a Board has to be an officer of the service to which the member of the service belongs.

Before conducting an inquiry against a member of the service, the disciplinary authority draws -

(i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge;

(ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge, that contains a statement of all relevant facts including any admission or confession made by the member of the Service ; a list of documents by which, and a list of witnesses by whom the articles of charge are proposed to be

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<sup>664</sup> GOI, MHA, letter No 7/8/62-A1S (111), dated 5th May, 1972.

<sup>665</sup> All India Services ( Discipline and Appeal ) Rules, 1969, comment to Rule 8

<sup>666</sup> *Id*, Rule 5-A.

<sup>667</sup> *Id*, Rule 6.

sustained.<sup>669</sup>

The disciplinary authority is competent to appoint a Government servant or legal practitioner, to be known as the "Presenting Officer" to present on its behalf the case in support of the articles of charge.<sup>670</sup>

The disciplinary authority forwards to the inquiring authority a copy of the articles of charge and the statement of imputations of misconduct or misbehaviour, a copy of the written statement of defence if any, submitted by the member of the service, a copy of the statements of witness, evidence proving the delivery of the documents to the member of the service and a copy of the order appointing the Presenting Officer. The member of the Service has to appear in person before the inquiring authority at any time prescribed by the inquiring authority.<sup>671</sup>

The member of the Service can take the assistance of any other Government servant to present the case on his behalf but may not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner, or the disciplinary authority, having regard to the circumstances of the case, so permits,<sup>672</sup> However, the member of the Service shall not take the assistance of any other Government servant who has two or more pending disciplinary cases on hand in which he has to give assistance.<sup>673</sup>

If the member of the Service who has not admitted any of the articles of charge in his written statement of defence or has not submitted any written statement of defence appears, before the inquiring authority, such- authority shall ask him whether he is guilty or has any defence to make and if he pleads guilty to any of the article of Charge, the inquiring authority shall record the plea, sign the record and obtain the signature of the member of the service thereon. The inquiring authority has to return a finding of guilt in respect of those articles of charge to which the member of the Service pleads guilty. The inquiring authority, if the member of the Service fails to appear within the specified time refuses /omits to plead, require the Presenting Officer to produce the evidence by which he proposes to prove the articles of charge and shall adjourn the case to a later date, not

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<sup>668</sup> *Id*, Part III, Rule 6.

<sup>669</sup> *Id*, Rule 8 part IV.

<sup>670</sup> *Id*, Rule 8(5) (c)

<sup>671</sup> *Id*, Rule 10.

<sup>672</sup> *Id*, Rule 10(a).

<sup>673</sup> *Id*, note to Rule 10(a)

exceeding 30 days.<sup>674</sup> On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by, or on behalf of, the disciplinary authority. The witness shall be examined by, or on behalf of, the Presenting Officer and may be cross-examined by, or on behalf of, the member of the Service. The Presenting Officer shall be entitled to re-examine, the witnesses on any points, on which they have been cross-examined, but not on any new matter, without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses as it thinks fit.<sup>675</sup> The inquiring authority if necessary allows the Presenting Officer to produce evidence not included in the list given to the member of the Service or call for new evidence or recall and re-examine any witness and, in such case, the member of the Service shall be entitled to have, if he demands, a copy of the list of further evidence proposed to be produced and an adjournment of the inquiry for three clear days before the production of such new evidence, exclusive of the day of adjournment and the day to which the inquiry is adjourned. The inquiring authority shall give to the member of the service an opportunity of inspecting such documents before they are taken on the record. The inquiring authority may also allow the member of the Service to produce new evidence, if it is of opinion that the production of such evidence is necessary in the interests of justice.<sup>676</sup> Such evidence may be called for only when there is an inherent lacuna or defect in the evidence, which has been produced originally.<sup>677</sup> The witness produced by the member of the Service shall then be examined and shall be liable to cross-examination, re-examination and examination by the inquiring authority according to the provisions applicable to the witness for the disciplinary authority.<sup>678</sup> The inquiring authority may, after the member of the service closes his case, and shall, if the member of the Service has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the member of the service to explain any circumstances appearing in the evidence against him.<sup>679</sup> The inquiring authority may, after the completion or the producing of evidence, hear the Presenting Officer, if any,

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<sup>674</sup> *Id*, Rule 12

<sup>675</sup> *Id*, Rule 15

<sup>676</sup> *Id*, Rule 16

<sup>677</sup> *Id*, note to sec. 16.

<sup>678</sup> *Id*, Rule 18.

<sup>679</sup> *Id*, Rule 19.

appointed and the member or the Service or permit them to file written briefs or their respective cases, if they so desire.<sup>680</sup> If the member of the Service, to whom a copy of the articles of charge has been delivered, does not submit the written statement of defence on or before the date specified for the purpose or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of this rule, the inquiring authority may hold the inquiry *ex parte*.<sup>681</sup>

The Central Government may act on the evidence on record or may, if it is of the opinion that further examination of any of the witnesses is necessary in the interest of justice, recall the witness and examine, cross-examine and re-examine such witnesses. If the Central Government do not find justification for imposing one of the penalties specified in CIs. (vii) to (ix) of rule 6 in a case referred to it by a State Government then it shall refer it back to the State Government.<sup>682</sup> After the conclusion of the inquiry, a report shall be prepared and it shall contain- the articles of charge and the statement of imputations of misconduct or misbehaviour; the defence of the member of the Service in respect of each article of charge; an assessment of the evidence in respect of each article of charge; and the findings on each article of charge and the reasons there for.<sup>683</sup>

The inquiring authority has to forward to the disciplinary authority the records of inquiry, which shall include, the report prepared by it , the written statement of defence, if any, submitted by the member of the Service; the oral and documentary evidence produced in the course of the inquiry; written briefs, if any, filed by the Presenting Officer or the member of the Service or both during the course of the inquiry ; and the orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry.<sup>684</sup>

**Action on the inquiry report:-**

(1) The disciplinary authority may, for reasons to be recorded by it in writing, remit the case to inquiring authority for further inquiry and report, and the inquiring authority shall thereupon proceed to hold further inquiry according to the provisions.

(2) The disciplinary authority, if it disagrees -with the findings of the inquiring

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<sup>680</sup> *Id*, Rule 20.

<sup>681</sup> *Id*, Rule 21.

<sup>682</sup> *Id*, Rule 22(b).

<sup>683</sup> *Id*, Rule 24(I).

<sup>684</sup> *Id*,Rule 24(2), see also *K.C. Venkata Reddy v. Union or India*, 1987 (4) S.L.R. 46 -70 (CAT.); *Badrinath v. Union or India*, 1987 (1) S.L.R. 218- 235.



authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.

(3) If the disciplinary authority, having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties should be imposed on the member of the Service, it shall<sup>685</sup>, make an order imposing such penalty.

(4) and it shall not be necessary to give the member of the Service any opportunity of making representation on the penalty proposed to be imposed.

### **The role of Indian judiciary in reforming laws of domestic inquiry procedure:**

All the disciplinary matters are essentially matters for the domestic tribunal to decide. If the domestic tribunal does not exceed its jurisdiction and acts honestly and in good faith, the courts do not intervene, even if the penalty is severe.<sup>686</sup> However, courts in India do give such interpretation to provisions relating to disciplinary matters and inquiries conducted on behalf of the employer so that no room is left for the exploitation.<sup>687</sup>

The Supreme Court of India continues to show extensive judicial creativity in interpreting statutory provisions relating to domestic procedure to be followed while taking any disciplinary action. It has been found that in majority of cases the court gives meaning to provisions as well as lays down guidelines to be followed and which are binding under the Constitution of the country to help weaker party. Below are given some examples:

In *Associated Cements Companies v. Workmen*<sup>688</sup> the apex court held that it is not fair in domestic inquiries against industrial employees that at the very commencement of the inquiry, the employee is closely cross-examined even before any evidence is laid against him. The fact that most of the industrial employees in the country are ignorant about their rights, illiterate and poor weighted with the court in laying down such proposition.

In *Mysore Steel Works v. Jitendra Chandra Kar*,<sup>689</sup> *Bharat Sugar Mills Ltd. V.*

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<sup>685</sup> *Id*, notwithsatnding anything contained in Rule 10

<sup>686</sup> *Lennox Arhtur Patrick O'Reilly v. Cyril Cuthbert Gittens* AIR 1949 PC 313.

<sup>687</sup> *D.R.Venkatachalam v. Deputy Transport Commissioner* AIR 1977 SC 842.

<sup>688</sup> (1963) 2 LLJ 396 .

<sup>689</sup> (1971) 1 LLJ 543.

*Jai Singh*<sup>690</sup> and *Swatantra Bharat Mills v. Ratan Lal*<sup>691</sup> the Supreme Court made it imperative to hold the departmental inquiry against the workers who are under suspension as early as possible without unnecessary delay.

In the case of *Calcutta Dock Labour Board v. Jaffar Imam*,<sup>692</sup> the apex court made it amply clear that even if workmen were terrorized and not willing to give evidence in a departmental inquiry, management is still required to hold a domestic inquiry. Any attempt to short circuit the procedure based on considerations of natural justice is discouraged if the rule of law is to prevail, and in dealing with the question of livelihood and liberty of a citizen, considerations of expediency, have no relevance.

In *D.K.Yadav v. J.M.A.Industries Ltd.*<sup>693</sup> the apex court laid down the right of private employer to terminate service of employee under the standing order without holding any domestic inquiry or affording any opportunity to the workman, as violative of constitutional provisions and also the principles of natural justice. It therefore ordered relief of reinstatement with 50 percent back wages.

#### **4. JUDICIAL REVIEW OF ADMINISTRATIVE & LEGISLATIVE ACTS**

The judicial review as a preserving instrument of constitutionalism extends to three principal areas: **(i)** it preserves the constitutional balance of authority between the central and state governments in a federal system; **(ii)** it maintains and preserves the balance between the executive power and the legislative power on the same governmental level; **(iii)** it defends the fundamental human freedoms and thus acts as the great sentinel of the cherished values of life.<sup>694</sup>

The three organs of the state Legislature, Executive and Judiciary are subordinate to the Constitution of India. The courts have been enabled to determine the validity of statutes passed by Parliament or state legislatures by examining whether they are in accordance with the constitution. The source of judicial review is the existence of

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<sup>690</sup> (1961) 2 LLJ 644

<sup>691</sup> AIR 1961 SC 1156

<sup>692</sup> AIR 1966 SC 282

<sup>693</sup> (1993) 3 SCC 259

fundamental law, namely, the constitution of India. It seeks to review administrative action and therefore it is called judicial review of administrative action. If, on the other hand, it is directed against a statute of legislature in the nature of rules, regulations, byelaws, etc., then because it seeks to determine validity of legislation, it is called as judicial review of legislation. Basically, judicial review is the assertion of the rule of law as controlling state action.<sup>695</sup> The judicial review thus, is the measuring rod of the extent of the invalidity of the statute. The courts have no power to invalidate a statute. The process of judicial review is a mere discharge of function than the exercise of a power.<sup>696</sup>

**(i) Judicial Review of Legislative Action:**

Judicial review is accorded a more positive and direct status in the constitution of India. It is explicitly provided for in the context of federal structure with defined and delimited competence of central and state legislatures. It is based on the assumption that the laws made by the competent legislatures must be in accordance with the detailed scheme of distribution of powers embodied in the seventh schedule to the constitution. Further the incorporation of a chapter on fundamental rights, with guaranteed provisions for their enforcement through the Supreme Court and high courts invites judicial review most decisively.<sup>697</sup> In exercising power of judicial review the courts are not only giving effect to the real will of the people of India but also abiding by the sacred pledge of upholding the constitution and the laws.<sup>698</sup>

It is indeed very difficult to make a correct appraisal of the course and development of judicial review and its specific directions and tendencies, during last five decades in the history of nation. No generalization in this direction is possible. The foundation of the Indian Supreme Court's review power was laid firmly and well in the case of *A.K. Gopalan v. State of Madras*.<sup>699</sup> This case not only elucidated the principle of judicial review and the basis on which it would rest in future, but at the same time evolved a set of guidelines which would eventually set the pattern for the fundamentals of judicial approach to the Indian Constitution. Generally two tendencies apparent from

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<sup>694</sup> Ray, *Judicial Review & Fundamental Rights*, 24 (Eastern Law House, 1974).

<sup>695</sup> V.S.Deshpande, *Judicial Review of Legislation*, 18 (Eastern Book Co., 1975).

<sup>696</sup> *Id*, 116

<sup>697</sup> Constitution of India, Art 32 and 226.

<sup>698</sup> *Supra* note 347. p 67

<sup>699</sup> AIR 1950 SC 27

the behavior of judiciary in India are:

- (i) a halting, over cautious and tradition bound attitude of the judiciary in restricting its own freedom of action by sticking to the express phraseology of the Constitution, and construing the law in favour of the legislature; and
- (ii) a big, bold and almost revolutionary effort to resurrect judicial review by expanding its horizon beyond a literal interpretation of the constitution.<sup>700</sup>

The court showed its impartiality and independence when in *Prem Chand v. Excise Commissioner*<sup>701</sup> wherein, it declared its own rule requiring deposit of security before moving writ petition as *ultra vires*. In the interest of justice Supreme Court of India discounted the argument that it is bound by its earlier decisions.<sup>702</sup> The Supreme Court refused to bind by technical hurdles like the finality of facts, etc. and has used its powers to undo injustice.<sup>703</sup> In *State of West Bengal v. Anwar Ali*,<sup>704</sup> the Supreme Court of India declared the West Bengal Special Courts Act of 1950 as invalid and violative of Article 14 of the Constitution for it conferred wide discretion on the government.

**Position of the judiciary and its review power vis-à-vis legislative predominance:** - The Constitution endows the judiciary with the power of declaring a law as unconstitutional if that is beyond the competence of the legislature according to the distribution of powers provided by the constitution / is in contravention of the fundamental rights. Though basic power of review by the judiciary was recognized, significant restrictions were placed on such a power especially in relation to fundamental rights concerning freedom, liberty and property.<sup>705</sup> From time to time, Indian Supreme Court has tried to assert its power of judicial review vigorously by relying on the scheme and pattern of the Constitution of India. The exercise of the power of judicial review by the Supreme Court of India is hedged in by several limitations. Most of the limitations are specifically incorporated in the constitution itself. These are

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<sup>700</sup> T.S.Rama Rao, "Judicial Review in India: A Retrospect" 121 *Year Book of Legal Studies*, (1957).

<sup>701</sup> AIR 1963 SC 966

<sup>702</sup> *Dhakeshwari Cotton Mills v. Commissioner of Income Tax*, 1955 S.C.W.R. 941

<sup>703</sup> *Ibid.*

<sup>704</sup> AIR 1952 SC 75.

<sup>705</sup> *Supra* note 350, Art 71.

as depicted below:

**(a) Constitutional limitations:** The Constitution of India itself excludes many acts from the purview of judicial review. There are numerous provisions of the constitution categorically precluding judicial review. For example, Article 77(2) relating to the conduct of the business of the government of India prohibits calling of validity of an order or instrument made and executed in the name of the President. Article 74(2) instructs courts not to question regarding any aid and advice given by the Council of Ministers to the President. Articles 122(1) and 212(1) preclude courts from inquiring into the proceedings of the Parliament and state legislature respectively. Also the exercise of powers vested in an officer or member of a legislature for regulating procedure or maintaining order is not subject to the jurisdiction of any court.<sup>706</sup> Court's power of judicial review is expressly limited in cases of powers, privileges of the House of Parliament and state legislatures.<sup>707</sup> No Member of Parliament is liable to any proceedings in any court of law in respect of anything said or any vote given by him in Parliament and no person is liable in respect of the publication by or under the authority of either house of Parliament of any report, paper, votes or proceedings.<sup>708</sup> Judicial review does not apply in the case of nomination of a limited number of persons to the Upper House of the Parliament and the state legislatures.<sup>709</sup> The President and the governors are immune from answering in any court for acts done in their official capacities.<sup>710</sup>

**(b) Intrinsic limitations** are grounded on the fundamental or commonly accepted norms of Anglo-Saxon jurisprudence, such as (i) judges do not legislate but only decide cases presented before them; (ii) every question is not fit for judicial determination, hence every political and non-justifiable question are excluded from the purview of judicial scrutiny; (iii) it is business of the court to apply the proper law to the facts of each case and never to make a new rule for the future or to change existing law; (iv) court has to decide any question only on a proper pleading and on facts on the record.

**(c) Self imposed limitations:** The Supreme Court of India has adopted in the

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<sup>706</sup> *Id*, Art 122(2) and 212(2).

<sup>707</sup> *Id*, Art 105, 194.

<sup>708</sup> *Id*, Art 105(2).

<sup>709</sup> *Id*, Art 80, 172.

last 50 years, following limitations in its task of deciding constitutionality of laws:

- (1) The court does not entertain a challenge to constitutionality of law unless the constitutional question involved is substantial.<sup>711</sup>
- (2) The constitutionality is determined as the last resort, when it is absolutely necessary / unavoidable for the ascertainment of the rights of the parties before it and not when it is capable of being decided on other grounds.<sup>712</sup>
- (3) The court will adjudicate within the narrow limits of controversy and will not embark upon an unnecessary wide or general inquiry.<sup>713</sup>
- (4) There is presumption of constitutionality of legislation.<sup>714</sup>
- (5) Most of the time court follows doctrine of *stare decisis*.<sup>715</sup>
- (6) The supreme court has also imposed on itself another guiding principle of interpretation, known as doctrine of severability, which means that if invalid part or section of a statute can be separated from the other parts, then the latter remains, whereas only invalid part is treated as void.<sup>716</sup>

**(ii) Judicial Review of Administrative Action:**

The Preamble of the constitution with an emphasis on social justice and the directive principles of the state policy envisage the establishment of a welfare state in India. The attempts of governments, to achieve this ideal have resulted in an immense increase in legislative output and the expansion of administrative action into fields previously uncovered. This in turn has given rise to the problem of controlling state action to ensure that the rights of the individual are safeguarded against arbitrariness on the part of administration.<sup>717</sup> The constitutional provisions have sanctioned the operation of administrative adjudicatory authorities, which have been set up under the specific

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<sup>710</sup> *Id*, Art 361.

<sup>711</sup> *State of Jammu & Kashmir v. Ganga Singh* AIR 1960 SC 356

<sup>712</sup> *State of Bihar v. Hurdut Mills* AIR 1960 SC 378

<sup>713</sup> *Attibari Tea Co. v. State of Assam* AIR 1961 SC 232

<sup>714</sup> *Chiranjitlal v. Union of India*, AIR 1950 SC 41; see also, *Ramakrishna Dalmia v. Justice Tendulkar* AIR 1958 SC 538;

<sup>715</sup> H.M.Seervai, *The Position of the Judiciary under the Constitution of India*, viii (University of Bombay, 1970).

<sup>716</sup> *R.M.D.C. v. Union of India*, AIR 1957 SC 538

<sup>717</sup> Marcose A.T, *Judicial Control of Administrative Action in India*, 1 (Madras Law Journal 1956).

statutes.<sup>718</sup> The post independence years have seen the emergence of a plethora of administrative tribunals, boards, agencies widely differing from one another in constitution, powers, procedure, some approximating closely to the courts in the strict sense of the term, others bearing a close resemblance to informal committees / interviewing boards.<sup>719</sup>

The constitution makers clearly envisaged a welfare state with unprecedented extension of the administrative process. They also drew up a list of fundamental rights and provided appropriate machinery for their enforcement. They incorporated in the constitution, which vested the courts with broad powers of review. Article 32 empowers the Supreme Court to issue writs, directions and orders for the enforcement of fundamental rights. Article 136 confers plenary powers upon the Supreme Court to entertain appeals. Article 227 gives the high court power of superintendence over all inferior courts and tribunals. The most important provision for the purpose of judicial review is, however, Article 226, which empowers the high court to issue to any person / authority including government, directions, orders, writs. Thus the constitution has provided the necessary safeguards against the extended powers of administration.<sup>720</sup>

**Position of the judiciary and its review power vis-à-vis Administrative Action:** The Supreme Court of India has evolved new tools, devised new procedures, invented new reliefs to provide redress. In view of new dimensions of public law evolved by the Supreme Court in the areas of accountability and liability of public servants, it is now imperative for public authorities and public functionaries to avoid misfeasance in public office, ensure that exercise of discretion is not malafide and discharge public duties in accordance with the procedure prescribed. They are also accountable individually for their actions when the courts call for judicial review.<sup>721</sup> In administrative actions the grounds for review for judiciary are: abuse of discretion, violation of fundamental rights, ultra vires, violation of natural justice, etc. In *Bhuth Nath v. State of West Bengal*,<sup>722</sup> made clear that it has control over the discretion exercised by the administrative authority. It held that it could strike down any discretion

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<sup>718</sup> *Administrative Process under the Essential Commodities Act, 1955* (Indian Law Institute Studies No. 9 1964).

<sup>719</sup> Fazal, *Judicial Control of Administrative Action in India & Pakistan* 8 (Oxford, 1969).

<sup>720</sup> *Id.* 21

<sup>721</sup> Jaytilak Guha Roy, "Judicial Creativity: Its Expanding Horizons", *The Administrator*, XLII,49,(April-June 1997).

that is colourable, fanciful and unrelated to the object of the Act. In the case of objective type of discretion the court can examine the existence of the facts contemplated in the statute and satisfaction of the authority in arriving the decision. In *Kraipak's case*<sup>723</sup> the principles of natural justice have been held to be applicable to administrative tribunals determining or affecting civil rights of nationals. Judicial review is directed against administrative / legislative action as being without jurisdiction / unconstitutional. But it is necessary that the main attack must be against the competence of the state/ public authorities.<sup>724</sup> In *Jagannath v. State of Orissa*<sup>725</sup>, authority while detaining had acted mechanically, without applying its mind on the provisions that authorised such detention. The Supreme Court of India held act of administration as abuse of the discretion and quashed its order. In *Dwaraka Prasad v. State of U.P.*,<sup>726</sup> clause 3(2) of U.P. Coal Control Order, 1953, was struck down by the Supreme Court of India, as it empowered the licensing authority to exempt any person / class of persons from taking out a license and gave absolute power to him to grant / refuse to grant, renew / refuse to renew, suspend, revoke, cancel / modify any license without any rules, principles / directions to guide.

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<sup>722</sup> AIR 1974 SC 806

<sup>723</sup> *A.K. Karaipak v. UOI*(1969) 1 S.C.W.R 1122

<sup>724</sup> *Supra* note 348, 14

<sup>725</sup> AIR 1966 SC 1140

<sup>726</sup> AIR 1954 SC 224