AMENDMENTS IN PROCEDURAL LAW — A CRITICAL APPRAISAL

*Amarjit Singh Chandhiok**

Procedure is often described as the hand maiden of justice, but, in reality this seems to be a half truth. Many a times procedural law becomes much more important than the substantive law which defines rights and duties. The statement that substantive law resides in the interstices of procedure reflects this reality. The Law Commission observed :

> The efficacy of substantive laws to a large extent depends upon the quality of the procedural laws. Unless the procedure is simple, expeditious and inexpensive, the substantive laws, however good, are bound to fail in their purpose and object.[1]

The Code of Civil Procedure is a product of well thought-out efforts and experimentation extending over more than half a century; the earlier codes being of 1859, 1877 and 1882. The Code has stood the test of time. It has, on the whole, worked satisfactorily and smoothly and has evoked the admiration of many distinguished jurists. In the controversies raging now over the amendments brought out in the Civil Procedure Code by Amendments Act of 1999, the main contention of the supporters of the amendments is that they are meant to remove delays in dispensing justice and to clear arrears in the courts. But no one has come forward to state how exactly the amendments are going to help advance the cause of justice or bring down the backlog of cases.

The law is meant to promote and render justice and it must take into consideration the social conditions, capability of people and their economic status. In India, almost half of the population is illiterate. They lack legal awareness. Availability of legal expertise is also inadequate and they hardly have means to get justice.

Right to judicial review is a fundamental right and is the basic structure of our Constitution. Curtailment or denial of judicial review is against the object of our Constitution and the establishment of courts. One cannot

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* Senior Advocate.

1. Twenty Seventh Report, Law Commission of India

reduce the arrears in courts merely by dismissing cases. Bringing in amendments to do their 'dismissal' can never help the cause of justice. It will only lead to miscarriage thereof. When a person comes to court, he comes with a grievance which he expects the court to understand and appreciate. The amendments now made in the Code of Civil Procedure will only serve to scuttle the course of justice and to make it appear that there are no arrears. If arrears are the only criterion and not justice, then one may conclude that there is no need for courts. Courts are the only panacea for the ills which have crept into the whole system. If this bastion is also attacked and powers are taken away, then it will be a case of denial of justice.

EXAMINATION OF A FEW OF THE AMENDMENTS

Let us examine some of the amendments which have been brought in and drastically affect the common man and also the amendments which curtail the powers of the courts.

Section 100A of the amended Code of Civil Procedure is one of the most draconian sections; it states that there will be no further appeal against the order of a single judge in respect of any writ, direction or order issued or made under Article 226 or 227 of the Constitution of India. A decision or order will also include an interlocutory order. In many cases, applications are made for an injunction or a stay. If a single judge either refuses or allows the application, the affected party will have no right of appeal. How can a common person afford the luxury of going to the Supreme Court against every order of a single judge? This will make litigation expensive.

The Supreme Court is already overworked. After many years, it has been able to reduce some of its arrears. If it has to be burdened further by appeals against the orders of the single judge, even in interlocutory matters, the arrears are bound to increase. This also affects the common man and he may be compelled to accept an adverse order passed by the single Judge unless he or she can afford to go to the Supreme Court. Moreover, introduction of section 100A of Code of Civil Procedure is contrary to the explanation of section 141 of the Code of Civil Procedure which excludes proceedings under Article 226 of the Constitution.

Amendment to section 102 prevents any second appeal from being filed when the amount of the value of the subject matter of the suit does not exceed Rs. 25,000. Both logic and rationale is missing in this amendment. Second Appeals themselves are not automatically admitted, they are admitted only if they involve substantial questions of law. The subject matter of the original suit may be below Rs. 25,000, yet it may involve substantial questions of law which require determination. Therefore, it is not the amount of money

that matters; it is the legal question that requires consideration which is important. Moreover, the amendments go directly against the poorer sections of the society, for, those who are filing suit less than Rs. 25,000 would normally belong to economically weaker sections of the society.

Prior to amendments, section 115 of the Code of Civil Procedure provided that High Court will interfere if there is failure of justice or any irretrievable injustice likely to be caused. This provision has now been eliminated. Further, a proviso states that the High Court will not vary or reverse any order, or any order deciding an issue in the course of suit or any other proceedings except where the order, if it has been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Notwithstanding, therefore, that even interlocutory orders may cost a person irretrievable injustice, he will have no recourse to the revisional jurisdiction of the High Court.

On the point being made about delay in the disposal of civil proceedings, one finds it often stated that the defendant should not be allowed to protract the proceedings by repeatedly asking for time to file his/her/its written statement.

It is indeed unfortunate that the framers of the amendments should be taken in by these mischievous contentions. If one takes the Limitation Act, 1963, one finds in the Schedule as many as 113 articles providing different periods for a plaintiff to institute proceedings at his/her or its choice. According to these articles, a plaintiff has one year term for instituting 14 types of civil suits[2], a two year term for 3 types of civil suits[3] and a three year term for 88 types of suits[4], not to mention about a few other cases where limitation extends to 12 years and in 2 cases even to 30 years.

When a defendant gets summons from a court, more time would have elapsed. Should he have not enough time to recollect the facts which may have even escaped his memory, visualise a situation which had happened a long time earlier and collect his documents before meeting his legal adviser? Any system which will give a plaintiff such a long time to decide whether he is going to take his opponent before court and deny even adequate time to a defendant to prepare his defence cannot justify itself. One cannot always take the view that a plaintiff's case alone is true and a defendant's is false. Granted the need for avoidance of delay in a court of law, one should not approach the problem with blinkered eyes. It is significant for me to refer in

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2. THE LIMITATION ACT, 1963, Articles 72 to 81, 98 to 100.
3. *Ibid*, Articles 82 to 84.
4. *Ibid*, Articles 1 to 71, 84 to 95, 101-105.

this context another draconian section, viz. Section 148 as now amended. It makes inroads into the powers of the courts. It is stated that if any time, limit is fixed under the Code, the courts can only enlarge it by a period which does not exceed 30 days. Where is the need to put such a fetter on the right of the courts and to curtail its rights. The task must be and is well left with the courts and the parties to find a solution. How many actions are not thrown out by the courts as being unsubstantiated and how many defences are not overthrown for same reasons?

By amendment made in 1976 a proviso was added to Order 17 Rule 1(2) to the following effect: "The fact that the pleader of a party is engaged in another court shall not be ground for adjournment".

Under Order 5, Rule 9, it is permissible to serve summons by fax or email. It is not known how many people possess fax or e-mail facilities in our country where millions of people live below the poverty line. If the summons is not served as contemplated under this provision, the plaint shall be rejected under the provision of Order 7, Rule 11 (f). This is a draconian law, which will once again make a mockery of the system of justice.

Order 6 Rule 5 has been omitted. This provision has allowed further and better statements of particulars in any matter stated in any pleadings, upon such terms as may be just. This amendment would mean that no further or better particulars can be filed. There may be particulars that the party may come to know subsequently, and preventing him or her from filing any such particulars will defeat the cause of justice.

Order 6, Rule 17 has been omitted. This had provided for amendment of pleadings. The Supreme Court had repeatedly stated that this is a beneficial provision and it had even allowed amendments at the appellate stage. There may be amendments that may be necessitated due to change of circumstances or due to change of law or the discovery of certain facts subsequently. By shutting out amendments of pleadings, a grave injustice has been done to the common person.

Order 7, Rule 14 states that when a document is not filed with the plaint, it shall not be allowed to be received in evidence on behalf of the plaintiff at the hearing of the suit. This will obviously result in injustice.

Order 14, Rule 5 has been omitted. It dealt with the powers of the court to amend and strike out issues. One wonder what is the purpose that is sought to be achieved by deleting this clause. Certain issues may become meaningless and certain issues may have to be changed owing to change of circumstances. This once again deals a blow to the cause of justice. In fact, this amendment tends to impede the administration of justice by curtailment of powers of the courts.

Order 18 provides for evidence of witnesses of examination-in-chief being given by means of an affidavit. Sub-Rule 2 of Rule 4 provides that the recording of evidence, cross examination, re-examination and so on, shall be done orally by a commissioner to be appointed by the court from among a panel of commissioners prepared for the purpose. The provision, however, provides that in the interest of justice and for reasons to be recorded in writing, the court may direct that the evidence of any witness may be recorded in the court in the presence of and under the personal direction and superintendence of a judge. This strikes at the very root of the system of justice. The judge has not only to record the evidence but also has to observe the demeanour of the witness and rejects and/or disallows irrelevant questions. The commissioner has merely to record the evidence but he or she cannot mention anything about the demeanour of the witness or even disallow any question. Even the court finds it difficult to record evidence under certain circumstances and if the commissioner has to be appointed, it will only lead to applications being filed to set aside the evidence recorded on various grounds. Allegations will be made against the commissioner and objections will be filed. This will lead to an increase of arrears.

Rule 17A of Order 18 had provided that the court would permit the party to produce evidence at the later stage if the party satisfies the court that after the exercise of due diligence, any evidence was not within his or her knowledge or could not be produced by him or her at the time when the party is recording the evidence. This beneficial provision has also been removed and again it is not clear how it helps the cause of justice.

Order 39, Sub-Rule 2 relates to injunctions. It now states that the courts shall while granting a temporary injunction, direct the plaintiff to give security or otherwise as the court thinks fit. It is not known how this protects the common person's right. In the case of a poor person, it will be impossible for him or her to provide any security. If the injunction is granted and it has been obtained by the party by misleading the court, the court can always order exemplary costs.

The public is being conveyed an impression that a great service has been done to the procedural system by these amendments with an intent to bring down arrears and speedy trials. Actually, what has been done is against the course of justice. This would require national debate.