

# Discretionary Powers of Courts

## (Civil Courts)

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1. **Nature of provisions of law:** Different natures of laws are as follows:
  - (i) Mandatory
  - (ii) Directory
  - (iii) Discretionary
2. **Kinds of orders that a court can pass at different stages ? :** A court can pass following three types of orders at different stages of the case :
  - (i) final order
  - (ii) intermediate or interim order
  - (iv) interlocutory order. See :Girish Kumar Suneja Vs. CBI, AIR 2017 SC 3620 (Three-Judge Bench)(Para 17)
3. **“Mandatory” provision:** Mandatory provision gives no discretion to the court and the court is bound to follow it. Non-observance of a mandatory provision results into illegality.
4. **“Directory provision”:** Observance of directory provision is not mandatory and its non-observance does not result into illegality and does not cause prejudice to the party.
5. **“Discretionary” provision:** Discretionary provision does not compel the court to act or not to act in a particular manner and gives freedom to the court to act or not act in relation to a matter. But the discretionary power vested in the court needs to be exercised in a judicious manner and not in a manner that causes prejudice to either of the parties.
6. **Different kinds of proceedings:** Different kinds of judicial proceedings in cases which are conducted by courts can be enumerated into following categories:

- (i) Regular proceedings
- (ii) Miscellaneous proceedings
- (iii) Ancillary proceedings
- (iv) Incidental or collateral proceedings
- (v) Supplemental proceedings
- (vi) Auxiliary proceedings. See: *Vareed Jacob Vs. Sosamma Gee Verghese*, (2004) 6 SCC 378

7. **Shall & May: Meaning of ?:** The word “ Shall” is ordinarily mandatory but not so interpreted if the context or the intention otherwise demand. The essence of the rule is that where the consultation has to be made during the performance of a public duty and an omission to do so occurs, the action cannot be regarded as altogether void, and the direction for consultation may be treated as directory and its neglect as of no consequence to the result. See: *Sainik Motors Vs. State of Rajasthan*, AIR 1961 SC 1480.
8. **Discretion & precedent distinguished:** One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a single judge or a division bench does not agree with the decision of a bench of coordinate jurisdiction, the matter should be referred to a larger bench. It is a subversion of judicial process not to follow this procedure. In our system of judicial review which is a part of our constitutional scheme, is the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective a a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute. See: *Sundarjas Kanyalal Bhathija vs. The Collector, Thane, Maharashtra*, AIR 1990 SC 261.
9. **Inherent power of Civil Court u/s 151 CPC:** For the purpose of the discussion of the question in the context of the relevant provisions of the CPC, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by

Section 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the CPC dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court under Section 151 CPC cannot be invoked in order to cut across the powers conferred by the CPC. The prohibition contained in the CPC need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates. See: Arjun Singh Vs. Mohindra Kumar, AIR 1965 SC 993.

- 10. Power u/s 151 CPC cannot be exercised in conflict with any other power of the Court expressly or impliedly provided in CPC:** Inherent power of the Court u/s 151 CPC is in addition to and complementary to the powers expressly conferred under the CPC but that power will not be exercised in conflict with any of the powers expressly or by implication conferred by other provisions of CPC. If there is a express provision in CPC covering a particular topic, then Section 151 CPC cannot be applied. See:
- (i). U.Sudheera Vs. C.Yashoda, (2025) 4 SCC 215 (Para 18)
  - (ii) Vareed Jacob Vs. Sosamma Geevarghese, (2004) 6 SCC 378 (Three-Judge Bench)
  - (iii) Mahoharlal Chopra Vs. Rai Bahadur, AIR 1962 SC 527
  - (iv) Ram Chand & Sons Sugar Mills Vs. Kanhyalal Bhargava, AIR 1966 SC 1899
- 11. Inherent power u/s 151 CPC cannot be exercised so as to nullify the provisions of CPC:** Inherent power u/s 151 CPC cannot be exercised so as to nullify the provisions of CPC. Where the CPC deals expressly with a particular matter, the provision should normally be regarded as exhaustive. See:
- (i) State of U.P. Vs. Roshan Singh, 2008 (71) ALR 1 (SC).
  - (ii) National Institute of Mental Health & Neuro Sciences Vs. C. Parmeshwara, 2005 (2) AWC 1865 (SC).
- 12. Power u/s 151 CPC cannot be invoked to deal with an application for which there is a statutory provision in CPC:** Power u/s 151 CPC cannot be invoked to deal with an application for which there is a statutory provision in CPC. Temporary Injunction can be granted by Court under

Order 39, rules 1 & 2 CPC and not u/s 151 CPC. See: Satya Prakash Tiwari Vs. Civil Judge (Jr. Div) Etawah & Others, 2006 (62) ALR 431.

Following cases have been relied on by the High Court in this case:

- (i). U. Sudheera Vs. C. Yashoda, (2025) 4 SCC 215 (Para 18)
- (ii) Vareed Jacob Vs. Sosamma Geevarghese, (2004) 6 SCC 378 (Three-Judge Bench)
- (iii) Arjun Singh Vs. Mohindra Kumar, AIR 1965 SC 993
- (iv) Atmaram Properties Private Limited Vs. Federal Motors Private Limited, 2005 (58) ALR 650
- (v) Chitivalasa Jute Mills Vs. Jaypee Rewa Cement, 2004 (54) ALR 706
- (vi) Naina Singh Vs. Koowarjee, AIR 1970 SC 997
- (vii) State of W.B. Vs. Karan Singh Binayak, (2002) 4 SCC 188

**13. Section 151 CPC will not be available when there is alternative remedy:** In the case noted below, the Hon'ble Supreme Court has held as under:

- (a) Inherent power of the Court are not to be used for the benefit of a party/litigant who has remedy under CPC similar in the position vis-à-vis other statute.
- (b) Objective of Section 151 CPC is to supplement and not to replace the remedies provided for in the CPC. Section 151 CPC will not be available when there is alternative remedy.
- (c) Section 151 CPC cannot be invoked when there is express provision under which relief can be claimed by the aggrieved party.
- (d) Inherent powers u/s 151 CPC are in addition to the powers specifically conferred on the courts. See: State of U.P. Vs. Roshan Singh, 2008 (71) ALR 1 (SC)

**14. Inherent power of Civil Court u/s 151 CPC:** For the purpose of the discussion of the question in the context of the relevant provisions of the CPC, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by Section 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the CPC dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court under Section 151 CPC cannot be invoked in order to cut across the powers conferred by the CPC. The prohibition contained in the CPC need not be express but may be implied or be implicit from the

very nature of the provisions that it makes for covering the contingencies to which it relates. See: Arjun Singh Vs. Mohindra Kumar, AIR 1964 SC 993

- 15. Power u/s 151 CPC cannot be exercised in conflict with any other power of the Court expressly or impliedly provided in CPC:** Inherent power of the Court u/s 151 CPC is in addition to and complementary to the powers expressly conferred under the CPC but that power will not be exercised in conflict with any of the powers expressly or by implication conferred by other provisions of CPC. If there is a express provision in CPC covering a particular topic, then Section 151 CPC cannot be applied. See:
- (i) Vareed Jacob Vs. Sosamma Geevarghese, (2004) 6 SCC 378 (Three-Judge Bench)
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- 16. Inherent power u/s 151 CPC cannot be exercised so as to nullify the provisions of CPC:** Inherent power u/s 151 CPC cannot be exercised so as to nullify the provisions of CPC. Where the CPC deals expressly with a particular matter, the provision should normally be regarded as exhaustive. See:
- (i) State of U.P. Vs. Roshan Singh, 2008 (71) ALR 1 (SC)
  - (ii) National Institute of Mental Health & Neuro Sciences Vs. C. Parmeshwara, 2005 (2) AWC 1865 (SC)
- 17. Power u/s 151 CPC cannot be invoked to deal with an application for which there is a statutory provision in CPC:** Power u/s 151 CPC cannot be invoked to deal with an application for which there is a statutory provision in CPC. Temporary Injunction can be granted by Court under Order 39, rules 1 & 2 CPC and not u/s 151 CPC. See: Satya Prakash Tiwari Vs. Civil Judge (Jr. Div) Etawah & Others, 2006 (62) ALR 431. Following cases have been relied on by the High Court in this case:
- (i) Vareed Jacob Vs. Sosamma Geevarghese, (2004) 6 SCC 378 (Three-Judge Bench)
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- 18. Section 151 CPC will not be available when there is alternative remedy:** In the case noted below, the Hon'ble Supreme Court has held as under:
- (a) Inherent power of the Court are not to be used for the benefit of a party/litigant who has remedy under CPC similar in the position vis-à-vis other statute.
  - (b) Objective of Section 151 CPC is to supplement and not to replace the remedies provided for in the CPC. Section 151 CPC will not be available when there is alternative remedy.
  - (c) Section 151 CPC cannot be invoked when there is express provision under which relief can be claimed by the aggrieved party.
  - (d) Inherent powers u/s 151 CPC are in addition to the powers specifically conferred on the courts. See: State of U.P. Vs. Roshan Singh, 2008 (71) ALR 1 (SC)
- 19. Mere making out a prima facie case by party not enough for grant of temporary injunction:** Only making out a prima facie case by plaintiff is not sufficient for grant of injunction. It must be shown that the injury suffered by the plaintiff in case of refusal of temporary injunction would be irreparable. See:
- (i) Best Sellers Retail India Private Limited vs. Aditya Birla Nuvo Limited, AIR 2012 SC 2448.
  - (ii) Moradabad Development Authority vs. Sai Sidhi Developers, AIR 2019 All 196.
- 20. No interim injunction in the absence of prima facie case even if the other requirements are fulfilled:** Interim injunction u/o 39, rules 1 & 2 CPC cannot be granted when the party is unable to prove prima facie case in his favour even if such party makes out a case of balance of convenience and irreparable injury. See: Kashi Math Samsthan vs. Shrimad Sudhindra Thirtha Swamy, AIR 2010 SC 296.
- 21. Ex-parte ad interim injunction:when to be granted?:** (Section 94 r/w Order 39, rule 3 CPC): Ex-parte injunction can be granted only under exceptional circumstances. The Supreme Court has enumerated following principles and factors which should weigh with the court for grant of ex-parte injunction:
- (1) whether irreparable or serious mischief will ensue to the plaintiff;
  - (2) whether the refusal of ex-parte injunction would involve greater injustice than the grant of it would involve;
  - (3) the court will also consider the time at which the plaintiff first had notice of the act complained of so that the making of improper order against a party in his absence is prevented;



- (4) the court will consider whether the plaintiff had acquiesced for some time and in such circumstances it will not grant ex-parte injunction;
- (5) the court would expect a party applying for ex-parte injunction to show utmost good faith in making the application;
- (6) even if granted, the ex-parte injunction would be for a limited period of time;
- (7) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court. See:
  - (i) *Bombay Dyeing & Manufacturing Co. Ltd. vs. Bombay Environmental Action Group*, (2005) 5 SCC 61
  - (ii) *Morgan Stanley Mutual Fund vs. Kartickdas*, (1994) 4 SCC 225

**22. Despite repeal of a provision under Trust Act 1882, court has discretionary power u/s 151 CPC to declare existence of constructive trust:** Despite repeal of Section 94 of the Trusts Act 1882, courts jurisdiction to declare existence of constructive trust can be derived from section 88 of the Trusts Act, 1882 and Section 151 CPC. See: *Janardan Dagdu Khomane Vs. Eknath Bhiku Yadav*, (2019) 10 SCC 395

**23. Consent, waiver or acquiescence & jurisdiction of Civil Courts:** No amount of consent, waiver or acquiescence can confer jurisdiction on a court which it inherently lacks or where none exists. See: *Vithalbhai (P) Ltd. vs. Union Bank of India*, (2005) 4 SCC 315.

**24. Inherent power of Civil Court u/s 151 CPC:** For the purpose of the discussion of the question in the context of the relevant provisions of the CPC, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by Section 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the CPC dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court under Section 151 CPC cannot be invoked in order to cut across the powers conferred by the CPC. The prohibition contained in the CPC need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates. See: *Arjun Singh Vs. Mohindra Kumar*, AIR 1964 SC 993

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  - (c) Section 151 CPC cannot be invoked when there is express provision under which relief can be claimed by the aggrieved party.
  - (d) Inherent powers u/s 151 CPC are in addition to the powers specifically conferred on the courts. See: State of U.P. Vs. Roshan Singh, 2008 (71) ALR 1 (SC)
- 29. Despite repeal of a provision under Trust Act 1882, court has discretionary power u/s 151 CPC to declare existence of constructive trust:** Despite repeal of Section 94 of the Trusts Act 1882, courts jurisdiction to declare existence of constructive trust can be derived from section 88 of the Trusts Act, 1882 and Section 151 CPC. See: Janardan Dagdu Khomane Vs. Eknath Bhiku Yadav, (2019) 10 SCC 395
- 30. Court can u/s 151 CPC direct defendant to provide security before proceeding with suit:** Court may on application of plaintiff or on its own motion using inherent powers of court under Section 151 CPC, under circumstances warranting the same, direct the defendant to provide security before further progress of the suit. See: Rahul S. Shah Vs. Jinendra Kumar Gandhi, (2021) 6 SCC 418 (Three-Judge Bench)
- 31. Discretion u/s 5 must be exercised to condone delay unless application lacks bona fides:** Unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 of the Limitation Act, 1963 is proved, the application must not be thrown out or any delay cannot be refused to be condoned. See: Shakuntala Devi Jain vs Kuntal Kumari, AIR 1969 SC 575
- 32. Meaning of expression “sufficient cause” in Section 5 of Limitation Act:** It has been held by the Supreme Court that discretion given by Section 5 of the Limitation Act, 1963 should not be defined or crystallized so as to convert a discretionary matter into a rigid rule of law. The expression “sufficient cause” should receive a liberal construction. See: New India Insurance Co. Ltd. vs Smt. Shanti Mishra, AIR 1976 SC 237
- 33. Restoration of suits or proceedings**

- 34. Extent of power & discretion of court in allowing amendment of pleadings u/o. 6, rule 17 CPC:** An unfettered discretion and wide power has been conferred on the courts u/o 6, rule 17 CPC to allow amendment of pleadings in such manner and on such terms as it appears to the court to be just and proper. See: Baldev Singh vs. Manohar Singh, (2006) 6 SCC 498
- 35. Delayed amendment to be allowed on cost:** An amendment application u/o.6, rule 17 CPC cannot be rejected merely on the ground of delay when the opposite party can be compensated by costs and no serious prejudice is caused to the other side. There is no absolute rule that in every case where a relief is barred because of limitation, an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed. See:
- (i) Andhra Bank vs. ABN Amro Bank, (2007) 6 SCC 167
  - (ii) Baldev Singh vs. Manohar Singh, (2006) 6 SCC 498
  - (iii) Pankaja vs. Yellappa, (2004) 6 SCC 415
  - (iv) Ragu Thilak D. John vs. Rayappan, (2001) 2 SCC 472
  - (v) Estralla Rubber vs. Dass Estate (P) Ltd., (2001) 8 SCC 97
  - (vi) B.K.N. Pillai vs. P. Pillai, AIR 2000 SC 614
  - (vii) Harcharan vs. State of Haryana, AIR 1983 SC 43
  - (viii) Dukhi Lal vs. XIV ADJ, 2000 ALJ 563 (All)
  - (ix) Jai Jai Ram Manohar Lal vs. National Building Material Supply, Gurgaon, AIR 1969 SC 1267
  - (x) Estralla Rubber vs. Dass Estate (P) Ltd., (2001) 8 SCC 97
- 36. Amendment after commencement of trial when be allowed:** Proviso added to o.6, rule 17 CPC w.e.f. 01.07.2002 is mandatory. However, amendment can be allowed only if in spite of due diligence the party could not have raised the matter before the commencement of the trial and when the proposed amendment is necessary to decide the real dispute between the parties. No application for amendment moved u/o.6, rule 17 CPC should be allowed after the commencement of trial unless the court is satisfied that the party seeking amendment, despite exercise of due diligence, could not have raised the plea or amendment before the commencement of trial. See:
- (i) Vidyabai vs. Padmalatha, 2009 (1) Supreme 238
  - (ii) Ajendra Prasad vs. Swami Keshav Prakash, AIR 2007 SC 513

- (iii) Prabhu Niwas vs. Laxmi Niwas, 2006 (63) ALR 23 (All)
  - (iv) Salem Advocates Bar Association vs. Union of India, (2005) 6 SCC 344 (Three Judge Bench)
  - (v) Pradeep Singhvi vs. Heero Dhankani, (2004) 13 SCC 432
37. **Despite repeal of a provision under Trust Act 1882, court has discretionary power u/s 151 CPC to declare existence of constructive trust:** Despite repeal of Section 94 of the Trusts Act 1882, courts jurisdiction to declare existence of constructive trust can be derived from section 88 of the Trusts Act, 1882 and Section 151 CPC. See: Janardan Dagdu Khomane Vs. Eknath Bhiku Yadav, (2019) 10 SCC 395.
  38. **Court can pass order despite caveat:** Court can pass order( issuing commission) despite caveat under Section 148-A CPC.: See: K. Sadasivan Vs Surendradas Bhanu, AIR 2021 (NOC) 168 Kerala (Full Bench).
  39. **Extent of power of court in review on production of new document not produced earlier:** Court can under Section 114 read with Order 47 of the CPC consider any document with intrinsic worth having bearing on lis decided earlier which was not on record because despite due diligence, the same could not be produced earlier, and if the same had been produced earlier, outcome of the case could have been different. See: Maharashtra State Transport Corporation Vs. Mahadeo Krishna Naik, (2025) 4 SCC 321 (Paras 38 &39)
  40. **Court may permit examination-in-chief in civil suits to be recorded in court:** U/o 18, rule 4(1) CPC the parties to a civil suit are required to file their affidavits in support of their pleadings in the form of their examination-in-chief. In appropriate cases court may permit examination-in-chief to be recorded in court. There is no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of the examination-in-chief. See: Salem Advocates' Bar Association Vs. Union of India, (2005) 6 SCC 344 (Three-Judge Bench).
  41. **Production of additional evidence at late stage of trial:** It has been held by the Hon'ble Supreme Court that even after deletion of Order 18, Rule 17-A CPC w.e.f. 01.07.2002, Court has inherent power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order 18, Rule 17-A CPC did not create any new right but only clarified the position. Therefore, deletion of Order 18, Rule 17-A CPC does not disentitle the parties to produce evidence at a

later stage. If a party satisfies the Court that after exercise of due diligence or the evidence was not within his knowledge or could not be produced at the time when the party was leading his evidence, Court may permit leading of such evidence at a later stage on such terms as may appear to be just. See: Salem Advocates' Bar Association vs. Union of India, (2005) 6 SCC 344 (Three-Judge Bench).

- 42. Production of additional evidence at late stage of trial:** It has been held by the Hon'ble Supreme Court that even after deletion of Order 18, Rule 17-A CPC w.e.f. 01.07.2002, Court has inherent power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order 18, Rule 17-A CPC did not create any new right but only clarified the position. Therefore, deletion of Order 18, Rule 17-A CPC does not disentitle the parties to produce evidence at a later stage. If a party satisfies the Court that after exercise of due diligence or the evidence was not within his knowledge or could not be produced at the time when the party was leading his evidence, Court may permit leading of such evidence at a later stage on such terms as may appear to be just. See: Salem Advocates' Bar Association vs. Union of India, (2005) 6 SCC 344 (Three-Judge Bench).
- 43. Injunction in a suit for specific performance of contract:** Grant of temporary injunction in a suit for specific performance of contract for sale is not proper when there are doubts as to the existence of a concluded contract and there is delay in instituting the suit. Grant of relief in a suit for specific performance is itself a discretionary remedy and a plaintiff seeking temporary injunction will therefore have to establish a strong prima facie case on the basis of undisputed facts. The conduct of the plaintiff will also be a very relevant consideration for purposes of injunction. See: Ambalal Sarabhai Enterprise Limited Vs. KS Infrastructure LLP Limited, (2020) 5 SCC 410
- 44. Judicial discretion available to refuse disputed and admitted documents to expert for comparison of signatures u/s 73 of the Evidence Act:** Comparison of hand writings or signatures is not a science at all much less any scientific approach is involved in making such comparison. It is only an art which has to be acquired by experience. In so far as judicial officers in State are concerned, they are provided with the subject of introduction to comparison of signatures and hand writing during their basic induction course at the time of their induction into the subordinate judiciary after selection. They are taken to several premier forensic and scientific institutions for practical experience and also are

provided with lectures by faculty on the above subject. It is not as if judicial officers undertake the power under Section 73 of the Evidence Act, in a gullible manner. They are provided with basic confidence in undertaking this subject. It cannot be said that lower Court which is Court presided over by senior subordinate judicial officer cannot undertake work of comparison of signatures in exercise of power under Section 73 of Evidence Act, particularly when that Court did not entertain any doubt on this aspect of matter. After all, evidence of a person who claims to be an expert, is not conclusive. An expert's evidence has to be scrutinized and adjudicated again by Court, like any other witness for the party, as to his approach to his conclusion and also reliability of such report. Judicial discretion thus exercised by lower Court in refusing to send disputed documents and admitted document to expert for comparison of signatures, proper. See: *J. Krishna Vs. Maliram Agarwal & Others*, AIR 2013 AP 107 (*paras 9 & 10*).

45. **Public prosecutor has discretion to examine only some of many injured witnesses:** Under S. 226 CrPC the public prosecutor has to state what evidence he proposes to adduce for proving the guilt of the accused. If he knew at that stage itself that certain persons cited by the investigating agency as witnesses might not support the prosecution case he is at liberty to state before the court that fact. Alternatively, he can wait further and obtain direct information about the version which any particular witness might speak in Court. If that version is not in support of the prosecution case it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for prosecution. When the case reaches the stage envisaged in S. 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said Section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution for relieving itself of the strain of adducing repetitive evidence on the same point but also helps the Court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload,



particularly those Courts crammed with cases, but without impairing the cause of justice. See: Hukum Singh & others Vs. State of Rajasthan, 2001 CrLJ 511 (SC).

46. **Direction of the Supreme Court as to when should cross-examination of witness be deferred:** Norm in any criminal trial is for the examination-in-chief of witnesses to be carried out first, followed by cross-examination, and re-examination if required, in accordance with Section 138 of the Indian Evidence Act, 1872. Section 231(2) of the Cr.P.C., however, confers a discretion on the Judge to defer the cross-examination of any witness until any other witness or witnesses have been examined, or recall any witness for further cross-examination, in appropriate cases. Judicial discretion has to be exercised in consonance with the statutory framework and context while being aware of reasonably foreseeable consequences. The party seeking deferral under Section 231(2) of the CrPC must give sufficient reasons to invoke the exercise of discretion by the Judge, and deferral cannot be asserted as matter of right. There cannot be a straitjacket formula providing for the grounds on which judicial discretion under Section 231(2) of the CrPC can be exercised. The exercise of discretion has to take place on a case-to-case basis. The guiding principle for a Judge under Section 231 CrPC is to ascertain whether prejudice would be caused to the party seeking deferral, if the application is dismissed. While deciding an application under Section 231(2) of the CrPC, a balance must be struck between the rights of the accused, and the prerogative of the prosecution to lead evidence. See: State of Kerala Vs. Rasheed, AIR 2019 SC 721.
47. **Order of production and examination of witnesses:** As per discretion of the Court: Section 135 of Evidence Act, 1872 (Now Sec. 140 of BSA, 2023)
48. **Trial Judge has vast and unrestricted power to put any question, relevant or irrelevant, to witness u/s 165 of Evidence Act (now Sec. 168 of BSA):** Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put any question he pleases, in any form, at any time, to any witness, or the parties, about any fact, relevant or irrelevant, in order to discover relevant facts. A Judge remaining mute in court during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind but there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the judge performing the role of only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary material from witnesses in the appropriate context which he feels necessary for reaching the correct



conclusion. There is nothing which inhibits his power to put questions to the witnesses either during the chief examination or cross examination or even during re-examination to elicit the truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip, it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for the trial Judge to remain active and alert so that errors can be minimized. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent, active interest by putting questions to witnesses in order to ascertain the truth. See: *Rahul vs State of Delhi*, (2023) 1SCC83 (Three-Judge Bench).

## **Discretionary Powers of Courts** *(Criminal Courts)*

1. Remand u/s 167 CrPC ( Section 187, BNSS)
2. Bail u/s 437 CrPC ( Section 480, BNSS)
3. Discretionary powers given by Parliament to Magistrates to grant bail in non-bailable offences u/s 437 CrPC (Section 480, BNSS)
4. Bail is rule, jail exception
5. Issuing BW, NBW
6. Cancelling BW, NBW
7. Fixing amount of surety bonds
8. Adjournments in criminal cases u/s 309 CrPC (Section 346, BNSS)
9. Cost
10. Bar of Section 362 CrPC ( Section 403, BNSS)
11. Discretion in awarding penalty as provided by Section 53, IPC (Section 4, BNS)
12. No inherent power to lower criminal courts like that of the High Court u/s 482 CrPC ( Section 528, BNSS)

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