

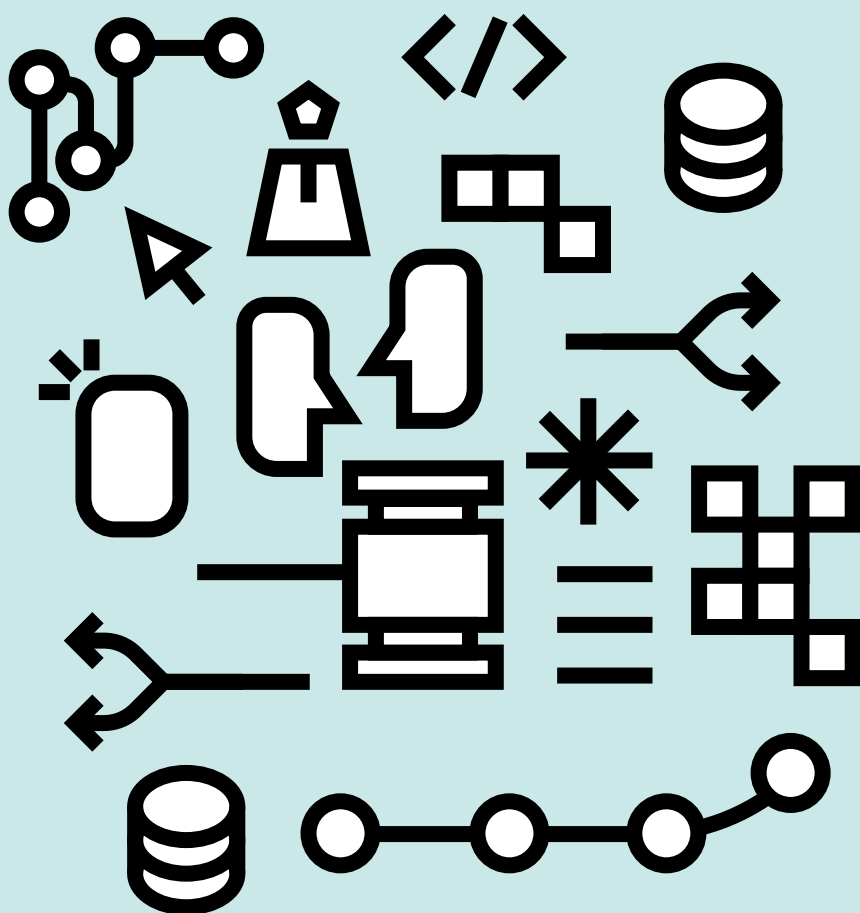
Civil Litigation
Process for the
Digital Age

CONSULTATION PAPER SERIES

Rediscovering Discovery and Inspection

JALDI
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Justice, Access &
Lowering Delays in India



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Introduction

The trial of most civil suits depends on documents as evidence. After both sides have filed their pleadings with the relevant documents they have, there's a phase called discovery and inspection in civil litigation. This happens before the actual trial begins. Section 30 of the Code of Civil Procedure (CPC) empowers the court to order the discovery, inspection, and production of documents either on its own accord or if applied for by a party. This means that the court can obtain information, including documentary evidence that has not been made part of the record by the opposite party/parties. Discovery can either be of documents¹ or through interrogatories.² The latter is a procedure through which a party is compelled to answer and provide information. Inspection, on the other hand, refers to the examination of the documents that have been discovered. Order XI of CPC details the conditions and limitations to give effect to discovery and inspection.

The idea behind the stage is that for a fair trial, equal opportunity must be given to both sides to access documents in a case³ to eliminate any ambiguity and ensure that there is no 'trial by ambush'.⁴ By facilitating this exchange of information, 'discovery' promotes transparency. Additionally, the discovery of documents leads to: (i) eliciting admissions, (ii) obviating the necessity to produce lengthy evidence, and (iii) expediting disposal,⁵ ultimately contributing to a more efficient and just legal process. The importance of this stage has been elucidated in judgements as far back as the 1940s. The Calcutta High Court had stated that just as one party to a suit is permitted to prove his case using questions put to the opposite party in cross-examination, he can also seek to establish his case by the process of discovery, interrogatories

1 Ayush Srivastava and Anooksha Ratra, 'Discovery of Documents And Interrogatories: An Analysis' (*Mondaq*, 2 June 2021) <<https://www.mondaq.com/india/civil-law/1075200/discovery-of-documents-and-interrogatories-an-analysis>> accessed 25 April 2024.

2 The Code of Civil Procedure, 1908, Order XI Rule 1.

3 The Code of Civil Procedure, 1908, Order XI Rule 17.

4 American Bar Association, 'How Courts Work' (28 November 2021) <https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/#:~:text=Steps%20in%20a%20Trial&text=Discovery%20enables%20the%20parties%20to,time%20to%20obtain%20answering%20evidence.> accessed 30 April 2024.

5 *Rajnarain v. Indira Gandhi* AIR 1972 All 41

and admissions, for which provisions are made in Orders XI and XII of CPC.⁶

The two types of discoveries under the CPC have been explained below in detail:

Discovery by Documents

Order XI Rule 12 to Rule 21 detail the production of documents and their inspection. An order to produce documents can change a trial's trajectory. However, the documents requested to be discovered should be relevant to the case and be in possession of the party on which the application of production of documents has been made. For example, in a suit for partition, a crucial piece of documentary evidence might be in possession of a party but may not have been produced at the time of filing as it could go against their claim. The opposite party being aware of this can apply for its production.⁷ If the party indeed possesses the said documentary evidence and the court deems that the same is relevant to the case,⁸ the party will be required to produce it in court. If not produced, the party may be precluded from producing the same at a later time or an adverse order might be passed against the party.⁹ The discovery of the document under Order XI could reveal the party's intentions, influencing the court's understanding of the case. A court will allow for discovery of a document and the admissibility of the same would not be considered relevant if the production of a document helps the party to either advance his case, damage the adversary's case or if it leads to a trail of inquiry that sheds more light on the matter than previously known.¹⁰

Discovery by Interrogatories

Though the nature of each party's case is set out in the plaint and written statement, they may not have sufficiently disclosed their respective cases and may have intentionally or unintentionally not provided certain significant details. To shorten litigation, save expenses,¹¹ and ensure a fair trial,¹² the CPC provides a method allowing

6 *Gobinda Mohun Roy vs Magneram Bangur and Co.* AIR 1940 CAL 331

7 The Code of Civil Procedure, 1908, Order XI Rule 12.

8 The Code of Civil Procedure, 1908, Order XI Rule 14.

9 The Code of Civil Procedure, 1908, Order XI Rule 21.

10 *ML Sethi v. R P Kapur* 1972 (2) SCC 427

11 *Ramlalsao v. Tansingh Lalsingh* AIR 1952 Nagpur 135

12 The Code of Civil Procedure, 1908, Order XI Rule 2.

parties to submit questions or “interrogatories” for the opposite party. The objective of interrogatories could be to determine the nature of the case when it might not be clear from the pleadings, make the party’s own case stronger by securing admission from the other party,¹³ and seek admission of a party on the matter in dispute so that the issues can be accordingly framed. This minimises the contentious issues or disputes left for the adjudication of the court, with the ultimate object of facilitating early and expeditious disposal of the suit.¹⁴ The court decides how the interrogatories delivered have to be answered, i.e., by delivering particulars, making admissions, producing documents relating to the matters in question, or a combination of these.¹⁵

The objective of interrogatories is better explained with the following example: consider a scenario where the plaintiff, a bank, has initiated legal action against a defendant, for recovery of a loan amount. When the defendant submits a written statement, if it merely denies all the allegations made in the plaint, the plaintiff may have to summon the bank manager at the time to establish that she indeed issued the loan. In such a scenario, substantial costs and logistical challenges may arise, especially if the bank manager has been transferred since. However, the plaintiff can opt for a more efficient approach by filing interrogatories with the defendant and pose key questions like- ‘Did not the defendant apply for a loan on __ date?’, ‘Did not the Bank manager issue the loan to you?’, ‘Did not the defendant use the money for __ purpose?’¹⁶

Courts have the power to make an order or judgement in regard to any oral or written admission made by the parties at any stage of the proceedings.¹⁷ Answers to interrogatories delivered under Order XI are judicial admissions covered under section 58 of the Indian Evidence Act, 1872, which explicitly states that admitted facts need not be proven.¹⁸ In fact, in a 2008 Supreme Court case it was held that admissions in pleadings or judicial admissions admissible under Section 58 made by the parties or their agents at or before the hearing of the case

13 See *Plymouth Mutual Co-op. Society v. Traders Publishing Association* [(1906) 1 LJ 415]

14 *Govind Narayan & Ors v. Nagendra Nagda & Ors* (2018) 1 WLC 478

15 *Ibid.*

16 *Appendix C to the CPC contains the format in which discovery (interrogatories are to be conducted).*

17 The Code of Civil Procedure, 1908, Order XII Rule 6.

18 *G. Lalitha Bai and Ors. vs. G.R. Jaya Rao and Ors.* (2015) 5 ALD 517

stand on a higher footing than even evidentiary admissions.¹⁹ Hence, the affirmative responses to these interrogatories could absolve the plaintiff from the burden of proving the loan transaction itself, thus expediting the legal proceedings and reducing associated costs.

Limitations to Discovery and Inspection

It must be noted that discovery and inspection is not something that can be undertaken by a party as a matter of right. In the case of *Delhi State Industrial and Infrastructural Development Corporation Ltd. v. Shiv Kumar*,²⁰ the Delhi High Court listed the principles to consider before making an order for discovery of documents:

1. The documents sought to be discovered and produced must be relevant to the matter in controversy viz. matters in question.
2. The documents must be in the possession and power of the person against whom discovery and production are sought.
3. Discovery and production of the documents which are sought for are necessary at that stage of the suit.
4. The discovery and production are necessary for fairly disposing of the suit or for saving costs.
5. The discovery and production may be general or limited to certain classes of documents as the court in its discretion deems fit and the production will only be ordered if the court considers it just.²¹

Similarly, all interrogatories are not required to be answered. The party which has been administered interrogatories can submit an affidavit refusing to answer some or all questions if it feels that the interrogatories are scandalous, irrelevant, not exhibiting bona fide purpose for the suit, the matters inquired into are not material at that stage, or the information is privileged.^{22 23} However, the affidavit would have to contain clear reasons and explanations for denial.

19 *Nagindas Ramdas v. Dalpatram Ichharam* 1974 (1) SCC 242

20 *Delhi State Industrial and Infrastructural Development Corporation Ltd & Anr. v. Shiv Kumar* 2013 SCC OnLine Del 3773

21 *Ibid.*

22 The Indian Evidence Act 1872, Sections 122,123,124,126,127.

23 *The Code of Civil Procedure, 1908, Order XI Rule 6*

Issues

At first glance, the stage of discovery and inspection seems to be a short and straightforward stage in the lifecycle of a civil case. The court would allow such time as it considers appropriate for discovery and inspection, and it is quite clear that the rules do not provide a lot of leeway for the party (who is ordered to produce documents or answer interrogatories) to not follow the time given by the court. In fact, consultations with lawyers also reveal that in terms of inefficiencies, this stage does not lead to many adjournments or delays.

However, a couple of inefficiencies related to this stage that can be addressed, are listed below.

A. *Underutilisation of the stage of discovery and inspection:*

As mentioned above, there do not appear to be any significant problems at this stage, however the reason behind that is mainly due to the fact that this stage is skipped in most civil cases. Once the defendant comes to the court and submits their written statements, issues are framed and the trial officially begins. This is also because the stage of discovery and inspection, unlike other stages, is voluntary and heavily depends on the evidence submitted with the pleadings. Furthermore, the lawyers tend to rely more on examination-in-chief and cross-examination of a party than interrogatories to get material points on record.

B. *Disclosure of Documents:*

Another issue that may cause delay at this stage is that a party only submits an application and requests for a document to be produced after going through the written submissions and the attached documentary evidence. The application also has to clearly state why the document being sought is necessary for the case and the court has to consider the request before taking a decision on it. Currently, there is no mechanism in civil courts for plaintiffs to just provide a list of documents, along with their pleadings, which they believe the defendant possesses and would be required for the case. Similarly, there is no mechanism to make this list available to the defendant while serving summons to ensure that nothing is missed. The defendant is also unable to produce a list at the time of filing the written statement that can show that the plaintiff has not come with clean hands. As a result,

the whole process of applications requires additional hearings, which tends to waste precious time of the courts.

Recommendations

A. Use of Interrogatories and Statements of Admission and Denial

The stage of discovery by interrogatories, if used efficiently, can practically eliminate the need for cross-examination. Admissions made by answering interrogatories can expedite the legal process and spare both parties the need for extensive oral evidence. This process can be made even more efficient by introducing the practice of a mandatory statement of admission and denial, as done in Commercial Courts.²⁴

In 2015 the Union Government enacted the Commercial Courts Act, 2015 (Commercial Courts Act) to establish commercial courts in all states for speedy resolution of commercial disputes and facilitate ease of doing business in India.²⁵ All commercial disputes of value above Rs. 3 lakhs fall under the jurisdiction of commercial courts.²⁶ Various procedural changes were made in CPC to ensure a speedy trial in commercial courts and some of the most significant changes were made to the stage of discovery and inspection. This led to a completely new Order XI that is applicable only to commercial courts.

In the new Order XI for Commercial Courts, an additional step in the stage of discovery and inspection was introduced. As per Rule 4 of the new Order XI, each party is required to submit a statement of admitting or denying details of inspected documents within fifteen days of their inspection or any later date as determined by the Court.

The statement of admission or denial is made keeping the following aspects in mind:

1. The correctness of the contents of a document;
2. The existence of a document;

²⁴ The Code of Civil Procedure, 1908, Order XI Rule 4. Amendment as per S. 16 under the Commercial Courts Act, 2015.

²⁵ Chandrashekhar U, 'Commercial Courts Act, 2015' (Karnataka Judicial Academy, 31 May 2022) <<https://kjablr.kar.nic.in/assets/articles/Commercial%20Courts%20Act.pdf>> accessed 25 April 2024.

²⁶ The Commercial Courts Act, 2018, Section 2 (i).

3. The execution of a document;
4. The issuance or receipt of a document;
5. The custody of a document.

The purpose of the statement of admission and denials is to expedite the marking of admitted documents. In complex commercial cases, which may involve numerous documents, this process is particularly valuable. Documents admitted through this statement can be promptly marked by the judge, eliminating the need for witnesses to be called for their verification. Consequently, documents can be marked efficiently prior to the evidence stage, saving valuable time and ensuring smoother courtroom proceedings.

This rule is inspired by Order XII of the CPC. However, the difference is that as per Order XII, admission or denial of a document only needs to be done if a party sends notice to the other party requiring them to do the same.²⁷ Consultations with lawyers reveal that Order XII is rarely used in civil litigation.

This step should be added in civil litigation in district courts due to the reason that admission of certain documents or parts of them can ensure that the trial focuses on the contended issues only.

However, it is important to keep in mind that while the intention behind this provision in Commercial Courts was to reduce time, their practical implementation may not always align with this goal. Consultations with lawyers have revealed that in commercial courts widespread and bare denials often undermine the efficiency of this step, despite the rule requiring the opposite party to specify what they admit or deny in the document presented. Though courts can dismiss unsupported denials, it requires meticulous scrutiny of each document, resulting in further delays and administrative burdens. Hence, it will be beneficial for the court to ask the parties whether they have any admissions to make instead of mandating a statement so that if a party is only planning on denying all documentary evidence, no time is provided to submit the statement and the case can move on to the stage of evidence.

The question then arises as to why would any party choose to admit to the existence or the content of a document. This is because with the

²⁷ The Code of Civil Procedure, 1908, Order XII Rule 2.

availability of provisions for interrogatories and stricter implementation of perjury laws,²⁸ parties can be deterred from barely denying documents.

B. Disclosure of Documents

Another rule implemented in the Commercial Courts Act is that the plaintiff and the defendant, respectively, are required to submit all the documentary evidence at the time of filing their pleading for the case in the form of a list.²⁹ While in practice this is also supposed to be the case in civil cases, the noteworthy change is that in the Commercial Courts photocopies are allowed to be submitted at the time of filing. The parties must attest through the 'Statement of Truth' that all documents have been disclosed at the time of filing³⁰ and they are prohibited from relying on any document not disclosed at the time of filing.³¹ This is a very important distinction as photocopies are not accepted in civil cases. In the era of e-filing, if the original document is unavailable, parties should be able to upload the copies of all documents and produce the original documents during trial.

Another important feature of this rule in the Commercial Courts is that if a party believes that the opposite party is in possession of a document that they wish to rely on, the same can be mentioned in the pleadings and they can seek leave of the court for the production of these documents.³² This practice should be introduced in civil litigation as well. If a plaintiff in her plaint already states she knows certain documents to be in the possession of the defendant, when the defendant receives the copy of the plaint with the summons, she would be more inclined to produce the same at the time of filing her written statement, if the documents are relevant, instead of waiting for the court to order the same at a later stage. It would show that the defendant has nothing to hide. On the other hand, if the defendant believes that the said documents should not be produced, she can provide the reasons in the written statement itself. Similarly, the defendant being able to provide a

28 Indian Penal Code, 1860, Sections 191 and 193

29 The Code of Civil Procedure, 1908, Order XI Rule 1(1). Amendment as per S. 16 under the Commercial Courts Act, 2015.

30 A declaration on Oath. Format is provided in Appendix 1 of CPC.

31 The Code of Civil Procedure, 1908, Order XI Rule 1(5) and Rule 1(10). Amendment as per S. 16 under the Commercial Courts Act, 2015.

32 The Code of Civil Procedure, 1908, Order XI Rule 1(6) and Rule 1(11). Amendment as per S. 16 under the Commercial Courts Act, 2015.

list of documents in her written statement highlighting the documents missing from the plaint can indicate that the plaintiff did not approach the court with clean hands. Additionally, it saves time by not requiring the defendant to file an application to the court to discover the missing documents.

C. *Strict Timelines*

Under Order XI Rule 3 of the CPC as amended by the Commercial Courts Act, parties are mandated to complete the inspection of all disclosed documents within 30 days of filing the written statement. Such a rule does not apply to civil cases. Furthermore, as per Order XI Rule 3(6) applicable to Commercial Courts, any party is prohibited from relying on documents that were not inspected or disclosed, except with the court's permission. The court also reserves the right to impose costs on parties who fail to comply with inspection or disclosure requirements. These provisions can improve efficiency in civil litigation as well.

D. *Learnings from Arbitration Proceedings for Discovery of Documents*

Currently, the CPC lacks a standardised list outlining the requirements for applications seeking discovery of documents. Introducing such a standardised format would greatly benefit both lawyers and judges, facilitating swift resolution of such applications. The International Bar Association (IBA) has developed rules governing the taking of evidence in International Arbitration, aimed at ensuring an efficient, cost-effective, and equitable process. These can be implemented in Indian civil litigation as well. These rules stipulate that a request to produce should include:³³

- A description of each requested document that's sufficiently detailed to enable the other side to identify it; and
- A description in sufficient detail of a narrow and specific category of documents that are reasonably believed to exist. For electronic documents this description can contain identifiers such as keywords to promote efficient document searches; and

33 IBA Council, 'IBA Rules on the Taking of Evidence in International Arbitration' (International Bar Association, 17 December 2020) <<https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>> accessed 25 April 2024.

- A statement as to how the requested documents are relevant to the case and material to its outcome; and
- A statement that the documents requested are not in the possession or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents; and
- A statement of the reasons why the requesting party assumes the documents are in the possession of another party.

Furthermore, in arbitration proceedings, parties often have the ability to request documents directly from each other, following the agreed-upon rules. If a requested document is uncontested, it typically exchanges hands between the parties without formal submission to the tribunal. With the envisioned e-filing and dashboard system, a similar streamlined process can be implemented. Here, a party could request specific documents directly through the dashboard. Only if the other party refuses disclosure would the requesting party need to escalate the matter before the court. This procedure can result in saving judicial time.

E. Depositions

One of the most common methods of discovery in the United States of America is to take depositions. A deposition is an out-of-court statement given under oath by any person involved in the case. It is to be used at trial or in preparation for trial. It may be in the form of a written transcript, a videotape, or both. In most states, either of the parties may take the deposition of the other party, or of any other witness. Both sides have the right to be present during oral depositions.³⁴ A trial often occurs months or even years after the event in question, during which time memories may fade. Depositions serve to preserve crucial information, ensuring that no details are lost over time.³⁵

Depositions are conducted in the presence of a court reporter. During a deposition, witnesses are sworn in and are under an obligation to tell the truth. The court reporter then transcribes all the testimony

34 American Bar Association, 'How Courts Work' (28 November 2021) <https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/> accessed 25 April 2024.

35 Cleartax 'Deposition' (Cleartax, 2 April 2024) <<https://cleartax.in/glossary/deposition/>> accessed 25 April 2024.

provided and transmits a copy of the same to the parties upon request. This becomes a binding record. This is beneficial as there is an official record of statements made should any inconsistencies develop in the future.³⁶

During a deposition, parties aim to obtain admissions from the opposing side. This discovery tool, like others discussed in this paper, assists advocates in building their case and identifying key areas for cross-examination.

In the Indian legal system, the evidence stage can be prolonged due to lengthy cross-examinations. However, conducting depositions beforehand allows lawyers to efficiently prepare for trial on contended issues and streamline the proceedings. Introducing depositions in India on a case-to-case basis, especially if requested by a party, can enhance judicial efficiency. While depositions entail significant costs and resources, their potential to expedite court proceedings is substantial. The costs can be borne by the party that requests the same.

Conclusion

The stage of discovery and inspection in civil litigation is a crucial aspect of ensuring a fair and efficient trial. While the CPC provides provisions for discovery through documents and interrogatories, it is often underutilised in practice. This underutilisation can lead to delays and inefficiencies in the legal process.

To enhance the effectiveness of this stage, several recommendations can be implemented. Firstly, the use of interrogatories and statements of admission and denial should be encouraged. These tools can streamline the trial process by reducing the need for extensive oral evidence and clarifying disputed facts. Secondly, the disclosure of documents should be made more efficient by requiring parties to submit a list of documents with their pleadings and allowing for direct requests for documents. Thirdly, stricter timelines and standardised procedures for discovery applications can also contribute to a more efficient process. Furthermore, exploring the potential benefits of depositions,

36 Colombo Law 'Benefits of Conducting Depositions' (Colombo Law, 12 April 2018) <<https://www.colombolaw.com/west-virginia-blog/benefits-of-conducting-depositions/>> accessed 25 April 2024.

as practised in other jurisdictions, can be considered. While depositions may involve additional costs and resources, they can potentially expedite the trial process by preserving evidence and facilitating efficient preparation.

By implementing these recommendations, the stage of discovery and inspection can be transformed into a more effective tool for promoting fairness, efficiency, and justice in civil litigation.

