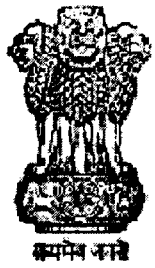

LAW COMMISSION OF INDIA

ONE HUNDRED AND FIFTIETH REPORT

ON

SUGGESTING SOME AMENDMENTS TO THE CODE OF CIVIL PROCEDURE (ACT V OF 1908)

1994

K. N. SINGH
(EX-CHIEF JUSTICE OF INDIA)

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA
SHASTRI BHAWAN
NEW DELHI-110001
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Res. 3019465

D.O. No. 6(3)/(27)/94-LC(LS)

May, 9, 1994

Dear Prime Minister,

I have great pleasure in forwarding herewith the 150th Report of the Law Commission of India on the subject "Suggesting some Amendments to the Code of Civil Procedure (Act No.V of 1908)". This is the 7th Report after the constitution of the 13th Law Commission.

2. The subject was taken up by the Law Commission *suo motu* with a view to remove anomalies in the Code of Civil Procedure, 1908. It is pertinent to state that the provision in Order I Rule 10(5) C.P.C. are inequitable and liable to be misused to delay the proceedings because it enables recalcitrant third parties to resort to all kinds of devices to avoid service of summons on them till the period of limitation expires. The Commission is of the opinion that the anomalies observed in this report should not be allowed to continue.

3. The Commission trusts that the recommendations will go a long way to subserve the interests of speedy and effective administration of justice.

With warm regards,

Yours Sincerely,

(K. N. SINGH)

Hon'ble Shri P.V. Narasimha Rao,
Prime Minister and Minister for
Law, Justice & Company Affairs,
New Delhi.

Encl : As above.

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CHAPTER I

GENERAL INTRODUCTION

1.1 The 1908 Code—The law relating to the procedure to be followed in suits and other proceedings in civil courts was codified in the early years of this century by the Code of Civil Procedure (Act V of 1908). The adequacy of these rules of procedure, their compatibility with the new order of things ushered in as a result of the independence of the country and the promulgation of the Constitution of India in 1950, and the important question as to how far the Code had been able to stand the test of time and the strain of litigation explosion consequent on the changes in the social, political and legal atmosphere in the country have been considered in detail by the Law Commission in several reports.

1.2 The 14th Report—The First Law Commission (1955—1958) appointed after the coming into force of the Constitution devoted its attention to certain major enactments and important legal topics which cried for reform. In its 14th Report, presented on 16-9-58, the Commission addressed itself to the major problems facing judicial administration in India and made important recommendations for its reforms. Various aspects and intricacies of reform in the procedure in courts, including civil courts, were discussed in this report.

1.3 The 27th Report—The 27th Report of the Commission made in December, 1964 examined at length the historical background as well as the scheme of the 1908 Code. While broadly of the view that the code had been well-thought out and formulated, it found, after reviewing the mass of case law that had accumulated during the half century of its life as well as the reforms made in other countries (particularly in England in 1962), that certain changes were required in some of the provisions of the Code and recommendations for amendment were accordingly made. A Bill to implement the reports of the Law Commission was duly introduced in Parliament but the Bill lapsed.

1.4 The 54th Report—When the question of reintroduction of the Bill arose, the Government of India considered it proper to request the Law Commission to examine the Code afresh. This was in 1972, it was thus the 54th Report of the Commission made in February, 1973 that examined the issues in all their perspectives and ramifications and suggested a comprehensive re-codification of the procedural law to better subserve the interests of speedy and effective administration of justice. It examined the Code from the angle of—

(a) minimising costs;

(b) avoiding delays in litigation; and

(c) the revised terms of reference of the Commission, the most important of such terms being the implementation of the directive principles in the Constitution.

The Commission, however, did not consider it necessary to deal again with the matters dealt with in the earlier report except where they disagreed with its recommendations or considered it necessary to reiterate and emphasise particular recommendations therein. Each and every provision of the Code and each and every general aspect that needed consideration was meticulously considered and a substantial report running to 347 printed pages was presented to Government in February, 1973.

1.5 The 55th & 56th Reports—The 54th Report was supplemented shortly thereafter by the next two reports of the Commission on certain isolated issues. The 54th Report (4-5-73) dealt with the question of the rate of interest on decrees and on costs under Ss. 34 and 35 of the 1908 Code. The 55th Reprot (also presented on 4-5-73) deals with the issue of notice of suit mandatorily required under certain statutory provisions.

1.6 The C.P.C. Amendment Act, 1976—It is a matter of great satisfaction that the recommendations made by the Law Commission on the Code of Civil Procedure[1] were substantially accepted and implemented by the 1976 Amendment of the Code.

1.7 Subsequent Developments—Aboute twenty years have passed by since the large scale amendment of the Code in 1976. The quantum of the litigation in the Civil Courts, the incidence of delay and costs and other difficulties incidental to litigation have Increased enormously during this period. An extreme view has been sometimes ventilated that the currently existing Anglo Saxon pattern of the Code embodying the adversary system of procedure cannot survive these onslaughts, and is soon bound to collapse. It is, however, generally felt that even if the present system is to continue, some radical reforms are needed in the procedural Code if it is to satisfactorily meet the requirements of litigants and provide an efficient and speedy system of justice. The task of suggesting the necessary reforms for this purpose, however, is an enormous one. It will need, as the recommendations in the 54th Report did, to be preceded by the elicitation of public and expert opinion on the various steps needed to usher in substantial changes in this sphere. That, no doubt is a task to which the Law Commission will have to address itself soon. That exercise may be taken up by the Commission at some later stage, but meanwhile this short report is submitted to meet an urgent need for amendment of Order 1 Rule 10 and Order XXII Rule (3) of the CPC.

1.8 Need for interim amendments—The possibility of an elaborate examination for the overhading of the Code altogether shoul not, be feel halt the process of effecting therein glaring changes found to be necessary in the existing framework. A consolidated codification cannot in the nature of things, be the only cure to all defects found in enactment. It is inevitable that, side by side with the process of considering periodical wholesale changes in any existing statute, one has also to consider setting right anomalies and drafting defects that come to light from time to time. Thus, soon after presenting its 54th Report of the Code as a whole, the Commission found it necessary to submit short reports (55th & 56th) on two minor but allied topics to suggest certain changes. Again quite recently, in 1991, the Commission found it necessary to recommend amendments in Order V Rule 19A and Order XXI, Rule 9(2) of the CPC, *vide* its (139th and 140th Report) suggesting such amendments. Again, in 1992, the 144th Report of the Commission has suggested amendments to a number of provisions in the Code with a view to settling conflicts of judicial opinion that had arisen in regard to these provisions. Reports of the Law Commission have also been presented outlining the need to carry out certain amendments to isolated provisions of the Code of Criminal Procedure[2]. This process of suggesting necessary amendments to a Statute is a continuous and inevitable one. It has recently come to the notice of the Commission that there are certain other provisions of the Code of the Civil Procedure which also require amendments in the light of the subsequent amendments in connected statutes. There is no point in deferring consideration of such amendments untill there are a good number of them or until a comprehensive amendment of the stature in question is taken up. It is for this reason that the Commission has considered it necessary to present this report *suo motu* though it is confined only to two provisions in the Code of Civil Procedure, 1908.

CHAPTER 2

BACKGROUND OF THIS REPORT

2.1 The Code of Civil Procedure (Act V of 1908) (hereinafter referred to as "the Code") was enacted in 1908. Consequently, where its provisions dealt with certain points of limitation, they referred to the relevant provisions of the Indian Limitation Act, XV of 1877 (hereinfter referred to as 'the 1877 Act'). However, though the 1877 Act was replaced by the Indian Limitation Act, Act IX of 1908 (hereinafter referred to as 'the 1908 Act') and then by the Limitation Act, 36 of 1963 (hereinafter referred to as 'the 1963 Act') and the Code was also extensively amended by Act 104 of 1976, references to the Indian Limitation Act, 1877 in the Code have been left untouched. This *per se* is not of much consequence-except that the references to a statute long since repealed should have been rectified at least at the time when a spate of amendments to the Code were carried out in 1976—as S.8 of the General Clauses Act provides for suh a situation. However, the references to the Indian Limitation Act, 1877 appear only at two places in the Code. It now transpires that these provisions require amendment in the light of later legislation as explained below.

2.2 In another provision in the Code [Order XXI, rule 92(2)] a time limit was prescribed on the basis of a period of limitation prescribed in the1877 Act. The Limitation Act, 1963 had amended the latter, but this was not taken note of to make a consequential amendment in the period prescribed in the Code. This created an anomaly and gave a rise to a need for an amendment to rule 92(2) of Order XXI of the Code in the light of a later amendment to the 1963 Act. This was the subject matter of the 140th Report of the Commission.

2.3 The other two anomalies mentioned in para 2.1 earlier, however, survive. The Commission is of opinion that these anomalies should not be allowed to continue and that simultaneoulsy with any action that may be taken with reference to the 139th, 140th and 141st Reports of the Commission, action should be taken to amend these provisions as well. Hence this report.

CHAPTER 3

ORDER I, RULE 10(5)

3.1 The first reference to the 1877 Act occurs in Order I, Rule 10 of the Code. Order I of the Code deals with "Parties to Suits" and rule 10 thereof deals with certain situations in which necessity to add or substitute fresh parties in a suit already filed arises. The rule reads thus:

> "10(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks fit.
>
> (2) The Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added.
>
> (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.
>
> (4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary and amended copies of the summons, and of the plaint shall be served on the new defendant and if the court thinks fit, on the original defendant.
>
> (5) *Subject to the provisions of the Indian Limitation Act,* 1877 *Section* 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."
>
> (emphasis supplied)

3.2 The intention of sub-rule (5) above apparently is that where a fresh party is ordered to be added as defendant in a suit, such party should be treated as having become a party only on the date he is served with summons in the suit. This deeming fiction is created primarily, if not solely, to preserve the plea of limitation that could be raised by such party and to enable the third party to raise the plea on the footing that the suit, so far as he is concerned, should be deemed to have been instituted only on the date on which he has been served with summons in the suit.

3.3 The language used in the sub-rule, however, suffers from two infirmities. In the first place, it says that "*the proceedings*" as against such party "*shall be deemed to have begun only* on the service of *summons*" instead of using words "the suit shall be deemed to have been instituted" only on such service. These words do not offer adequate protection to the third party in regard to its plea of limitation which has to be based on the "date of institution" of the plaint and not on when "the proceedings are deemed to have begun" against a defendant. They are not effective enough to change the date of institution of the suit so far as the freshly added defendant is concerned.

3.4 Secondly, the language appears to be some what repugnant to the relevent provisions of the Limitation Act, Viz., Section 22 of the 1877 Act, which was in operation when the code was enacted and of the 1908 Act which replaced it. The provisions were materially the same and read thus :

"S. 22(1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him be deemed to have been instituted when he was so made a party".

The effect of this provision was to postpone the date of institution of a suit, qua a newly added defendant, to the date on which he is made party, thus protecting his right to raise appropriate pleas of limitation. Sub-rule (5) of rule10 clearyl, intended to postpone this date still further and thus alter the impact of S.22 in such cases and to provide in effect, that the suit as against such party, be deemed to have been instituted on the date of service of the summons on him and that the provisions of Limitation Act were to apply as so modified.

3.5 On the language of sub-rule (2) of rule 10, the person added as a defendant under that sub-rule is either one who ought to have been added as a defendant even initially or one whose presence before the Court is found necessary for a complete and effective adjudication of all the questions involved in the suit. Whether the omission to join him as defendant in the suit originally was due to a fault on the part of the plaintiff which is sought to be cured on his application or by the Court *suo motu* or whether the necessity to add him is felt by the plaintiff or the Court which proceeds to do so, the newly added defendant may not have been responsible for the delay in the initiation of the suit (or proceedings) against him and should not therefore, be deprived of any plea of limitation that may be available to him consequent on the delay between the original date of institution of the suit and the date on which he is added as a party. This was the object of S. 22 (1) of the 1877 and 1908 Acts and rule 10 (5) of Order I of the Code Intended that this benefit should be further liberalised and made available till the date on which the newly added defendant receives the summons in the suiit, after he is added as a party defendant. But then the sub-rule should have read:

Notwithstanding any provision contained in the Indian Limitation Act, 1877, the suit shall, as regards any person added as defendant under sub-rule (2), shall be deemed to have been Instituted only on the date on which he is served with summons in the suit".

The words "subject to the provisions of the Indian Limitation Act, 1877" are totally inapposite to the context. Those words only bring in the 1877 Act and since that Act had already provided for deeming the suit to have been initiated on the date when the new defendant is added, the words of rule 10(5) added nothing to the contents thereof by making the rule subject to Section 22.

3.6 The purpose of rule 10(5) has, further, become more pointless after the enactment of the Limitation Act, 1963. S. 21 of the 1963 Act corresponds to S. 22 of the 1877 and 1908 Act but its whole effect is changed by the insertion of a proviso. S. 21 reads:

21. Effect of substituting or adding new plaintiff or defendant: (1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit shall be deemed to have been instituted on any earlier date".

3.7 The effect of S. 8 of the General Clauses Act, 1897 is to compel one to read the reference to S.22 of the 1877 Act in rule 10 (5) as a reference to its successor provision viz. S.21 of the 1963 Act. Reading S. 21 of the 1963 Act and rule 10 (5) of Order I of the Code together it will be seen that they are pulling in opposite directions althought rule 10 (5) is expressed to be subject to S. 21. The object of S. 21 is to treat the suilts against a new defendant as having been filed on the date on which he is made a party (with a disetion to the Court to treat it as having been filed even earlier) On the other hand, the purpose of rule 10 (5) is to treat the suit as having been filed only on the date

on which the newdefendant is served with summons. In this context there is no sense in making rule 10 (5) subject to S 21; its provision should, if at all, be operative not withstanding of anything contained in the Limitation Act, as already pointed out.

8 The real question that arises, therefore, is whether the refinement attempted in rule 10 (5) of treating the date of service of summons as the date when "the proceedings are deemed to have begun" against the new defendant is at all worthwhile and whether it will not be much simpler and more equitable to omit rule 10 (5) altogether and allow the provisions of S. 21 of the 1963 Act, which are intended to cover precisely the very situation provided for in order I rule 10 to operate directly without any change. The answer to this question, we think has to be in the affirmative. Interests of justice and equity no doubt require that a third party should not be prejudiced in putting forward the pleas of limitation available to it as a consequence of the failure, omission or neglect to implead it earlier in the suit. It is quite just to provide, as S. 21 of the 1963 Act does, that, in such cases as regards the newly added defendant, the date or institution of the suit shall be the date on which it is added as a party. The proviso empowering the Court to relax this rule is also necessary safeguard to protect a bona fide plaintiff. On the other hand, the provision in rule 10 (5) postpones the date of institution to the date of service summons on the newly added party. There is thus anomaly in the two provisions as, while under Sec. 21 of 1963 Act suit shall be deemed to be instituted against the newly added defendant on the date he is added as a party, under Rule 10 (5), the suit shall be deemed to be instituted against such party not on the date he is added as party but on a later date, viz. the date on summons are served on him. This is illogical because in principle limitation should be computed with reference to the point of time when the plantiff has taken steps for initiating legal proceeding against the defendant in question and should not be made dependant on a later event. There is no need to postpone the institution of the suit beyond the date provided in S. 21 of the 1963 Act. The provision in rule 10 (5) is also inequitable, and liable to be misused to delay the proceedings because it will enable recalcitrant third parties to resort to all kinds of devices to avoid service of summons on them till the period of limitation expires.

3.9 For the above reasons, it is clear that the necessity for rule 10 (5) does not survive. It is therefore, recommended that sub-rule (5) of rule 10 of Order I of the Code of Civil Procedure, 198

CHAPTER 4

ORDER XXII, RULE 9 (3)

4.1 Order XXII deals with the steps to be taken in a suit when death, marriage and insolvency of parites supervene after a suit is instituted. We are concerned here only with a case of death of the plaintiff in an action. Rules 1 to 6 provide that the death of a party shall not cause a suit to abate if the right to sue survives and that the suit may be allowed to be continued by the legal representatives of the deceased party on an application being made by them for being substituted in the suit in the place of the deceased party. Rule 3 (2) provides, however, that the suit shall abate if legal representatives of a deceased plaintiff fail to make such an application to be brought on record within the period specified therefor—which is 90 days from the date of death[3].

4.2 Rule 9 provides an escape hatch from this situation. It reads (in so far as is relevant for our present purpose):

> "9 (1). Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
>
> (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.
>
> (3) The provisions of S. 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2)."

4.3 The rule is clear and unambiguous. An application to set aside the abatement had to be filed within a period of 60 days from the date of the abatement (Art. 171 of the Schedule to the 1877 and 1908 Acts; Art. 121 of the Schedule to the 1963 Act). A relaxation of this rigid rule was, however, necessary since there could be circumstances which prevented such an application being filed in time. S. 5 of the Indian Limitation Act, 1877 empowered the Court, on sufficient cause being shown, to condone the delay in filing of "any appeal or application for review of judgment or any application to which this section is made applicable for the time being in force" and admit the same after the prescribed period. In view of the underlined words, it became necessary to add sub-rule (3) specifically making the provisions of S. 5 of the 1877 Act applicable to applications made under Order XXII Rule 9(2) of the Code.

4.4 As mentioned earlier, the 1877 Act was replaced by the 1908 Act which in turn was replaced by the 1963 Act. While S. 5 of the 1908 Act substantially repeated the language of S. 5 of the 1877 Act, the corresponding section 5 of the 1963 Act which has to be read in to Order XXII rule 9 (3) of the Code by virtue of S. 8 of the General Clauses Act has been worded differently. It reads (in so far as it is relevant here):

> "5. Extension of prescribed period in certain cases: Any appeal or any application other than an application under any provisions of Order XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

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The change in language is significant. The power of condonation of delay available under S. 5 of the 1963 Act has become available automatically in respect of all applications made to a Court under the Code (with the one exception mentioned therein) and it is no longer necessary, for such power to be exercised, that the provisions of S. 5 should find an explicit reference in the relevant statute.

4.5 The need for sub-rule (3) of Order XXII, rule 9 therefore, no longer survives. It is true that its presence is only superfluous. However, in order that such a specific provision in respect of only one of the innumerable categories of applications that can be made under the Code and its obsolete reference to the 1877 Act may not create anomalies or apprehensions, and in view of its patent superfluity, it is advisable that sub-rule (3) of rule 9 of Order XXII of the Code be omitted. We, therefore, recommend accordingly.

CHAPTER 5

RECOMMENDATIONS

5.1 For the reasons discussed above, we recommend the following amendments in the Code of Civil Procedure (Act V of 1908):—

(a) Sub-rule (5) of rule 10 of Order I of the Code be omitted;

(b) Sub-rule (3) of rule 9 of Order XXII of the Code be omitted.

5.2 We also reiterate the recommendations contained in our 139th and 140th Reports suggesting amendments to Order V, Rule 19A and Order XXI Rule 92 (2) of the Code.

(K. N. SINGH)
CHAIRMAN

(S. RANGANATHAN)
MEMBER

(D. N. SANDANSHIV)
MEMBER

(P. M. BAKSHI)
MEMBER (PART TIME)

(M. MARCUS)
MEMBER (PART TIME)

(CH. PRABHAKARA RAO)
MEMBER SECRETARY

FOOT NOTES

1. And also on the Code of Criminal Procedure.

2. The 48th, 102nd, 113th, 132nd, 135th, 141st and 142nd reports of the Commission, likewise, suggested isolated amendments to supplement the recommendations for a major overhauling of the Code of Criminal Procedure on the basis of which the law of Criminal Procedure had been recodified in 1973.

3. Vide: Article 175A of the Schedule to the 1877 Act, Art. 176 of the Schedule to the 1908 Act and Art. 120 of the Schedule to the 1963 Act.

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