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DELIVERY OF 'CIVIL JUSTICE' AND JUDICIAL DISCRETION: A Critical Analysis of Use of Order I Rule 10 of CPC by the Civil Courts

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DELIVERY OF 'CIVIL JUSTICE' AND JUDICIAL DISCRETION: A Critical Analysis of Use of Order I Rule 10 of the CPC by Civil Courts

Jasper Vikas*

[Abstract: *Order I Rule 10 (OI R10) of the Civil Procedure Code, 1908 (CPC) plays a pivotal role in the comprehensive adjudication of civil disputes in India. This rule grants the Civil Judge discretionary power to add or subtract parties to the suit, a process that presents a significant challenge to civil justice. However, a lack of consistency and predictability in this process can lead to inconsistent outcomes within the Indian Civil Justice System. This type of judicial decision-making raises various concerns primarily about (i) the protection of the rights of the civil litigants (ii) the integrity of the civil proceedings and most importantly (iii) the effect on the 'equitable administration of justice'. This research is intended to contribute to the already-ongoing discourse on the role played by Civil Judges in administrating civil justice and analysing the impact of 'judicial discretion' on judicial outcomes. Firstly, the legislative intent behind the drafting of OI R10 of CPC will be explored to establish its foundational understanding in the present times. Secondly, various case laws will be analysed on OI R10 of CPC to examine the pattern of judicial interpretation and its impact on the delivery of civil justice. The focus would also be on exploring as to how, in varying contexts, Civil Judges exercise their judicial discretion and what weighs in their minds while passing such orders. Thirdly, theories of justice pertaining to fairness and legal pragmatism will be examined in light of the judicial discretion used by the Civil Judges to evaluate the present judicial practices and whether they align with the normative ideals of justice. Fourthly, to develop best practices, a comparative analysis would also be done with the common law jurisdictions which have analogous provisions as of India to analyse the Indian approach critically and, fifthly, a framework would be designed comprising guiding principles to standardise the judicial discretion under OI R10 of CPC to ensure, that it contributes towards the equitable administration of civil justice in India.*]

Keywords: *Code of Civil Procedure 1908, civil justice, judicial discretion, civil suit, dominus litus, managerial judges, etc.*

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I

Introduction

Civil Suits generally comprise those parties whose presence is necessary before the Civil Judge for the final resolution of their civil disputes by conclusive adjudication in a timely and fair manner. Order I Rule 10 of the Code of Civil Procedure 1908 (CPC) in this regard enables the Courts to add any party at any stage of the suit when, in its absence, it is not possible for the Court to adjudicate upon and settle all the issues. Similarly, the Court can also strike down the unnecessary parties. This can be done by the Court *suo moto* or on an application by a party to the proceedings. The legislative intent behind this provision is to bring on record, about the same subject matter, all the parties in a dispute, so that the dispute can be decided in their presence and without any protraction. Often, this also leads to avoidance of multiplicity of suits, though that is not the objective of this provision.[1] But, many a times, due to initial lapse in the non-addition or deletion of the relevant parties, the suit takes a longer route to civil trial and also adds a considerable cost to the pocket of the parties which then also has the tendency to derail the path of justice. It is the plaintiff who decides the parties to the suit against whom he wants to litigate, but it is the Civil Judge who exercises the final discretion regarding the addition and deletion of the parties. However, the unbridled judicial discretion used by the Civil Judge, either *suo moto* or based on an independent application, can lead to decisions that sometimes frustrate the pursuit of justice. This can cause grave injustice to the parties involved in litigation since the addition and deletion of necessary or proper parties may either derail the suit itself, ultimately leading it to nowhere or even create unintended bottlenecks to civil justice. It is, therefore, necessary to first examine the impleadment law as enshrined under OI R10 of CPC regarding the addition and deletion of the parties to analyse the judicial checks on the power of the Civil Court while deciding such an application under OI R10, CPC so that a necessary balance between 'procedural fairness' and delivery of the 'substantive civil justice' can be achieved. For Jack Jacob, there is a notable shift from 'civil procedure' to 'civil justice' because of its public dimension, as the right of action is a public right and public interest is born as soon as the civil proceedings commence. After that the State controls the suit through CPC.[2]

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[1] *See Anil Kumar* v. *Shivnath*, (1995) 3 S.C.C. 147.

[2] Refer Jack Jacob, THE FABRIC OF ENGLISH CIVIL JUSTICE 41 (1987).

Civil Judge: An Umpire, Interventionist or an Impartial Arbitrator?

Now, the problem is that people expect the Civil Judge to behave like an 'Umpire'[3], whereas the Civil Judge starts dominating the proceedings, many times as an interventionist.[4] Justice Spence of the Canada Court, in *Bell et al.*[5] case observed that the trial court judge must act as an 'impartial arbitrator' and must not play the role of the advisor of the parties. The Judge must not act like a machine.[6] Rather, according to Chief Justice C P Meredith, it is the duty of the Judge to see both the regularity and the propriety in all things.[7] Parties are always expected to actively participate in the civil proceedings and therefore, from time to time, they move various types of interlocutory applications and one such application is under OI R10 of CPC 1908. The problem with civil justice is that it is party-driven, especially prior to the 1999 and 2002 amendments to the CPC and therefore, many times, it lacks due diligence. For example, several adjournments etc. in a suit affect its efficiency. The problem with this party-run civil process is that tactical considerations generally influence it.[8] The amendments to the CPC were effectuated in 1999 and 2002 so that Civil Judges could control the outer boundaries of the civil proceedings. It is the cost and delay, which affect civil justice system, the most[9]. Eventually, by addressing the issues of judicial discretion under OI R10 of CPC, the problem of cost and delay has also been addressed, at least to some extent, as the addition of unnecessary parties always increases the cost of litigation and as a result, drags the civil trial for an extended period. OI R10 (1) of the CPC 1908, applies in the cases related to the addition of parties as plaintiffs only,[10] where the suit mistakenly or sometimes due to overlook, is filed in the name of wrong person or for that matter a wrong plaintiff or where it is also doubtful that whether the suit is filed in the name of the correct plaintiff, the Court by applying its discretion, at any stage of the suit, if finds that this error has occurred due to bonafide mistake of the party or it is necessary for the purpose of determining the real matter in the dispute, may order the substitution or the addition of the plaintiff.

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[3] Lord Denning in *Jones* v. *National Coal Board*, [1957] 2 Q.B. 55, 63 (U.K.), observed that the judge is not sitting in the court to be like an umpire, to answer the questions such as, 'How's that?', rather his object is to find out the truth and to deliver justice.

[4] *See Yuill* v. *Yuill*, [1945] P. 15 (C.A.) Justice Lord Denning while explaining the conduct of judges in the court proceedings, observed that they must not act like umpires.

[5] *Bell et al.* v. *Smith et al.*, (1968) S.C.R. 664, 673 (Can.).

[6] See Hugh W. Silverman Q.C., *The Trial Judge: Pilot, Participant or Umpire?* XI ALBERTA LAW REVIEW 43 (1973).

[7] *See Gage* v. *Reid*, (1917) 38 O.L.R. 521 (Can.).

[8] Refer Dominic De Saulles, *Reforming Civil Procedure: The Hardest Path 42 (2020).*

[9] Damien Byrne Hill and Maura McIntosh, *The Civil Procedure Rules Twenty Years On: The Practitioners Perspective* in THE CIVIL PROCEDURE RULES 20, 3 (Andrew Higgins (ed.) 2020).

[10] *Ramprasad* v. *Vijayakumar*, A.I.R. 1967 S.C. 278 (India).

Law of Impleadment of Parties in the Suit under OI R10 of CPC

A suit is instituted in the Civil Court by presenting a plaint and in any other prescribed manner[11]. But, before the institution of the suit, the plaintiff has to decide, whether the suit is to be filed in his name as a plaintiff only or if others can also be joined along with him as plaintiffs.[12] Similarly, the plaintiff is also free to decide against whom he has to file the suit to settle the issues or in other words, who will be the defendant/ defendants in the suit.[13] In many cases, after the filing of the suit, the parties come to know that due to some bonafide reasons, they erred in preparing the memo of parties and missed out certain proper or necessary parties[14] to the suit, for which they later file an application under OI R10(2) of CPC before the concerned Court for adding such parties. After the filing of the suit, it is no more the right of the parties to add or strike off the parties on their own, rather from this stage onwards, it is the judicial discretion of the Court, which will decide whether the application to add or delete the parties is to be allowed to settle the dispute once and forever against all the parties in matters in controversy and also in the interest of justice. The Court has judicial discretion to add or delete the parties at any stage of the suit. But, the question here is, whether the Civil Court's power here is extensive and unbridled or is it subject to some judicial limitations? We will examine this aspect in detail.

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[11] *See* Code of Civil Procedure, 1908 (hereinafter CPC, 1908) S. 26.

[12] CPC, 1908, O. 1, R. 10(1), clearly states that any person or persons with any right to relief arising from the same act or series of acts or transactions can join as the Plaintiff or Plaintiffs, jointly or severely, or in alternative. The provision further clarifies that any person or persons can also be joined as the Plaintiffs, where if they will file a separate suit, the common question of fact and the law would arise.

[13] According to CPC, 1908, O. 1, R. 10(3)(a), all parties against whom any alleged right to relief derives from the same act or series of acts or transactions may be joined as Defendants. Moreover, if separate lawsuits were filed against them, the same factual and legal issues would arise.

[14] The necessary party is a party without whom the relief claimed in the plaint cannot be adjudicated or granted. and no effective decree can be passed. And, if the Court has not impleaded the necessary party, the suit in every scenario is liable to be dismissed. Whereas the proper party is one whose presence would assist in the full adjudication of the dispute in the suit.

II

Applying the Doctrine of *Dominus Litus* and Civil Justice: Role of Judicial Discretion

The plaintiff is the *dominus litus*[15] in the suit. And, no one can compel a plaintiff to sue any person against whom he has no claim to make. But, if the pleadings of the plaintiff and the facts of the matter are such that for the final adjudication of the civil dispute, it is necessary to add a new plaintiff or defendant as a necessary or proper party, then in that case, the Court can ask the plaintiff to make such an amendment in the plaint and add such other necessary or proper parties also as original parties to the suit.[16] In *Jagannath Khanderao Kedar*[17] case, a suit for partition and separate possession was filed. A person who had entered into an agreement of sale with respect to suit property, much prior to filing of the said suit, filed an application for impleadment stating that he is a necessary party as he had an interest in property under the suit. The said application was allowed by the Trial Court, but the Bombay High Court reversed the Trial Court's order on the ground that the sale agreement, as per Section 54 of the Transfer of Property Act, 1882, (TPA 1882) does not create any interest in the property in question, unlike a Conveyance Deed. The Bombay High Court relied upon the principle of *dominus litus* and observed that the plaintiff is entitled to oppose the impleadment of third parties. In fact, the Supreme Court in *Gurmit Singh Bhatia,*[18] case, considered the fact that the submission made by the plaintiff, who is the *dominus litus* in the suit, that the third parties/subsequent purchasers who are claiming the title under the vendor of the plaintiff are the necessary parties, and therefore, their claim of impleadment can be considered, based on title acquired by them, even during the pendency of the suit. This means that the law as it stands today is that when the plaintiff himself submits the application of impleadment of the third parties, who can be the subsequent purchasers also of a property under consideration, the Civil Judge can use judicial discretion in favour of the plaintiff, as he is the *dominus litus*. This position is entirely different from the situation where the plaintiff opposes the impleadment

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[15] *Dominus litus* means 'Master of the Lawsuit' and it refers to the legal doctrine establishing as to who controls a lawsuit. However, there is a need to limit the application of the theory of Dominus Litus while impleading the parties because the duty of the Court finally is to adjudicate the dispute under consideration forever and against all the necessary and real parties. And, just because the Plaintiff has failed to implead the necessary party/ parties, does not mean that Court should also ignore it.

[16] *See Mohamed Hussain Gulam Ali Shariffi* v. *Corp of Greater Bombay*, (2020) 14 S.C.C. 392.

[17] *Jagannath Khanderao Kedar & Another* v. *Gopinath Bhmaji Kedar @ Gopinath Bhagwant Mohite & Others*, 2022 S.C.C. OnLine Bom 1228.

[18] *Gurmit Singh Bhatia* v. *Kiran Kant Robinson*, 2019 Mah L.J. OnLine (S.C.) 183.

application filed by any other party. As in that case, the Court can disallow the impleadment by using its judicial discretion.

Lis Pendens Purchasers, Impleadment Application, Dominus Litus and the Supreme Court: Use of Judicial discretion by the Civil Judge Under OI R10 and Cautioning the plaintiff for Opposing Impleadment

A civil suit in *Sudhamayee Pattnaik*[19], was filed for claiming declaration, permanent injunction and possession. During the pendency of the suit, the defendants sought the impleadment of certain third parties to whom land parcels of the property in question were sold by the plaintiffs. The Civil Judge allowed the impleadment application by observing that the said parties are *lis pendens* purchasers and are thus, proper parties. The said order was passed in order to avoid multiplicity of litigation (which, though, is not the main objective of OI R10, CPC). The said impleadment order was upheld by the High Court. Subsequently, an appeal was filed before the Supreme Court. Keeping in mind, the opposition of the plaintiffs against the impleadment, the Supreme Court emphasised on the principle of *dominus litus* and held that impleadment of any party cannot be done contrary to the wishes of the plaintiff except in a case where the Court *suo motu* directs addition of any party to a Court proceeding. Though in the facts of this case, the Supreme Court also felt that the non-impleadment of the subsequent purchasers shall be at the risk of the plaintiffs since there was a counterclaim raised by the defendants for declaration of their rights in the property in question and the said fact may not be adjudicated in the absence of the parties whose impleadment was being opposed. Thus, it can be said that impleadment of parties can even be relevant as per the facts of a particular case and without which just and fair determination of rights may not be even possible and therefore, the Civil Judge has to take caution, every time an impleadment application is preferred. He is not supposed to act mechanically in disposing of the application by adding or deleting the parties but has to deliver a reasoned order based on the facts of each case and as per the judicial principles settled by the Apex Court. In *M. James,*[20] the Court dismissed the revision application filed for the impleadment as proper or necessary party at the time of final decree proceedings as the proposed party was a *pendente lite* purchaser and had no other role to play. However, if the person is able to show a fair semblance of title, he can certainly prefer the impleadment application.[21] Thus, in order to ascertain as to whether a party is required to be impleaded in a legal proceeding, one has to analyse the facts of the case in hand in detail.

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[19] *Sudhamayee Pattnaik* v. *Bibhu Prasad Sahoo and Others*, 2022 S.C.C. OnLine S.C. 1234.

[20] *M. James* v. *Sulochana Amma*, 2024 S.C.C. OnLine Mad 4031.

[21] *Sumtibai* v. *Paras Finance Co. Regd. Partnership Firm Beawer (Raj.)*, (2007) 10 S.C.C. 82, 87.

Civil Judge and OI R10: Applying Judicial Discretion

But, many a times, the applications for impleadment of the parties filed under OI R10(2) of CPC are decided by the Civil Judges in a manner detrimental to the life of the suit, thereby causing grave injustice to the parties to the suit. Whereas, in many such cases, by carefully perusing the plaint itself, the Civil Court can easily determine whether the impleadment or the striking out of the parties is necessary or not in the interest of civil justice. And because of this unbridled judicial discretion, the necessary parties are often not added as the parties to the suit. Therefore, the life of such civil suits is alarmingly lengthy and unstructured and is also a classic case of bad case management. For example, in *Moreshar S/o Yadaorao Mahajan's* case[22], the plaintiff (a doctor) took a portion of the defendant's house on rent to run his medical practice. Later, the defendant required some money, both for agricultural purposes and also for fulfilling his day-to-day needs, for which he sold his part of the land to plaintiff at fifty thousand rupees by way of an agreement to sell. And towards this agreement, the plaintiff initially paid rupees twenty-four thousand on the day of the agreement and later paid rupees six thousand. Subsequently, when the plaintiff informed the defendant about his intent to give the full and final amount and asked the defendant to fulfil his part of the promise and transfer the property to him, the defendant refused and claimed that he had taken money only as a loan and had not sold his property. He also claimed that his three sons and a wife are joint owners of the property. The plaintiff was accordingly compelled to resort to civil proceedings. Interestingly, the plaintiff, in his plaint itself, mentioned that the defendant's three sons and wife constitute a joint Hindu family and the defendant is the Karta of the same and they own the residential premises. In fact, the defendant had also mentioned in his written statement to the suit that the defendant's wife and children are looking after their share of properties independently and they have nothing to do with this loan. Therefore, he objected to the suit on the ground that the transactions are in the nature of money lending only and he further raised the issue of non-impleadment of his three sons and wife as parties to the suit as they were necessary parties. Despite these clear averments from both the parties, the plaintiff had not impleaded any of them as parties to the suit. The Civil Judge held that the suit property is the exclusive property of the defendant only. The Appellate Court, though, rejected the observation that the defendant is the absolute owner and held that the property is joint and the defendant represents the entire family but it was further held that because the transaction was pertaining to the antecedent debt, there was no requirement to make everyone a party. Now, the question here is that when the plaintiff admits that the wife and the defendant's three sons are the joint owners of the suit property and the defendant has also put a specific objection in regard to the non-joinder of them as the necessary parties, then why the Court has

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[22] *Moreshar Yadaorao Mahajan* v. *Vyankatesh Sitaram Bhedi (D) through Legal Representatives & Others*, [2022] 7 S.C.R. 259.

not at the first instance itself, categorically impleaded them as the parties to the suit, because, there cannot be a possibility of an effective decree without making them a party. In *Kasturi's*[23] case, the Court formulated the twin tests for determining as to who is a necessary party. The *first* requirement is that there has to be a right to redress against such a person in relation to the issues included in the proceedings, and the *second* requirement is that no valid decree can be rendered in the absence of such a party. Both of these requirements must be met. In this case, both the requirements were fulfilled. The High Court, in order to balance the equities, ordered the defendant to refund the amount of rupees thirty thousand along with the interest of 9 per cent per annum from the date of the institution of the suit to the plaintiff. This travesty of justice would have been avoided at the beginning of the suit itself if the Court had applied its judicial discretion early and added the wife and three sons of the defendant as defendants. For an effective adjudication of a civil dispute, it is the duty of the Court to decide, at the earliest, whether all the necessary parties are made parties to the suit or not. Civil Justice System, like Criminal Justice System, is equally responsible for maintaining peace and order in society by adjudicating the private disputes of the parties. As Justice Katju did in *Sumitbai* case[24], where by exercising his judicial discretion, he, in a suit for specific performance allowed to implead the legal representatives of the defendant who died during the pendency of the suit itself and also allowed the legal representatives to file the written statement, because, it was found that they are also the co-owners of the property in dispute. He observed that, in a suit for specific performance of a contract between X and Y, the third-party Z (legal representatives of Y) could not be impleaded as a party. But, if Z would be able to show some resemblance between property in dispute, then in that case, by not allowing him to be impleaded will rather in future lead to multiplicity of the proceedings. For instance, if, the case is decided without Z, then Z will have to wait for the decree to be passed in the case against Y, so that he can then file a fresh suit for the cancellation of the decree passed in favour of X. In this way, a well taken exercise of judicial discretion, will save both the time and energy of the judiciary on one hand while on the other hand, it will repose the trust of the public also in civil justice system. The Civil Justice System can also be termed as a public good[25]; therefore, it also needs to be groomed from time to time. If we carefully examine the role of the Civil Judges in the present administration of the civil justice system, it seems that they are presently working more like 'managerial judges[26]', which, in a way, has both negative and positive effects on civil justice. On the positive side, most matters do not reach the trial stage because the judicial focus is more on 'the matter be settled'. The managerial judges

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23 *Kasturi* v. *Iyyamperumal*, (2005) 6 S.C.C. 733.

24 *Sumitbai* v. *Paras Finance Co.,* A.I.R. 2007 S.C. 3166.

25 *See* Hazel Genn, *What is Civil Justice for - Reform, ADR, and Access to Justice* 24 YALE J. L. & HUMAN 397 (2012).

26 *See* Judith Resnik, *Managerial Judges* 96 HARV. L. REV. 374 (1982).

use judicial discretion more to follow the procedure. While the downside is that Civil Judges engage more in case management and enjoy judicial discretion to a larger extent. This also shows that procedural justice is not given due weight. As the civil justice system goes at a snail's pace, despite so many reforms that have been brought in the past three decades, the focus shifts more towards the 'speed along with control and quantity,' which has affected the quality of civil justice and in many ways has also overshadowed the much necessary values such as (i) accuracies in the judicial decision-making process (ii) reasoned decisions and (iii) the quality of the adjudication.[27]

III

Duties of the Court while Impleading Parties Under OI R10(2) of the CPC

Interestingly, it is predictable that the Civil Courts will not be consistent in their approach while adjudicating[28] the applications under OI R10, CPC which becomes an easy recipe for breeding unequal justice or in other words, decision being less fair. This provision gives unbridled power to civil judges to add or delete any party firstly, at any stage of the proceedings and secondly, with or without any application from the party, and thirdly, if it 'MAY' appear to the court, that the reasons given in the application are just. This power is very subjective and the only criteria is when the judge thinks that it is 'just', whereas, nowhere it has been prescribed that what is 'just' in regard to OI R10(2) CPC and therefore, more often, this provision is randomly used by the Court and makes the situation of the litigant precarious. From the litigant's perspective, it is, therefore, necessary for him to make a comprehensive pleading in which he should bring in all the parties that he considers necessary. However, until and unless, there is a concrete submission from his side backed by substantive *prima facie* evidence, the plaintiff should also restrain himself from impleading any unnecessary party to the suit. However, this restraint is not expected to come automatically unless the Courts turn stricter and at times, may impose punitive costs for making unnecessary parties. Let's take an example of an old lady who lives in Mumbai and whose husband was running the affairs of a Company which was in the restaurant business. The lady herself was also a Director in the Company, though she had not been engaged in any activity vis-à-vis that particular Company and had even resigned after some time. The husband also had some other friends as Directors on the Board, who were engaged with him in the Company's business activities. After the death of her husband, the lady was left in

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[27] *Id*. at 430.

[28] Michael Zander Q.C., THE STATE OF JUSTICE 44 (2000).

a situation of lurch, facing litigation only in her capacity as an alleged Director of the Company at one point in time. Under the prevailing law, she could not have been made a party to the suit and no liability could be casted upon her. But, if the Civil Court is not careful in applying the law, while arraying her as a party, the situation would develop where, even at her advancing stage of life, she would have to run from pillar to post to various Courts to get her name deleted as a Director because, interestingly, in none of the Suit proceedings, there was any allegation vis-à-vis her as an independent person, which could necessitate her presence. In such situations, if the Civil Judge checks these small errors while examining the suit plaints at the very beginning, then the proceedings for the deletion of the names of such parties from the suits, can be initiated at an early stage of the suit and thus gives respite to such parties, who are sometimes unnecessarily being embroiled in the hardships of the civil justice administration, whereas, there is nothing to recover from such parties[29] which are altogether separate legal entities from the Company in the eyes of law.[30] Thus, a Civil Judge has to necessarily examine the plaint carefully rather than acting as a mere post office and, secondly, consider whether necessary and adequate pleas along with the documentary evidence can substantiate the story in a thin imaginary castle being built for exploiting the parties by putting in their names and ensure addition of their names as parties would not be a mere 'civil process' but, 'civil justice'. Whenever any of the parties to the suit are making a prayer under OI R10 (2) of CPC before the Civil Judge for the purpose of either adding a new party or striking out the name of any of the parties to the title of the civil suit, the Civil Judge *firstly* has to be cautious about the fact the presence of such parties are necessary to enable the Court to effectively and completely adjudicate the dispute between the parties. *Secondly*, the Court must also keep in mind that the addition and striking out of the parties must not lead to a multiplicity of proceedings. *Thirdly*, the Civil Judge can add any third party to the suit at any stage if he thinks that by the outcome of the suit, that third party would also suffer. The provisions contained in OI R10 (2) of CPC are extensive and the powers of the Court are not exhaustive. This also means that if the Judge is satisfied that it is necessary to implead a third party to the suit, he can do so, even when the plaintiff has not chosen to implead him in the suit by way of an application. The Civil Judge can *suo moto* add any party to the suit, even when there is no application filed by any of the parties to the suit.[31] *Fourthly*, a Civil Judge must also be cautious about applying section 21(1) of the Limitation Act while disposing of an application under OI R10(2) of CPC regarding the addition of the parties. The Court is not supposed to allow the impleadment of any of the parties to the suit, which is time-barred as

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[29] *See Sanjiv Kumar Mittal* v. *Deputy Commissioner (TRC), CGST Commissionerate Delhi South*, 2020 S.C.C. OnLine Del 2638.

[30] Refer *Bacha F. Guzdar* v. *Commissioner Of Income-Tax, Bombay*, 1955 A.I.R. 740.

[31] *Committee of Management, Ratan Muni Jain Inter College* v. *III Additional Civil Judge, Agra,* 1995 All. L.J. 54.

per the Limitation Act 1963.[32] *Fifthly*, the Court must not allow the addition of the parties to the suit, because the party has relevant evidence to give in reference to the issues in controversy in the suit. For this, the party can be a necessary witness without even being a party to the suit. The purpose of OI R10, CPC is not to avoid the multiplicity of the actions of the parties, though many times, it can be an incidental outcome.

IV

Suo Moto Power of the Civil Court to Add or Strike Off the Parties: Boon or Bane?

In *Sudhamayee Pattnaik*[33]case, the Supreme Court again upheld the principle of *dominus litis* and categorically held that the plaintiff has the sole discretion to choose the parties against whom he wants to litigate. No party can be impleaded against his wish. In this case, the plaintiffs had filed a civil suit for declaration, recovery of possession and permanent injunction. The defendants had filed a joint written statement and also raised a counterclaim against the plaintiffs. During the pendency of the suit, the plaintiffs had disposed of some portion of the land in dispute. Subsequent to the conclusion of the evidence of the plaintiffs, the defendants sought impleadment of the subsequent purchasers under OI R10, CPC, which the plaintiffs vehemently opposed. Both the Trial Court and the High Court leaned in favour of the defendants and permitted the impleadment of the subsequent purchasers. The plaintiffs agitated the issue till the Supreme Court and opposed the impleadment on two grounds, *firstly*, that the defendants have no locus to seek the addition of any party to the suit and *secondly*, that the plaintiffs are the *dominus litis* and no party can be impleaded against their wish. The Supreme Court upheld the principle of *dominus litis* in favour of the plaintiffs but also observed an exception that the Court can *suo moto* direct any party to join the proceedings for the purpose of an effective decree or for proper adjudication of the case at hand. The Court then proceeded to reject the application filed by the defendants under OI R10 CPC and quashed the High Court order of impleadment. However, despite thereof, the Court observed that on the merits of the case, since the defendants had also raised their counter claim, therefore, in case the counter claim is allowed then the plaintiffs shall not be permitted to raise a plea that no decree can be passed in the absence of subsequent purchasers. In the light of the facts of this case, the subsequent purchasers would have been a necessary and proper party for the just and fair adjudication of the suit

[32] *C. Doctor and Company Ltd. and another* v. *Belwal Spinning Mills Ltd.*, 1995 All.L.J. 66.

[33] *Sudhamayee Pattnaik* v. *Bibhu Prasad Sahoo*, A.I.R. 2022 S.C. 4304.

which revolved around the disputed land. The fact that the rights of the subsequent purchasers may also be affected, cannot be lost sight of.

V

Necessary and Proper Party

Primarily speaking, the party as a litigant plays an important part in the civil proceedings.[34] And, the necessary party is one, without whom an effective order cannot be passed by the Civil Judge and the proper party is one, whose presence is necessary to make a complete and final decision regarding the question involved in the proceedings.[35] The Supreme Court laid emphasis on the discretion available to the Court under OI R10(2), CPC on the issue of addition or deletion of parties to a suit which discretion can be exercised at any stage of the proceedings. It observed that this discretion can be conditional or unconditional but has to be supported by reasons. In this case[36], the issue in consideration was regarding the impleadment of Mumbai International Airport Private Limited as a party/defendant to the suit for specific performance filed by the Airport Authority of India. The Supreme Court decided against Mumbai International Airport Private Limited. It held that it was neither a proper nor a necessary party. It was neither a lessee nor a purchaser of the property in question and consequently, it did not have any title, right or interest vested in the said property. The mere expectation of getting a lease in its favour from the Airport Authority of India, who had filed the suit for specific performance, on dismissal of the suit, could not be a ground to implead it in the suit proceedings since it does not confer any title or right to Mumbai International Airport Private Limited. The Court even went on to hold that securing its presence is not necessary to decide the controversy involved between the parties. Most importantly, the Airport Authority of India had not claimed any relief against Airport Authority of India or vice versa. It is therefore understood that retaining such a party would not serve the purpose since it would only complicate the issues and lead to a multiplicity of litigation. Therefore, the concept of a necessary and a proper party has to be carefully understood and applied. In case of a divorce petition filed on the ground of adultery, the adulterer can be a proper party[37]. The wrong description of the

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[34] *Jemine* v. *Commissioner Of Wakfs*, 1983 N.O.C. 1267.

[35] *Sarvinder Singh* v. *Dalip Singh*, 1996 (6) S.C.A.L.E. 59.

[36] *Mumbai International Airport Private Limited* v. *Regency Convention Centre & Hotels Private Limited*, (2010) 7 S.C.C. 417.

[37] *Arun Kumar Agarwal* v. *Radha Arun*, A.I.R. 2003 Kant. 508 (D.B.).

parties can be corrected at any time during the life of the suit/ appeal, even before the Supreme Court of India.[38]

VI

Applying Judicial Discretion in the Deletion of the Name of the Defendants

In *Sumer Singh's*[39] case, the Trial Court permitted the deletion of the name of one of the defendants under OI R10(2), CPC, on the ground that vague averments were made against him in the suit plaint. The said deletion order was affirmed in the review petition filed by the plaintiff. The order of deletion as well as the order passed in the review petition, were assailed by the plaintiff before the Delhi High Court in a writ petition. The Court relied upon the Supreme Court's decision[40] and accordingly, it duly noted that damages had been sought against the party whose name has been deleted under OI R10(2), CPC. The Court further observed that the averments in the plaint were sufficient to proceed against that party and the genuineness of the said averments will have to be proved by the plaintiff during trial. In the backdrop of these facts, it is clear that the provisions of OI R10(2), CPC cannot be misused by any party when relief is claimed against him and also since the allegations and contentions made against him can be subsequently proved at the stage of trial. The deletion of any party without proper adjudication, can cause irreparable harm and legal injury to the plaintiff since the plaint is based on a cause of action against every party against which it is filed. Deletion of a proper and/or necessary party may lead to a situation where the rights/claims of the plaintiff against the said party will remain unascertained and the whole purpose of the litigation will be defeated.

Impleadment Application Should Show Substantive Interest in the Subject Matter of Suit

Similarly, the Himachal Pradesh High Court in *Rajinder Rustagi's case*[41] upheld the order of the Civil Judge, who disallowed the application of the applicant and held that, while deciding an impleadment application, it is necessary to see that the party applying for the impleadment is able to show that,

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[38] *Kuldeep Kumar Dubey* v. *Ramesh Chandra Goyal (D), Through Legal Representatives*, (2015) 3 S.C.C. 525.

[39] *Sumer Singh Salkan* v. *Vikram Singh Mann & Ors.*, 2022 S.C.C. OnLine Del. 76.

[40] *Vidur Impex and Traders Pvt. Ltd.* v. *Tosh Apartments Pvt. Ltd.*, (2012) 8 S.C.C. 384.

[41] *Rajinder Rustagi* v. *Johri Mal Rustagi*, I.L.R. (2016) 2 H.P. 12.

(i) It has a direct and substantive interest in the dispute under consideration before the Civil Judge and its interest would be directly affected if the decree is passed in the civil suit.
(ii) The Court further said that the application can also be allowed if the impleader's presence is necessary to answer any issues that may arise in the suit.

The Madras High Court, in the *Chennimalai Goundar* case,[42] formulated a test to be applied by the Civil Judge while adjudicating an application under OI R10 of CPC, for the addition of the parties**.** It was held that :

(i) For adjudicating the real controversy between the parties, it is necessary to have the presence of the third party,
(ii) Such impleadment of the proposed party, may finally determine all the issues arising in the suit over the same subject-matter and may put to rest, so as to avoid the multiplicity of suits,
(iii) The litmus test for the party to be added to the suit is that it should have a direct and subsisting interest along with the substantive interest in the litigation and that interest should be either (a) legal or (b) equitable.
(iv) Civil Judges should take extra caution to avoid the adding of a party if that is only proposed to settle some other score with the other party.
(v) It is also necessary to take caution because, many times, 'considerable prejudice' is caused to the other party, whenever irrelevant matters are allowed to be considered by the Courts, one such matter is, the addition of a new party, who has no nexus with the subject matter of the civil suit.

In *Yogesh Goyank*a,[43] the Appellant failed to seek impleadment both before the Additional District Judge (ADJ) as well as before the High Court and was compelled to approach the Supreme Court. In this case, a suit was filed for injunction and for seeking a declaration that the sale deed in favour of the person who had in turn sold the property in question to the Appellant, was null and void. The Appellant had purchased the land in question after payment of consideration but the said purchase was subject to an explicit declaration to the effect that litigation was pending with respect to the said land. This implies that the Appellant was well aware of the pendency of litigation. Subsequent to purchase by the Appellant, a temporary injunction order was passed. On receipt of information about the passing of an injunction order, the Appellant filed an impleadment application in the said suit under OI R10 CPC. The said application was, however, rejected by the ADJ on the ground that the sale was done during the pendency of the suit without the permission of the Court and the Appellant was not a bona fide purchaser since he was well aware that the matter was *sub judice*. When the order of rejection of

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[42] *Firm Of Mahadeva Rice and Oil Mills* v. *Chennimalai Goundar*, A.I.R. 1968 Madras 287.
[43] *Yogesh Goyanka* v. *Govind*, 2024 S.C.C. OnLine S.C. 1692.

impleadment was challenged by the Appellant before the High Court, it met with the same fate as the High Court was of the view that the principle of *lis pendens* hit the subsequent sale under Section 52 of the TPA 1882. When the matter reached the Supreme Court, it clarified that the principle of *lis pendens* under section 52 of the TPA 1882 does not make all such transfers, void. However, it was also observed that such transfers depend on the rights of the parties involved in the litigation and any direction being passed by the Court. The Supreme Court, while setting aside the order of the High Court, observed that the Appellant has a registered sale deed in his favour and had accordingly acquired interest in the said property and therefore, he is entitled for impleadment in the litigation. While doing so, the Supreme Court also observed that though there is no bar in impleading such a transferee with notice, but the same is as per the discretion of the Court and can be exercised in order to enable the transferee to protect its interest since it has a legally enforceable right. Thus, it is evident that the tool of OI R10 CPC also enables various parties to join litigation who have a substantial interest in the matter and are duly entitled under the law to protect their rights. But, it has to be borne in mind that the parties must not be added to introduce, altogether a new cause of action. Suppose, a person Z has purchased a type of one thousand bags by the sample from Y. But, later, Z found that the order was not as per the sample and therefore, he sued Y for damages before the Civil Judge. Now, Y moved an application for adding X as a party to the suit, because he bought the bags from X. Later, Y pleaded before the Court that the cause of action between Y and X is similar to the cause of action between Y and Z. And, by adding X in the present suit, the time of the Court be saved, as he bought bags from X only, which bags are the subject matter of dispute. In such cases, the Court has to be careful about the common identity of the cause of action, which is not the same, between X and Z. In fact, the presence of X is not necessary for adjudicating the issues involved in the case which basically revolve around Y and Z. It is a pertinent step to add all relevant parties in a suit, so that in future, no new party would come and say that they also had an interest in the suit, but, one complexity which arises with the addition of many names in the Suit or proceedings before any Court is that it leads to protracted litigation. In such situations, there is a requirement to consider the submissions in the plaint or the proceeding threadbare to analyse as to whether the parties who have been so engaged or dragged in the proceedings are the parties required to be impleaded or it is only based on thin line figment of imagination, which ought not to be so permitted. It is, therefore, the duty of the Civil Judge to do the structured examination of the plaint, to avoid adding those parties who will only protract the litigation and add those parties whose presence will settle the dispute and do civil justice. In *Bhogadi Kannababu*[44], the Court held that an application under OI R10 of CPC would only decide whether the party's presence is necessary to enable the Court to adjudicate and settle the issues in

[44] *Bhogadi Kannababu* v. *Vuggina Pydamma*, (2006) 5 S.C.C. 532.

controversy, effectively. Though, this provision is not strictly applicable before the Claims Tribunal established under the Motor Vehicles Act 1988.[45] Like for instance, in a motor accident claim, which is filed by the legal heirs of the driver or car that was involved in the accident, the owner of the car and insurer are not the necessary parties to this claim.[46]

Judicial Discretion and Transposition of the Parties: Diligent Moves

Under OI R10 of the CPC, the Court also has the power to transpose the plaintiff as defendant and the defendant as the plaintiff, for the purposes of complete adjudication in the suit.[47] More often in cases where the appeal filed is dismissed as withdrawn, the Judge can by using its judicial discretion, transpose the Respondent as the Appellant.[48] But, the Judge can use his discretion only when the appeal is pending and once the appeal stands abated, he cannot order transposition.[49] In fact, many a times, the Court can also direct the ex-parte Respondent to be transposed as the Appellant and in this situation, there is no need for the Judge to set aside the *ex-parte* order because now as a Appellant, he can carry forward the suit.[50] Similarly, the Court also has the power to transpose one of the plaintiffs as the defendant.[51] While hearing transposition applications, the Court has to use its discretion judiciously by first satisfying the Applicant's bonafide, *second,* by diligently checking into the plausibility of the claim and *third,* by examining the genuineness of the Applicant's interest in the litigation.[52]

OI R10 and OVI R17 (Amendment of Pleadings): Carefully Applying Judicial Discretion

The implementation of the party or even the correcting the name of any party in any suit, the empowering provision is encapsulated under OI R10 of CPC, according to which, the basic purpose that forms the basis of OI R10 is that, the necessary parties to any proceeding are made as Respondents/defendants and in the event, a party is missed out from being so impleaded, an Application under OI R10 can be filed whereby the party can be arrayed as a party defendant/Respondent. Similarly and in the same breath, is the idea that the party who is not necessary to any proceeding, is not to be necessarily impleaded as a Respondent and its name necessarily needs to be struck off for the very reason that if a person has only been impleaded as a

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[45] *Bhagwant Singh* v. *Ram Pyari Bai*, 1991 M.P. 370.

[46] *Gujarat State Road Transport Corp* v. *Sarojben*, A.I.R. 1994 Guj. 59.

[47] *Kiran Tandan* v. *Allahabad Development Authority*, A.I.R. 2004 S.C. 2006.

[48] *K K Abraham* v. *Josepth Varghese*, A.I.R. 2003 Ker. 1 (3).

[49] *E K Abdula Khader* v. *Thalakkal Kunhammad,* A 1986 Kerala 3.

[50] *Supra* no. 48.

[51] *See Janadas* v. *Vedanarayayam*, 2004 (3) Ker. L.T. 425 (D.B.).

[52] Refer *Manphool* v. *Surja Ram,* A.I.R. 1978 Punjab and Haryana, p. 216.

Respondent with closed eyes or alternatively, with an intent to harass him/her, the judicial discretion of the Court should result in the striking out of such party. But, many a times, this provision is used by the plaintiff so that he can bring it in the court proceedings, those issues or facts, which by mistake or even intentionally left out by him or after reading the response of the defendant come to his mind, which then he wants to include in the pleadings pending before the Court. And, then, instead of moving an appropriate application under OVI R17 of the CPC for the purpose of amendment of the pleadings, he, many a times, moves an application under OI R10 for the purpose of addition of the parties because the parameters for the addition of parties are different than the parameters of amendment of pleadings and therefore, the Judge would also have to apply his judicial discretion in order to adjudicate the applications based on the provision invoked by the plaintiff. And thus, the Judge must tackle these intelligent moves or clever drafting techniques of the plaintiff because non-early detection of this move often proves prejudicial for the defendant. By such moves, the defence of the defendant also stands destroyed. Therefore, the Judge must carefully understand the purpose and intent behind the filing of such applications under OI R10 of the CPC 1908 to check whether, in the name of the addition of parties, the plaintiff is not asking more, that is, an amendment to the pleadings, which can prove to be prejudicial both for the trial of the suit as well as for the defendant. By way of amendment, the plaintiff can put substantially fresh issues before the Court, for the purposes of grand duty. The nicety of OI R10(2) is that the Court may at any stage of the proceedings, either with the interface of an application or even otherwise, proceed with either adding a part or striking out the name of a particular party who has been wrongly arrayed as a party Respondent. And, therefore, the Judge has to be very diligent in analysing, both, the case as well as the content of the application. Only by examining holistically, the Judge can check whether the plaintiff only wants to add the parties because they are necessary parties or his purpose is to substantially change his stand, by including the fact, which is otherwise outside the purview of the suit by mistake or otherwise.[53] In *Kisan Co-op Sugar Factory* case[54], the Court directed that the name of the parties must not be allowed to be added in the suit under OI R 10, by amending the plaint, in cases where (i) the suit is already barred against such proposed parties under any of the provisions of the Limitation Act and (ii) the omission of the name of the party, originally, was not due to the *bona fide* mistake of

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[53] As per OI R10 (4) of the CPC 1908, in cases where the Courts allow the addition of the Defendants in the suit, then the Court also directs the Plaintiff to amend the contents of the plaint, wherever necessary and then a copy of the amended plaint has to be shared with the new Defendant and also with the original Defendant. The addition of this new Defendant would be subject to the provisions of the Indian Limitation Act 1963 (Section 21), and the proceedings against the newly added Defendant would only start from the date of receipt of the summons from the Court.

[54] *Kisan Co-Operative Sugar Factory Ltd.* v. *Rajendra Paper Mills*, A.I.R. 1984 ALL. 143.

the plaintiff. No amendment is generally allowed in cases where there is a possibility of change in the complete nature of the suit itself or it may cause substantial prejudice to the defendants.[55]

VII

OI R10 of CPC 1908 and Theories of Civil Justice

Judicial Discretion and Civil Justice

Aristotle discusses 'distributive justice' by emphasising the fair distribution of benefits and burdens among society members. Hence, judicial discretion under OI R10, CPC should be exercised to meet the ends of civil justice by ensuring that all parties in a suit will have a legitimate stake in the legal addressing of civil litigation in an equitable manner by their fair inclusion and exclusion in the suit. Similarly, John Rawls' theory in his classic text, 'Justice as Fairness', discusses the principles of justice. By applying his theory, we have to examine the nature of judicial decisions given in the context of OI R10 of CPC on the scale of 'impartiality' and 'fairness'.[56] This will ensure that none of the parties in a suit are at an advantaged or disadvantaged positions, due to their inclusion and exclusion as parties. Similarly, the focus of Jeremy Bentham[57] and J S Mill[58], the propounders of Utilitarian philosophy, was on the 'greatest good for the greatest number'. Thus, the judicial discretion used by the judge under OI R10 of the CPC needs evaluation through a utilitarian lens so as to determine how the inclusion or the exclusion of parties to the civil suit maximises the societal welfare. Lord H Woolf's theory of civil justice first incorporates an extensive policy of maintaining equality, even above substantive justice.[59] For example in *Manglesh*[60] case, Justice Sanjay Dwivedi upheld the decision delivered by the family court, of rejecting the application filed under OIR10 of CPC 1908 for making an adulterer a party in the petition. In this case, the husband (Respondent) on the grounds of cruelty, had filed a petition for divorce against his wife before the Family Court. He alleged that the wife is constantly making false accusations against him related to an illicit relationship with one girl, Sanghmitra

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55 *Ishtiaq Ahmad* v. *Prescribed Authority, Etawah*, A.I.R. 1990 N.O.C. 22 (All.).

56 John Rawls, JUSTICE AS FAIRNESS 10-19 (2001).

57 Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-13 (1789, 2007).

58 John Stuart Mill, UTILITARIANISM 6-16 (2001) (Originally published in 1863).

59 John Sorabji, ENGLISH CIVIL JUSTICE: AFTER THE WOOLF AND JACKSON REFORMS: A CRITICAL ANALYSIS 165 (2014).

60 *Smt. Manglesh Singh* v. *Rajkumar Singh*, (2024) MPHC-JBP:41378 Judgement dated: 12.08.2024.

Singh whereas on the other hand, the wife (Petitioner) under OIR10 CPC 1908 had sought to add and implead Sanghmitra as a party to the petition so as to substantiate her claim and had approached the High Court against the order passed by the Family Court. She argued that adding her as a party in the petition, is necessary for the complete adjudication of the case. The application for the addition of party was rejected by the Family Court, on the ground that Sanghmitra was not a necessary party to the proceedings. In fact, the High Court also upheld the view of the family court on the ground that the core issue of cruelty could be adjudicated without Sanghmitra being added as a party. Now, if we examine *Manglesh's* case from the Rawlsian theory of justice, which emphasises (i) fairness and (ii) the veil of ignorance[61], to ensure that the civil court's decisions must be bereft of bias towards any party, it is found that the Court's above decision of excluding Sanghmitra from being a proper or necessary party completely aligns with the procedural fairness and this would further avoid, unnecessary defamation or chances of other harm or injury to others, who are not a party to the marital disputes. Though procedurally, this judgement looks fair, but, this approach has the potential of neglecting the various aspects of 'substantive justice' itself, as the Petitioner argued that for the final adjudication of her petition (divorce on the ground of cruelty), the testimony of the third party, Sanghmitra is critical. Similarly, if we examine *Manglesh's* case from Bentham's approach, the exclusion of Sanghmitra as a party would definitely reduce the procedural delay and will also not complicate the already ongoing divorce proceedings. In this way, the Judgement has balanced the interest of both (i) the husband and (ii) the third party, Sanghmitra, by not exposing her to unnecessary litigation. But, by analysing the *Manglesh* judgement from the utilitarian perspective, it seems that the exclusion of Sanghmitra, actually in a way, has denied the opportunity to the wife-petitioner to prove her case completely. Thus, this judgement fails to provide maximum justice to all the stakeholders. In fact, if we examine the judgement from the Woolf's theory of justice, for whom the essential elements of justice in civil procedure are (i) proportionality[62] and (ii) accessibility[63], and therefore, he advocates for streamlining the processes to avoid any unnecessary complexities, the judgement no doubt reflects the Woolf's proportionality principle, as the Judge has prioritised the 'efficient resolution' that is also, without adding any unnecessary parties. However, this raises other necessary questions of accessibility of justice for the wife-petitioner, whose whole evidentiary strategy was completely dependent upon the fact of impleadment of the adulterer as a party to the petition. This is the only reason why it is good also to go through the critiques of Dominic De Saulles, who vehemently criticises the existent 'rigid procedural systems', which many a times oscillate between (i) laxity and (ii)

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[61] *Supra* note no. 56 at 118.

[62] Lord Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* 12-16 (Her Majesty's Stationery Office, 1996).

[63] *Id*. at pp. 32-38.

rigidity, and therefore, he advocates for the need to balance the 'rule adherence' with that of 'judicial discretion'[64]. So, by applying the yardsticks of Dominic De Saulles, this judgement demonstrates the inherent rigidity in applying and interpreting the 'necessary' as well as the 'proper' party as are defined under OIR 10(2) of the CPC 1908. He, therefore, advocated for a more flexible approach[65] in civil procedure by acknowledging the fact of 'the evidentiary significance' of Sanghmitra's role while adjudicating the divorce petition on the ground of cruelty of being in an adulterous relationship for the purposes of ensuring holistic adjudication. The question therefore which comes to mind is that is there any objective yardstick for the judge to apply while deciding the applications under OI R10 of the CPC 1908 for the addition or deletion of the parties? One yardstick can be to adjudicate the applications based on nature of civil disputes. The principle of proportionality in family disputes requires the application of 'procedural flexibility' so as to balance the efficiency with that of the fact-finding. And, including the testimony of Sanghmitra as a witness would have also achieved the principle of proportionality, without further complicating the legal proceedings to achieve complete civil justice. Even for both De Saulles and Lord Woolf, the reforms in the civil procedure should align with the procedural rules on the lines of contemporary realities to ensure procedural rigidity without undermining the principles of substantive justice. *Manglesh Singh*'s judgement has clearly demonstrated a tension present between the principle of 'procedural efficiency' on the one hand and 'substantive justice' on the other, while delivering civil justice. It has to be borne in mind that the Judge has to adhere to both the principles of (i) fairness and (ii) proportionality by rigidly applying them, which has considerably curtailed the wife-petitioner's ability to substantiate her claims fully. There is a dire need to have a jurisprudential shift towards (i) greater flexibility, as is informed by Rawlsian fairness and the utilitarian welfare. Lord Woolf also propounded the same when he proposed the principle of proportionality as indispensable for ensuring that judicial discretion should fulfil the ultimate goal of civil justice, that is, delivering 'holistic and the equitable justice'. In *Ch. Padmavathi*[66] case, the issue before the Court was whether the adulterer (Narasimha Rao), in case of divorce on the ground of adultery filed by a Husband, should have been impleaded as a proper or a necessary party for ensuring both (i) adherence to procedural rules as well as the (ii) principles of natural justice, as the Court granted divorce to the husband without making adulterer a party. In this case, the Court followed the Lord Woolf's approach of proportionality, by focusing more on the 'core marital dispute' and for that, the Court streamlined the applied procedure, however, at the risk of incomplete resolution in the absence of the adulterer as a party, as this also raised the questions

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[64] Dominic De Saulles, REFORMING CIVIL PROCEDURE: THE HARDEST PATH 174-181 (2019).

[65] *Id*. at pp. 82-87.

[66] *Ch. Padmavathi* v. *Ch. Sai Babu*, (2012) F.C.A. No. 21 of 2009, judgement dt: 12.09.2012.

of accessibility of justice for all the stakeholders. Even in *Mala Rai's*[67] case, the Court upheld the decision of the family court to grant divorce to the husband on the ground of adultery without making the adulterer a party on the ground that the adulterer is neither a proper and nor a necessary party to the divorce proceedings. And, the testimony of the husband is sufficient for the resolution of the case. Let us analyse the judgment from Rawlsian's point of view. The judgement has compromised the principle of fairness, as it did not provide the adulterer a platform to defend himself against allegations of such a serious nature, as the allegations could have the tendency to tarnish his reputation. The procedural rigidity here has though ensured fairness by preventing undue delays, which has already choked the civil justice system. Similarly, when we apply the principles of Utilitarianism, it makes it clear that the Judge has prioritised procedural efficiency with minimum harm to the legal process, by excluding the adulterer from being a party. However, this exclusion seems to have failed to maximise justice, especially for the adulterer, whose involvement as a necessary party could have allowed the Court to do an efficient and effective adjudication. For enhancing the 'procedural flexibility' within the civil justice system, it is necessary that the courts *firstly*, should interpret OI R10 CPC 1908 to also include within its parameters, those parties also, whose reputational interests are at stake as the judgement can directly impacted their public reputation. *Secondly*, it is necessary to maintain the balance between efficiency and fairness, and towards this objective, judicial discretion should aim to maintain proportionality, by balancing the need for an efficient resolution of the civil dispute, with the inclusion of all the necessary and proper as well as affected parties. As, in this case, if the adulterer had been made a proper party, rather than a necessary party, it could have ensured fairness in procedure without complicating the civil proceedings. It is therefore also proposed that procedurally, there is a strong need to amend OI R10 of the CPC 1908 so as to allow the limited participation of the third parties in civil cases where their interests are directly at stake.

Judicial Discretion and Theories of Fairness

Procedural fairness requires that the judicial processes of providing civil justice be transparent, consistent and unbiased. OI R10 of CPC upholds procedural fairness, as it ensures that all the parties are given an equal opportunity to sue based on a purely objective criteria rather than personal biases. The use of judicial discretion by the Court while adjudicating the applications under OI R10, CPC helps in achieving the equitable results. The Patna High Court recently, in the Badri Prasad case, when allowed the intervenor's application under OI R10 and added him as a plaintiff in the suit, has achieved the result with equity. It was argued that the intervenor seeking impleadment had bought the immovable property to his name during the pendency of the suit itself. It is the legal principle that the party has to get the Court's

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[67] *Mala Rai* v. *Bal Krishna Dhamala*, A.I.R. 2016 Sikkim 28.

permission when he has bought the suit property during the pendency of the suit. It was further argued that the same was reiterated by the Supreme Court in one earlier decision of *Bibi Zubaida Khatoon* case[68], that transferee pendente lite have to take the permission of the Court and even otherwise court further held that there is no absolute right, to give permit to one. But, the Court in this case went contrary to the settled principles in regard to the addition of the parties and allowed him to be added as a party subject to certain restrictions. The Court further, on a fairground, found that the proposed party has a valid interest in the suit property because of the presence of the sale deed in his favour and therefore, his presence is necessary for the adjudication of all the issues in controversy.

Arbitration Tribunal and OI R 10 of CPC 1908: Following the Principles of Fairness

In *Cardinal Energy & Infrastructure (P) Ltd.* case[69] also, the central dispute before the Court revolved around whether it is within the jurisdiction of the Arbitral Tribunal to add any non-signatories as parties to the arbitration by applying the doctrine of Group of Companies and therefore, whether OI R10 of CPC 1908 can be invoked to do so in the arbitration proceedings. The Arbitral Tribunal, by applying its judicial discretion, allowed the application under OI R10 of CPC 1908 on the ground that the company, which was sought to be added, was bound by the agreement because of being part of the Group of Companies and then in such a case, despite it not being a signatory to the arbitration agreement, yet can be added, because of its close relationship with the Company which is a signatory. It is also argued that it is necessary to add this third party to the arbitration if it was involved in the performance of the contract. The Bombay High Court affirmed the exercise of judicial discretion by the Arbitral Tribunal and upheld the applicability of Group of Companies doctrine, as in this way, the Tribunal also ensured that all the necessary parties having the legitimate stake in the arbitration dispute, are included in the arbitration proceedings. In this way, the Arbitral Tribunal has prevented the fragmentation of the cause of action and thereby ensured that this single arbitration itself, will end up resolving, all the related issues once and for all, which then aligns with the objective of OI R 10. Similarly, in *Indraprastha Power Generation Company's*[70] case also, the Delhi High Court upheld the decision of the Arbitral Tribunal, whereby it had rejected the application filed under OI R10 of the CPC 1908 by the Petitioner, IPGC (Indraprastha Power Generation Company) to induct the Ministry of New and Renewable Energy (MNRE) as a party to the arbitration because the Respondent, M/s. Hero Solar Energy Pvt. Ltd. (HSEPL) was contending that the

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[68] *Bibi Zubaida Khatoon* v. *Nabi Hassan Saheb*, (2004) 1 S.C.C. 191.

[69] *Cardinal Energy & Infrastructure (P) Ltd.* v. *Subramanya Construction*, 2024 S.C.C. OnLine Bom. 964.

[70] *Indraprastha Power Generation Company* v. *Hero Solar Energy Private Limited*, ARB. A. (COMM.) 46/2024 and CAV 421/2024, IA 37805- 37806/2024, Delhi High Court, dt: 30.08.2024.

Ministry has not paid the 30% subsidy amount to it. The pertinent questions which arise for consideration here are (a) was the refusal by the Arbitrator to implead MNRE as a necessary party to arbitration is a just exercise of judicial discretion? (b) whether the decision to not implead MNRE is in alignment with the principles of (i) substantive justice and (ii) procedural efficiency? (c) how far the Arbitral Tribunal has been able to balance (i) the responsibilities particularly in the context of the contractual parties, especially with the inclusion of third parties directly affecting the procedural dynamics of the legal system? Dworkin[71] categorically emphasised the moral fabric of justice, in coherence with the legal principles of justice. Dworkin also advocated for the legal framework, comprising of law as an integral part[72] of the legal system. The Arbitral Tribunal's refusal to implead MNRE as a party was consistent with another broad principle that the parties should contract to bear the primary responsibility for knowing their rights-related obligations. By excluding MNRE as a proposed party, the Arbitration Tribunal actually further shrank its already available share, limited to the fact of the case necessary for the (i) comprehensive adjudication of the case and (ii) potentially undermining the much necessary coherence of justice. According to Rawlsian approach, the Judge, while delivering the judgement in this case, had heavily relied on the procedural efficiency, that also at the possible cost of equitable justice. Similarly, the rejection of the MNRE's application under OI R10 of the CPC for joining as a party by the Arbitral Tribunal is a classic case of locating J. Bentham's approach. The application to join MNRE as a party was rejected by the Arbitral Tribunal, from joining the arbitration proceedings, thereby ignoring the objective of the whole process itself. The judgment also exemplifies the enormous tension specifically going on between the 'procedural efficiency' and 'substantive justice'. While the refusal to implead MNRE aligns with procedural norms, the judge has taken a risk by compromising the holistic principles of (i) fairness and (ii) utility. The insights both from Ronald Dworkin and John Rawls and also from the likes of Bentham, who throughout his life advocated for a more inclusive approach by balancing (i) the procedural adaptability with (ii) the moral imperatives of justice. However, David Dyzenhaus[73] proposes to have flexibility in the legal interpretation.

Allowing OI R 10 of CPC in case of Settlement Agreement for Addition of Parties

In *Suman Aggarwal's*[74] case also, the defendant moved an application under OI R 10 CPC for the addition of his wife and two sons as defendants on the ground that they had already entered into a compromise with the plaintiffs and their addition, therefore, would assist in the early adjudication of the suit. The Delhi High Court

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[71] Ronald Dworkin, JUSTICE FOR HEDGEHOGS 128-135 (2011).

[72] Drucilla Cornell and & Nick Friedman, THE MANDATE OF DIGNITY: RONALD DWORKIN, REVOLUTIONARY CONSTITUTIONALISM, AND THE CLAIMS OF JUSTICE 92-97 (2016).

[73] *See* David Dyzenaus, LONG ARC OF LEGALITY 2017-2020 (2024).

[74] *Suman Aggarwal* v. *Rajender Prashad Aggarwal*, 2024 S.C.C. OnLine Del. 4941.

by applying its judicial discretion, allowed their impleadment as additional defendants on the ground that (i) there was existence of a settlement agreement in the suit (ii) the settlement was between the parties of the existing suit and (iii) this will avoid initiation of fresh litigation.

Theory of Fairness and Application under OI R 10 of CPC: Case of Group Companies Overlooking Other Companies

In a unique case, the plaintiff preferred a civil suit against SBI on the ground that it had failed to address the issue of unauthorised credit card transactions. SBI thereafter moved an application under OI R 10 of CPC for striking down its name on the ground that it does not look into the credit card transactions and a different concern/ company of SBI, looks after it. The Court, after careful examination of the facts, found that SBI has substantial control over credit card banking, which therefore makes it liable, even if it is majorly looking at the other banking operations. Hence, the Court, in this case, by applying its judicial discretion, disallowed the application to strike out the name of the party under OI R 10.[75] The Court here was successful in preventing fragmented litigation which has the tendency to drag the suit for years to come. The Court in *Sriram Housing Finance & Investment (India) Ltd.* case[76] also has appropriately used its discretion in dismissing the application filed under OI R 10 of the CPC by the plaintiff for the addition of certain other parties. The Court in this case, was focussed on the scope of the suit and its efficiency and aimed at protecting the interests of all.

OI R 10 of CPC and Allowing Third Parties to Intervene: Principle of Fairness

In fact, in *Rupinbhai Bharatbhai Divecha* case,[77] to uphold the principles of procedural fairness, the Court allowed the application filed under OI R 10 of CPC by the third parties to be added as the necessary parties. The suit was for pulling down that part of the immovable property that was in very bad shape or in other words in dilapidated condition. The Applicants (third parties) claimed to be the legal heirs of the original tenants of the property. For complete and also for an effective adjudication of the dispute, *firstly*, the Trial Court allowed the application of impleadment and later the Gujarat HC also stamped on it. This is a classic case of judicial efficiency, where by allowing this application of addition of necessary parties, the Court avoided the possibility of future litigations over the same suit property. *Parmod Bamba* case[78] was a property dispute regarding a residential property. The plaintiff (Sudarhana Devi) filed a partition suit against the other

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[75] *State Bank of India* v. *Ramesh Kumar Naroola*, 2024 S.C.C. OnLine Del. 4472.

[76] *Sriram Housing Finance & Investment (India) Ltd.* v. *Omesh Mishra Memorial Charitable Trust*, 2024 S.C.C. OnLine 15.

[77] *Rupinbhai Bharatbhai Divecha* v. *Legal Heirs of Chandulal Gaurishankar Thakar*, 2023 S.C.C. OnLine Guj. 1905.

[78] *Parmod Bamba* v. *Sudarshana Devi*, 2024 S.C.C. OnLine 32.

family members because she was the legal heir of her husband. In the meanwhile, Parmod Bamba, the defendant, alleged her claim over the property on the grounds of an oral settlement between the family members. Accordingly, she applied under OI R 10 of CPC to be added as a necessary party. The Court, by applying its judicial discretion, rejected the application filed by Parmod Bamba on the ground that the present suit was of partition whereas the Applicant was claiming property on the basis of an oral settlement. The Court here by rejecting the application for impleadment, separated the legal issues for good, one was for partition claim and the other was for claiming the oral settlement. In fact, after the said order of rejection of impleadment application, the partition suit shall proceed without any complexities. And, in this way, the Court also encouraged the parties to focus on a single legal remedy, that is, partition suit and must not complicate the case by adding parties. Even in *Rajshree Gahnghoria's*[79] case, the Court rejected the request of the plaintiff to implead the subsequent purchasers of a property (under dispute) as parties to the suit for partition and separate possession along with the interim injunctions on the ground that there is already a provision under section 52 of the Transfer of Property Act (TOPA), pertaining to the doctrine of *lis pendens*, according to which the property in dispute should be subject to the outcome of the civil litigation. This also is one of those classic cases, to understand as to how contextually the civil court should decide the application under OI R10 of CPC 1908 by applying the judicial discretion in the light of both, Dworkin's principle of law as an integrity and Woolf's principle of proportionality on the broad principles of theories of fairness. In this case, during the pendency of the civil suit, the defendant sold certain property to the third party and the plaintiff wanted to induct those purchasers as the parties to the suit and for which he filed appropriate application under OI R10 of the CPC 1908. The civil court categorically rejected the aforesaid application, which led to formulation of the following questions (a) whether the rejection of impleadment application by the Civil Court on the ground of procedural considerations is correct? (b) did the exclusion of the subsequent purchasers by the Court align with the principle of both fairness and substantive justice? (c) And, should the third parties which derive interests in the disputed property of the civil suit be also included and heard to ensure comprehensive adjudication of the case? To answer the above questions, it is necessary to examine the judgement by applying various approaches propounded by multiple theories of justice. When we discuss such cases from the lens of Lord Woolf, we find that he comprehensively emphasises the place of proportionality in the civil justice system by balancing procedural efficiency with the much-necessary principle of substantive fairness. The judgment clearly reflects the application of the theory of proportionality, as it, by rejecting the OI R10 application filed under CPC 1908, has avoided the procedural

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[79] *Smt. Rajshree Gahnghoria* v. *Smt. Azadrani Khatik,* 2024:MPHC-JBP:59553, Judgement dt: 04.12.2024.

delays, which might have arisen due to the impleadment of third parties. It is evident that in this process, the purchasers have been excluded from formally joining the civil suit, which, *firstly*, could lead to 'fragmented litigation' as later, the third parties can also challenge the decree passed by the court, which will then undermine holistic justice. *Secondly*, the exclusion also limits the necessary opportunity to address the stakeholders' claims, which can potentially, many a times, create inconsistency in the adjudication of civil disputes and in this way, the application of law as a unified whole would not have been possible which would have then affected the coherence and fairness in interpreting the law and therefore, the principle of 'law as an integrity', defined by Ronald Dworkin would also have been affected.[80] *Thirdly*, the rejection of impleadment of subsequent purchasers had actually disregarded the potential claims or the defences and thereby had compromised the procedural fairness, which therefore is against the Rawlsian theory of fairness and by prioritising the 'procedural efficiency', this judgement can lead to separate litigation, which will unnecessarily increase the costs of the suit and will further delay civil justice, which then will undermine the delays, hence is also against Bentham's utilitarian approach. In this case, the court, while delivering justice has (i) rigidly interpreted the procedural law by narrowly interpreting the procedural rules of CPC 1908 and thereby applying limited judicial discretion. (ii) The court has also, by excluding the subsequent purchasers, actually put at risk the inconsistent outcomes that come in the near future in the shape of civil suits between almost the same set of parties. (iii) The court, while focussing on procedural efficiency, has actually overlooked the larger goal of 'comprehensive resolution' of the civil dispute. In this manner, this Judgment is a mixed bag of how law should actually be applied by keeping in mind various theories of law so that at the end, nothing but justice prevails while upholding the principles of natural justice.

Application of OI R 10 at Appellate Stage: Procedural Fairness and Efficiency

In *Usha Rani* case[81], the Court rejected the application filed under OI R 10 for the addition of the party at the appellate stage, in a suit for specific performance, where the Trial Court had already decreed the suit in the favour of the plaintiff. During the pendency of an appeal, Usha Rani along with certain other parties, moved an impleadment application to be added as defendants before the appellate Court. They claimed themselves as necessary parties, being the legal heirs of the erstwhile owner of the suit property and also the co-owners whose interest was not adequately represented. The Court by applying its discretion, rejected the application, principally on the ground that they were not the parties to the agreement, because the main issue was the enforceability of the contract. Further, there was no relief which was claimed against them, whereby the very idea of

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[80] *Supra* note no. 71 at 113.

[81] *Usha Rani* v. *Shanti Parkash Jain*, 2024 S.C.C. OnLine P&H 10109.

adding them as the necessary parties was also diminished. Nextly, the Court also found that if at this stage, the addition of the parties is permitted then this may covert the suit for specific performance into a title suit, which will then unnecessarily expand the scope and horizon of the litigation. This will somewhat complicate the existing issues, which can then lead to delay in the resolution of the present dispute, that is, the enforceability of the contract. The Court in this case has applied its judicial discretion judiciously, as, *firstly*, its focus did not deviate from the original cause of action, which was enforcement of the contract. *Secondly*, by rejecting the application, it has preserved the procedural efficiency of the CPC 1908, as allowing the said application at this stage, would have broadened the property dispute from contract enforcement to the title suit (much beyond the scope of the original suit) and *thirdly*, the Court also recognised that what the applicants under OI R 10 of CPC 1908 were demanding was altogether a separate legal remedy, which also means that the applicants can pursue their claim by filing a separate suit before the appropriate forum, which also means that whatever rights they had, were very well preserved, without complicating the present suit. *Fourthly*, the Court also adhered to the precedents. Both *Kasturi*[82] and *Vidur Impex and Traders Pvt. Ltd*. case[83] clearly held that in a specific performance suit, only those parties are impleaded, who are directly related to the agreement. *Fifthly,* the Court also discouraged unnecessary litigation. This is a classic example of application of judicial discretion while adjudicating applications under OI R 10 of CPC 1908. The Court's approach here was to preserve the much necessary 'procedural fairness' and also to keep the 'efficiency' intact by preventing the expansion of the scope of the suit by aligning with the already established legal principles.

Legal Pragmatism and Judicial Discretion Under OI R10 of CPC

Richard Posner[84] emphasised the (i) practical and (ii) outcome-based decision-making in law, which is also termed as legal pragmatism. This helps in assessing whether pragmatic considerations such as the legal process and the efficiency of avoiding multiple litigations, are appropriately covered in the judicial decisions. The judges should balance between legal formalism and legal pragmatism by, on the one hand, following strict adherence to rules prescribed under OI R10, CPC and also by following the judgements delivered by the Supreme Court and on the other hand, by being flexible and outcome-focused in their decision-making under OI R10 of CPC. This balance is crucial so that judicial discretion serves the enhancement of already undermined justice.

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[82] *Kasturi* v. *Iyyamperumal*, (2005) 2 R.C.R. (Civil) 691.

[83] *Vidur Impex and Traders Pvt. Ltd.* v. *Tosh Apartments Pvt. Ltd.*, (2012) 4 R.C.R. (Civil) 308.

[84] Richard A. Posner, HOW JUDGES THINK, 59-77 (2008).

Flexibility in Legal Interpretation and Adjudication while deciding an Application Under OI R10 of CPC 1908

It is necessary to refer to David Dyzenhaus here, whose discussion on 'flexibility' critically emphasises that legal interpretation and adjudication should consider interacting between the enacted laws and the basic principles of legality. This aligns with the adjudication of an application under OI R10 of CPC 1908, where civil judges regularly exercise their discretion while allowing or denying third-party interventions. Dyzenhaus further posits that the laws should be interpreted in such a way that the fundamental principles of legality must be respected.[85] This also means that civil judges must apply judicial discretion to resolve the suit and legal issues arising therefrom comprehensively. Dyzenhaus further describes how the interpretation of the laws should be done to reinforce the legitimacy of the legal authority, both by (i) ensuring fairness and (ii) coherence.[86] This means that the civil judges while adjudicating applications under OI R10 of CPC 1908, must adopt an approach with 'balancing procedural integrity' towards the substantive need for justice. For Dyzenhaus, the procedural justice is a mechanism (law) to transform the 'might into legal right'.[87] This transformation is very crucial, especially in regard to the adjudication of applications under OI R 10 of CPC 1908, where the procedural justice both through the provisions of law (CPC 1908) as well as the judgements delivered by the Apex Court, fully ensures that (i) all the stakeholders in the civil suit are heard and (ii) it also prevents the judicial decisions solely on the basis of 'rigid procedural formalism', for example, in *M/S Neyvely Lignite Corporation Ltd.*[88] case, the Supreme Court fully emphasised on the importance of procedural justice by particularly allowing the beneficiary of land acquisition to comprehensively participate in the land acquisition proceedings affecting it. Such an approach fully aligns with Dyzenhaus' views on 'legal legitimacy' through the 'inclusive adjudication' of the civil suits. In this case, the Supreme Court was pleased to extend the benefit of OI R 10 of CPC 1908 to the beneficiary for whose benefit the land was being acquired, as a proper party for the reason that it is an interested party. It was held that since, it is supposed to bear the higher compensation therefore, the beneficiary must have all the valuable rights under the Land Acquisition Act. Thus, it is evident that Order 1 Rule 10 CPC is an important tool that ensures that the legal rights of a party remain intact. While looking at the mordant critique of 'procedural rigidity' while adjudicating an application under OI R10 of CPC, it can be noticed as to how the excessive formalism is undermining the application of substantive justice. In this regard, Dyzenhaus' insights particularly into the 'flexibility' and Ronald Dworkin's perspective on 'law as integrity', generally serve as a

[85] David Dyzenhaus, THE LONG ARC OF LEGALITY: HOBBES, KELSEN, HART 3-4 (2022).

[86] *Id*. at 12.

[87] *Id*. at 13.

[88] *Neyvely Lignite Corpn. Ltd* v. *Special Tahsildar (Land Acquisition)*, 1995 S.C.C. (1) 221.

counterpoint to such type of prevalent rigidity and therefore, it is necessary that the courts should adopt an approach, where the procedural rules are used only as tools for applying fairness rather than being used as mordant barriers for 'inclusion and coherence'. This mordant observation by Dyzenhaus shows the much necessary importance of (i) proportionality and (ii) pragmatism in the present times for ensuring that 'the procedural justice should align with the broader constitutional values'.

Mordant Critique of Judicial Discretion Used by Civil Judges while Adjudicating Applications Under OI R10 of CPC 1908

David Dyzenhaus critiques the prevalent rigidity in the application of judicial discretion by the Courts, which directly undermines the principle of adaptability regarding procedural justice. Similarly, Ronald Dworkin also highlights the drawback of 'fragmentation of justice', where the decisions delivered by the Courts completely lack moral coherence. John Rawls also focuses on the prevalent unfair procedural exclusions caused due to the applicability of inequity. Bentham also, while doing a mordant critique of judicial discretion, targets the inefficiencies which are directly causing harm to the collective welfare of the litigants, who are approaching the Courts for holistic justice. As a mordant critique, Lord Woolf also directly emphasises the principle of proportionality for avoiding procedural overreach by the civil courts. In summary, all these scholars in the context of OI R10 of CPC 1908 are collectively arguing for the (i) balanced (ii) coherent and (iii) fair application of the judicial discretion for ensuring that procedural justice aligns with the outcomes of substantive justice, by avoiding the mordant flaws of procedural justice, which is eroding the legitimacy of the civil adjudication under the CPC 1908. For instance, in *Owners and Parties Interested in the Vessel M.V. Polaris Galaxy*[89] case, the dispute between the parties revolved around a maritime claim towards the misdelivery of the cargo made by the vessel, M.V. Polaris Galaxy. Banque Cantonale de Geneve had fully financed the cargo, which was delivered to a third party, that is, the Gulf Petroleum FZC, without any appropriate authorisation. For the purposes of effective adjudication, the Commercial Division of the High Court ordered that the Gulf Petroleum FZC, should also be added as the defendant. However, the Division Bench overturned this order, which, therefore, led to the intervention by the Supreme Court, which reinstated Gulf Petroleum as a party, so as to resolve the conflicting claims between the parties comprehensively because by excluding the party, Gulf Petroleum would violate the Rawls' principles, by denying the equitable representation to all the stakeholders. The mordant critique of Division Bench's decision, shows that, the Division Bench has followed the flawed formalism by rejecting the Gulf Petroleum's inclusion by prioritising the procedural technicalities

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[89] *Owners and Parties Interested in the Vessel M.V. Polaris Galaxy* v. *Banque Cantonale De Geneve*, (2022) LiveLaw (SC) 793.

enshrined under OI R10 of CPC 1908, over substantive justice, by undermining the much necessary principle of fairness. The Division Bench, also by this decision, has led to fragmented justice, by excluding a necessary party and in this way, the Court has also avoided the filing of multiple lawsuits which can choke the legal system and it can also lead to inconsistent outcomes, which then will also contradict the utilitarian efficiency. And, therefore, the Supreme Court, by following the judicial economy, corrected the procedural inefficiency by correcting the Division Bench decision and allowed Gulf Petroleum to join as a party to the suit. The Supreme Court's decision in this case embodies the Rawlsian fairness along with the Benthamite utility. This judgment also has the tinge of Lord Woolf's proportionality and it has also reaffirmed the importance of Civil Courts' power of judicial discretion, which they have to use while adjudicating applications under OI R10 of CPC 1908. This judgment also underscores that there is a strong need for (i) inclusivity and (ii) efficiency along with (iii) fairness, while delivering judgements on civil procedures, in alignment with the broader principles of justice. *Owners and Parties Interested in the Vessel M.V. Polaris Galaxy* case also highlights as to how when judicial discretion is prudently exercised, it fosters both the essentials of procedural justice i.e. (i) procedural integrity and (ii) substantive justice.

Challenges and Solutions of Delivering Civil Justice

The challenges such as, over-reliance on the subjective and inconsistent application of judicial discretion by the civil judges while adjudicating applications under OI R10 CPC 1908, many times, lead to the 'inconsistent' application of law and which further leads to the unpredictability in civil justice system. And, the major reason for this is 'over-reliance' on 'formalism', as it has the tendency to lead to 'excessive' adherence to the procedural rules as are provided under CPC 1908, which many a times undermines the much necessary, substantive justice. This excessive adherence also leads to 'fragmented litigation' by excluding the necessary parties, which as discussed above, may increase the risk of multiple and contradictory rulings from the Court. The solution for the above challenges is as follows, *firstly*, the judiciary should develop clear principles and issue pointed guidelines for the Judges to identify both the 'necessary' and 'proper' parties under OI R10 of CPC 1908 before applying their 'judicial Discretion'. *Secondly*, the judges should be trained specifically on the principles of David Dyzenhaus, Ronald Dworkin and John Rawls for ensuring fairness as well as coherence while adjudicating aforesaid applications. *Thirdly*, ensuring the balance between the efficiency and the inclusivity of necessary and proper stakeholders while adjudicating the above applications also requires adoption of proportionality tests.

VIII

Procedural Rules and Comparative Best Practices from Across the World H2

American and English Themes in Civil Procedure

While discussing legal realism, Roscoe Pound explained the role of managerial judging in the civil justice system and critiqued the prevalent inefficiencies of rigid civil procedural systems. He therefore advocated for the procedural flexibility so that it could adapt to the much necessary societal needs.[90] For example, Rule 1 of the Federal Rules of Civil Procedure (FRCP), 1938, emphasised on the 'just, speedy and inexpensive determination of every action'. Similarly, Clark advocated for pragmatism and efficiency in streamlining of the civil procedures for ensuring justice without causing procedural delays.[91] He was responsible for drafting significant portions of the FRCP, focussing on (i) simplicity and (ii) merging the law with equity. For example, in *Hickman's*[92] case, the Court supported the procedural discovery rules. Stephen Subrin approaches the civil procedure by balancing the principles of fairness and flexibility.[93] He is also a strong critic of tension between the standardised rules and the judicial discretion used by the Courts. Adrian Zuckerman insists on the aspects of 'consistency' and 'predictability' in the context of civil procedure, as for him, civil justice system is about law enforcement. He advocates for consistent clarity in the rules of civil procedure so as to uphold the legal certainty and minimising the judicial subjectivity[94], for example in *Mitchell*'s[95] case, the Court opted for the procedural default rules.

United Kingdom: Rule 19 of Civil Procedure Rules (CPR) 1998

Rule 19 of the CPR, 1998 covers 'Parties and Group Litigation' in England and Wales, which in India correspondingly deals with in OI R10 of CPC. Rule 19 follows a flexible approach and allows the Court to not only add but substitute and also remove parties from the civil suit (wherever necessary) to resolve all the issues. The rule incorporates the 'necessary and proper parties' rule, which is similar to the CPC

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[90] Roscoe Pound, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, 1906, was addressed before the American Bar Association, 29.08.1906, in 29 ABA Reports, 395, (1906).

[91] Charles E Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules* 3 (1950), VANDERBILT LAW REVIEW, 493.

[92] *See Hickman* v. *Taylor*, 329 U.S. 495 (1947).

[93] *See* Stephen Subrin, *On Thinking about Description of a Country's Civil Procedure* 7 TULANE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 139 (1999).

[94] Adrian Zuckerman, CIVIL PROCEDURE: PRINCIPLES OF PRACTICE, para 1.7. (3rd edn. 2013)

[95] *See Mitchell* v. *News Group Newspapers Ltd.*, [2013] E.W.C.A. Civ. 1537

1908 in India. However, in the United Kingdom, the focus is more on enhancing (i) 'judicial efficiency' and (ii) cost-effectiveness, and therefore, here, the presence of all those parties is necessary, who can enable the Court to (i) effectually and (ii) completely, adjudicate and settle all the questions raised and involved in the matter.[96]

United States: Rule 19 of the Federal Rules of Civil Procedure (FRCP)

It is Rule 19 of the FRCP, which deals with the 'Required Joinder of Parties' in a civil suit. It provides a detailed framework to determine the feasibility of making a party to a suit. The rule in clear terms, provides for the mandate of 'joinder of only those parties' who are necessary for the 'complete relief' in addition to those who are already parties in the suit, so as to 'protect the interests' of all those who are absent. The rule incorporates, 'a balancing test' to fundamentally determine, whether a present suit can be proceeded with or without a necessary party and the weighing factors are two (i) the potentiality of the prejudice caused to the existing parties and (ii) the adequacy of the Civil Court's judgment. In *Provident Tradesmens Bank & Trust Co.*[97] case, the Court discussed the importance of the 'balancing judicial economy' weighing with 'the rights of parties' to be heard.

Australia: Rule 9 of Federal Court Rules 2011 (FCR)

In Australia, Rule 9.05 of Federal Court Rules, 2011 provides for the Joinder of Parties, which says that any person can be joined as a party whose cooperation is necessary for ensuring that all the matters in the controversy in the civil proceedings can effectively be determined completely and adjudicated upon. Similar to OI R10(2) of the CPC, Rule 9.07 of the FCR 2011, provides the provision for the removal of Parties, where the judicial discretion is granted to the Civil Judge to remove an improper or not-necessary party to be joined as a party to the matters in dispute. By excluding the unnecessary parties, the litigation process would be simplified and potential delays would also be checked. In *UCPR*[98] case, the High Court of Australia held that the Civil Courts must ensure that only those parties are there in the suit, whose presence are necessary for resolving all the issues in controversy, as the addition of unnecessary parties, complicates the litigation and potentially affects the civil justice by delaying it.

Canada: Ontario Rules of Civil Procedure (ORCP) 1990 in Canada

Rule 5 of the ORCP regulates the joinder of parties in the suit as it deals with the addition, deletion and substitution of parties. The Canadian Courts adopt a

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[96] *Amon* v. *Raphael Tuck & Sons Ltd.*, [1955 A. No. 1298] 1955 Nov. 10, 23; Dec. 7, 19.

[97] *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968).

[98] *UCPR* v. *Commonwealth*, [2006] H.C.A. 52.

pragmatic approach, often focusing on the practical implications of the addition or removal of the parties. The Canadian approach emphasises the prevention of multiplicity of proceedings and this also reflects their strong policy preference of resolving all the issues in a single litigation.

By comparing the provisions of different jurisdictions, such as the UK and the US, it is clear that they have developed a very structured framework for exercising the judicial discretion in case of joinder of parties, so as to reduce (i) the variability and (ii) unpredictability in the final outcomes of the judicial decisions.

IX

Conclusion

The Justice in civil proceedings is slow to get because of the procedural delays, and, the justice delivery in the civil proceedings had the tendency to be directly affected by the use of 'Judicial Discretion', especially by the Civil Judge under OI R10 of CPC 1908. In this regard, the judiciary is developing necessary principles, through judicial reasoning, for the 'Civil Justice System and ensuring the maintenance of both 'consistency' and 'fairness' in civil justice. The main objective of civil justice is conflict resolution,[99] and to achieve that, CPC 1908 has developed various mechanisms and one such mechanism is OI R10. To a larger extent, the Civil Judge's effective decisions on the applications under OI R10 of the CPC would solve the issue of the addition of non-necessary or unnecessary parties to the suit, which, in a way, is one of the essential steps towards conflict resolution. The test of necessary parties to civil proceedings puts a responsibility on the shoulders of the Court to determine that only those parties are arrayed and if by inadvertence a party is not impleaded, the error be corrected for proper dispensation of justice. Rejecting frivolous applications for the impleadment of the parties under OI R10 will allay the unwanted procedural hiccups, which prolong the suit's life. Such issues cannot be overlooked. So, we can sum up the crucial aspects which the Court has to bear in mind while applying its judicial discretion either so moto or on an application under OI R10 as *firstly*, whether the party sought to be added is a necessary party for the suit? *Secondly*, whether the addition of the party is necessary for the effective and complete adjudication of the issues in controversy in the suit before the Court? And *thirdly*, whether the final order passed in the litigation shall affect the party sought to be added?[100] The need of the hour is to think out of a pigeonhole and to put on a new trajectory of law that is noticeable. Indubitably, legislations are the compound

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[99] Alan Uzelac (ed.), GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEM 12 (2013).

[100] *Gram Panchayat, Garhi* v. *Dharamveer*, A.I.R. 1998 P&H 165.

interest of detailed deliberations and the effect of legislations is strikingly apparent only after years of enactment. There is a strong need to rationalise the interpretation of OI R10, CPC as it is a double-edged sword, on the one hand, rejecting the application under O1 Rule 10, CPC can shorten the life of the suit and on the other, it may cause injustice to a necessary party also whose interest may be jeopardised due to the decision taken in the suit. Thus, it is warranted that a set of directions is formulated based on the law developed by the Judiciary up till now, which would then be followed and applied by the Civil Courts, to meet the ends of justice. There is not even an iota of doubt in the fact that, it is not going to be easy for the Civil Judges to always objectively decide the issue under OI R10 of CPC, even after the set of directions is formed by the Judicial Principles, because of the precarious nature of the facts, which are going to be different in each case and a handful of problems do come in the way when any order is pronounced under this provision but designing the way for its effectiveness and efficiency should always be borne in the mind of the Civil Judges. And only then it can avoid becoming a ship without a rudder. It is, therefore, necessary to have some minimum objective standard based on judicial principles to be followed whenever any judge decides an application under OI R10, CPC. Roscoe Pound once made this point that the rules are not merely prescribed for their own sake instead, they are administered to achieve the larger objective of 'social ends' and the problem is not of 'how' to achieve this objective, but it is about how the law administering functions (civil procedure) are meant to accomplish this objective.[101] Treating a symptom without tackling the issue behind it, shall not be helpful in the latter part of the day. Thus, it is necessary to have civil justice right now or in the immediate future, but not in the distant future. Essentially, the impact of adjudicating the application preferred under OI R10 of CPC 1908 cannot be gainsaid by anyone. In this way, the legislative intent of (i) ensuring comprehensive adjudication by including necessary parties to the civil suit proceedings, (ii) balancing the procedural rigidity with that of judicial flexibility and promoting 'civil justice' and (iii) protecting the disputes between the parties, by promoting 'Judicial Efficiency' can be accomplished. One cannot lose sight of the fact that upholding the private rights of the parties to the civil suit is not just a private matter, but, upholding such rights will send a public message and will also encourage peaceful and smooth running of the society.[102]

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[101] Roscoe Pound, THE SCOPE AND PURPOSE OF SOCIOLOGICAL JURISPRUDENCE 591 (1911).

[102] Adrian Zuckerman, *Litigation Management Under the CPR: A Poorly-Used Management Infrastructure* in THE CIVIL PROCEDURE RULES TEN YEARS ON 91 (D Dwyer ed. 2009).