

# Supreme Court on the Right to Fair Trial under Code of Civil Procedure, 1908

Mahek Bhojwani\*

**Abstract:** The most important rule of any trial is to be fair to all the parties involved in the proceeding. But what is fair and what are the constituents of fairness? Are there any parameters to determine if a trial has been conducted fairly or with prejudice? Is it entirely left to the discretion of the court? The concept of fairness has been incorporated in legal doctrines since time immemorial, however, throughout the years these have been developed tremendously. Fairness is a broad concept under natural justice and includes several facets that accord to the rights of both parties. While these elements are broadly similar under both civil and criminal laws, there are slight differences owing to the procedural differences. Throughout the years, courts in India have analysed the provisions of the Civil Procedure Code to ensure that the implementation of these principles is underlined with the fairness concept. This article undertakes to review these judgements to arrive at a better understanding of the effectiveness of these provisions in ensuring fair trials.

**Keywords:** *Civil Procedure, Fairness, Summons, Supreme Court, Fair Trial.*

## 1. Introduction

Fairness in the proceedings of any case has always been the core value on which the judicial system is built. It has also been recognized internationally as the civil right of every individual.<sup>1</sup> This has also been incorporated into the Indian legal system *vis-à-vis* the Constitution.<sup>2</sup> Since the fundamental right of life for any person includes a multiplicity of other rights as well, individuals cannot be punished unless the “due process of law” has been followed.<sup>3</sup> This also extends to protections against arbitrary arrest.<sup>4</sup> Separate

---

\* Undergraduate Student, Symbiosis Law School, Hyderabad

<sup>1</sup> International Covenant on Civil and Political Rights 1996, art 14

<sup>2</sup> Constitution of India 1950, art 14, 21, & 22

<sup>3</sup> *Ibid*



fundamental rights for the facilitation of legal aid,<sup>5</sup> protection against self-incrimination and double jeopardy are also guaranteed by the Indian constitution<sup>6</sup>. Being a constitutional principle, the norm of fairness is to be followed in all proceedings. Despite the difference drawn between a civil and a criminal matter, the Supreme Court has upheld that the right to a fair trial also extends to civil cases.<sup>7</sup> The two legislations governing the two subject matters also incorporate the same through their different provisions. In fact, the amendments to the Civil Procedure Code (“CPC” *hereinafter*) also depict their objective to be the assurance of a fair hearing.<sup>8</sup>

The concept has not been universally defined yet it has been understood<sup>9</sup> to have evolved from including merely two principles; namely, “*nemo iudex in causa sua*” and “*audi alteram partem*” to several other rights such as to be represented by a legal counsel.<sup>10</sup> In the more general sense, it has been understood as a check against arbitrariness, impartiality and other evils that result in injustice.<sup>11</sup> Today, the Civil Procedure Code contains various provisions, such as those ensuring that the parties have a platform to be heard through the mechanism of legal aid<sup>12</sup>, the right to an impartial hearing<sup>13</sup>, and maximized protection against being unheard<sup>14</sup> which has also been propounded by the Supreme Court.<sup>15</sup> The Supreme Court has on various occasions, both in civil and criminal matters interpreted the provisions of the procedural codes to emphasize the importance of a fair trial.

To understand the ambit and scope of what a fair trial entails, the history and development of the same will be studied in this research. A perusal of the provisions of the CPC and the judgements of the Supreme Court would also throw light on the manner in which a fair trial is deemed to be ascertained in India. It would also be beneficial to find out the international standards followed and compare the same to ascertain if they are met under the Indian legal framework.

---

<sup>5</sup> Constitution of India 1950, art 39A

<sup>6</sup> Constitution of India 1950, art 22

<sup>7</sup> *Brij Mohan Lal v Union of India* (2012) 6 SCC 502

<sup>8</sup> Code of Civil Procedure (Amendment) Act 1976

<sup>9</sup> Curtis F.J. Doebbler, *Introduction to International Human Rights Law* (CD Publishing 2006) 108

<sup>10</sup> Constitution of India 1950, art 39A

<sup>11</sup> 11<sup>th</sup> Edition, Black’s Law Dictionary (Henry Campbell Black 2019) 717

<sup>12</sup> Code of Civil Procedure 1908, order 33 rule 9A

<sup>13</sup> Code of Civil Procedure 1908, s 100A

<sup>14</sup> Code of Civil Procedure 1908, order 11 rule 13

<sup>15</sup> *Jolly George Varghese v Bank of Cochin* (1980) AIR 470

## 2. The Concept of a Fair Trial

The cardinal principle of any trial and the “first imperative in the dispensation of justice” is the most fundamental norm for the assurance of fairness throughout the proceedings. As a significant component of public justice, fairness prevails over any other concern, be it the convenience or hypersensitivity of any of the parties, convenient facility of legal services or nature of the grievance.<sup>16</sup> The significance ascribed to procedural fairness is of such a high magnitude that it has the ability to shape the perspective that the general public has toward the process applied by the judiciary and to determine the trends in dispute resolution.<sup>17</sup>

It is not just the perception of the judiciary that is shaped by abiding by the fair trial norm but also the constitutional principles of a democratic nation that is mirrored by it. One of the features of any democracy is the separation of powers, the ideal of an independent judiciary is prescribed to ensure that the process is non-arbitrary, non-discriminatory, or non-biased towards any party, even if it may be that the decision maker has vested interests in the party to the pleadings.<sup>18</sup> It is also reflected as the “rule of law”, another important feature of any democracy.<sup>19</sup>

The term “fair trial” was used to depict fairness obligations approximately around the 17<sup>th</sup> century, primarily for criminal matters.<sup>20</sup> However, the principles that constitute it are as old as the Twelve Tables that date back to 455-459 B.C.<sup>21</sup> The premier document on basic rights, the prestige Magna Carta too had referred to the prerequisites of a fair hearing and natural justice. Passed by King John in 1215, these conditions were included *via* the provisions of clauses 39 and 40 for hearings before a jury (as in civil law countries).<sup>22</sup> After WWII, these age-old principles of fairness were then enshrined in the constitutions of various countries and became the core aspect of procedural laws along with the simultaneous internalization of the same at a global level.<sup>23</sup> These procedural norms are

<sup>16</sup> *Maneka Gandhi v Rani Jethmalani* (1979) AIR 468

<sup>17</sup> Tom R. Tyler, ‘Governing amid Diversity: Can a Fair Decision-Making Procedure Resolve conflicts between Competing Public Interests and Values?’ (1994) 28(4) *Law & Society Rev.* 710

<sup>18</sup> Doebbler (n 10) at 171

<sup>19</sup> Tom Bingham, *The Rule of Law* (Penguin UK 2010) 90

<sup>20</sup> Ian Langford, ‘Fair Trial: The History of an Idea’ (2008) 8(1) *Journal of Human Rights* 29

<sup>21</sup> Elgar’s *Encyclopaedia of Comparative Laws* (2012) vol. 1-2

<sup>22</sup> R. Lettow Lerner, ‘The Failure of Preserving Originalism in Constitutional Rights to Civil Trial’ (2004) 8 *William & Mary Bill of Rights J* 846-850, 847

<sup>23</sup> Mauro Cappelletti & Denis Tallon, ‘Fundamental Guarantees of Parties in a Civil Litigation’ (1973) 21(4) *The American Journal of Comparative Law* 43

now complied with by courts on a day-to-day basis, in a number of civil cases, by following the doctrine of procedural fairness.<sup>24</sup>

The principle of a fair trial is therefore the oldest and most important concept of any judicial proceeding and has a rich history to credit its development in its current form.

### 3. Fair Trial under the Code of Civil Procedure

In light of the common principle of fairness to be felt by the aggrieved parties and not just be made in theory, expeditious hearing of suits is prescribed by the code. This is done in order to ensure that the truth is intact in the minds of the witnesses and the parties and ensure that there are no obstacles in presenting reliable evidence. It also upholds the morals of society and does not discourage litigants to abandon their rightful claims.<sup>25</sup> To embed the doctrine of “justice delayed is justice denied” changes were introduced to the CPC after the recommendations of the Malimath Committee.<sup>26</sup> When the case of the death of the plaintiff is concerned, the court allows the legal representative of the deceased to apply to the court making him a party so that the suit continues and the dispute over the claim is resolved. Even in such a case, a time limit of 90 days from the deceased’s death is provided to file the application, failing which the court will consider the suit to be abated.<sup>27</sup>

Another essential for the healthy administration of justice is to ensure that the trial takes place in an open court.<sup>28</sup> This is ensured under Order 19, Rule 18 of the court and also under Section 135 to instil confidence in the people by making the process open to scrutiny and acting as a test against judicial vagueness.

A quintessential procedural requisite the right to be heard is ensured through the concept of summons to the defendant under Section 27.<sup>29</sup> The aspect has been meticulously covered under Order 5 of the Code which prescribes the required format<sup>30</sup>, content<sup>31</sup>, manner<sup>32</sup>, and even exceptions<sup>33</sup> for notifying the defendant. In furtherance of building

---

<sup>24</sup> Arfinn Bardsen, *Reflection of Fair Trial in Civil Proceedings* (2007) 99

<sup>25</sup> C.K. Takwani, *Civil Procedure Code* (Eastern Book Company 2017) 751

<sup>26</sup> Code of Civil Procedure (Amendment) Act 1999

<sup>27</sup> Code of Civil Procedure 1908, order 22 rule 3(2)

<sup>28</sup> Code of Civil Procedure 1908, order 18 rule 19

<sup>29</sup> Code of Civil Procedure 1908, s 27

<sup>30</sup> Code of Civil Procedure 1908, schedule I appendix B

<sup>31</sup> Code of Civil Procedure 1908, order 5 rule 5-8

<sup>32</sup> Code of Civil Procedure 1908, order 5 rule 1-3.

<sup>33</sup> Code of Civil Procedure 1908, s 132-133

trust, the summons should be signed by the Judge.<sup>34</sup> The impugned plaint<sup>35</sup> must also be attached and any date of hearing that has been decided must also be duly communicated to the defendant.<sup>36</sup> Rule 6 and 8 are invoked by the Court to direct the defendant to present witnesses that support their stance and also provide sufficient time to prepare for the case as well respectively. To make these provisions applicable, the mode of giving the summons to the defendant has also been prescribed which ranges from personal service to service to the agent<sup>37</sup> and has also considered developments such as sending it through WhatsApp.<sup>38</sup> A safeguard against misuse is also guaranteed by treating the summons as having been served in case the defendant refuses to accept the same under Rule 9.<sup>39</sup>

After being notified of the case against him/her, the defendant shall then respond to each of the facts claimed through a written statement filed in accordance with Order 8.<sup>40</sup> This should be done within thirty days of receiving the summons and the time limit can only be extended in case of appropriate reasons up to 90 days.<sup>41</sup> A set-off too is allowed where a right to claim a certain amount is also vested with the defendant and the same when claimed against the plaintiff's claim would be negated.<sup>42</sup> Other than a set-off, the provision of the counter-claim is also available to the defendant. Any claim that the defendant has against the plaintiff, against which the defendant has a legal right can also be raised in the same suit.

It is also required of the plaintiff to specifically counterclaims, failing which they would be deemed to have been admitted.<sup>43</sup> However, when a written statement is not filed, the same inference cannot be drawn and the judgement cannot be made in favour of the plaintiff as it would be deemed that the defendant was denied his right to defend himself/herself.<sup>44</sup> Additionally, when it is found that the judge has passed a biased order, an appeal for transfer of cases under section 24 is also available to the parties.<sup>45</sup> But if the time limit to

---

<sup>34</sup> Code of Civil Procedure 1908, order 5 rule 1-2

<sup>35</sup> Code of Civil Procedure 1908, order 5 rule 2

<sup>36</sup> Code of Civil Procedure 1908, order 5 rule 5

<sup>37</sup> *Salem Advocate Bar Association v Union of India* Writ Petition (Civil) No. 496/2002 <sup>38</sup>

*SBI Cards & Payments Services Pvt. Ltd., v Rohidas Jadhav* Execution No. 1196/2015 <sup>39</sup>

*Puwada Vekanteswara v Chidamana Venkata* (1976) AIR 869

<sup>40</sup> *Food Corporation of India v Yadav Engineer & Contractor* (1982) AIR 1302

<sup>41</sup> Code of Civil Procedure 1908, order 5 rule 1

<sup>42</sup> *Jyanti Lal v Abdul Aziz* AIR 1956 Pat 199

<sup>43</sup> *East India Trading Co., v Badat & Co.* AIR 1959 Bom 414

<sup>44</sup> *Syed Ismail v Shamsian Begum* AIR 2001 Kar 99

<sup>45</sup> *Sudarshan Jain v Deep Chand Jain* AIR 2006 MP 6

file one has been crossed, the court may proceed to rule in favour of the plaintiff as per Rule 10 of Order 8.<sup>46</sup>

Although the fair trial has not been explicitly mentioned for civil suits in the constitutional framework, the perusal of its sections, rules, and order implies the basic fundamentals of fairness *i.e.*, impartiality and fair hearing have been ensured. The High Courts through their various judgements have also read the civil procedure for special enactments and upheld the norm of a fair trial.

#### 4. Judicial Interpretation by Supreme Court

In addition to the provisions of the Code and the respective clarifications given by several high courts wherever ambiguity had existed, the Supreme Court has also passed certain remarks as per the objectives of these provisions and the light in which they must be read. The Supreme Court has held that no doubt the principle of “*audi alteram partem*” is quintessential for a just proceeding, in the absence of any guideline on the procedure to be followed, a distinction between the violation of the entire principle or of any rule thereof shall be drawn by the bench or tribunal respectively.<sup>47</sup> To facilitate the same, it is pertinent to differentiate between a “no hearing” and a “fair hearing”.<sup>48</sup> In the case of a “no hearing”, due to the non-issuance of a notice to the defendant to respond to the plaintiff’s claim, the entire proceeding is considered to void by virtue of failing to do justice. In the case of a hearing that is speculated to be unfair on the basis of the violation of any technical rule, the mere breach of the rule would not negate the proceedings as long as the fairness in the proceeding is observed.

In the case of *Union of India v. Alok Kumar & Ors.*<sup>49</sup>, the Apex Court set out the path to be followed in the cases yet to be decided where doubt of prejudice has arisen. Criticizing the norm of a hyper-technical approach that had been observed in previous cases, it was laid down that a “*de-facto*” prejudice also needs to be proved to claim that either of the parties was not heard in full.<sup>50</sup>

---

<sup>46</sup>*Modulla India v Kamakshya Singh* (1988) AIR 162

<sup>47</sup> *State of U.P. v Sudhir Kumar Singh & Ors.* Civil Appeal No. 3498/2020

<sup>48</sup> *State Bank of Patiala and Ors. v S.K. Sharma* (1996) AIR 1669

<sup>49</sup> *Union of India v Alok Kumar & Ors.* Civil Appeal No. 3369/2010

<sup>50</sup> *Ibid*

Waiver, acquiescence, non-denial or challenge or application of facts are some of the circumstances in which real prejudice cannot be said to have occurred.<sup>51</sup> However, in cases where deviance from the standard norms of non-prejudice is present and if the same is justified as per the procedural or substantial law for the sake of both individual and public interest, the same too would not be considered as real prejudice.<sup>52</sup> If otherwise, it so appears that no real prejudice has been caused due to a breach of a rule, then the court has the right to exercise its discretion to act so accordingly.<sup>53</sup> This prejudice is required to be proved in addition to the assumed breach of natural justice and the breach of merely one technical rule that does not have an impact on the merits of the case<sup>54</sup> since the mere technical breach does not make a claim of an unfair trial.<sup>55</sup> For instance, in a case where the condition of attachment of an enquiry officer's report along with the statement to properly enable a fair hearing has not been fulfilled, the breach being one of natural justice in light of the rules does not take away the fairness of the trial if prejudice has not been established in full. That being said, a cogent inference must be drawn from the facts presented and the same cannot be substituted by a "mere apprehension" or even a "reasonable doubt."<sup>56</sup>

Other aspects of a fair trial such as the expeditiousness on part of the judiciary were also discussed in a case where the appointment of judges and the judicial institution was under scrutiny.<sup>57</sup> The right to legal aid to ensure that the parties have access to justice has also been upheld in the case of *Hussainara Khatoon v. Union of India*<sup>58</sup>.

The Supreme Court has also cautioned of an over-reading of fairness in the principles of natural justice that causes an unnecessary bloating of the latter. It is now a well-settled principle of law that when the judge exercises fairness in the "form, features and fundamentals of each procedural propriety", then a reversal of order need not be sought on the grounds of apprehending a prejudice caused.<sup>59</sup>

---

<sup>51</sup> *Punjab National Bank and Ors. v Manjeet Singh and Anr.* Appeal (Civil) No. 4330/2006

<sup>52</sup> *State of Manipur and Ors. v Y. Token Singh and Ors.* Appeal (Civil) No. 849/2007

<sup>53</sup> *M.C. Mehta v Union of India and Ors.* (1999) 6 SCC 237

<sup>54</sup> *K.L. Tripathi v State Bank of India* (1984) AIR 273

<sup>55</sup> Henry William Rawson Wade, *Administrative Law* (5th ed., Oxford University Press 1982) 472-475

<sup>56</sup> *Haryana Financial Corporation v Kailash Chandra Ahuja* Civil Appeal No. 4222/2008

<sup>57</sup> *Brij Mohan Lal v Union of India* Transfer Case (Civil) No. 22/2001

<sup>58</sup> *Hussainara Khatoon v Union of India* (1979) AIR 1369

<sup>59</sup> *All India Recruitment Board and Another v K. Shyam Kumar and Others* Civil Appeal Nos. 5675-5677/2007



Therefore, an analysis of cases decided by the Supreme Court demonstrates the background in which the procedural law has been interpreted to ensure that fairness is not only present in theory but has also been felt by the parties to a case. In this aspect, the role of the judiciary is commendable for setting the path for the judicial process beyond its technicalities.

## 5. International Fair Trial Norms

After analysing the Indian law on fair trial, it is necessary to also ascertain the international norms on the same and compare the provisions. The International Covenant on Civil and Political Rights (ICCPR) also makes it obligatory for its signatories to mandatorily comply with procedural fairness norms and embed the same in their sovereign procedural laws.<sup>60</sup> It is applicable to the procedure followed in court and does not extend to influencing the verdict to be passed by the respective nation state's authorities. Several other international bodies have recognized the obligatory fairness principle.

The European Convention on Human Rights (ECHR) signed by the members of the European Council in 1953 also recognizes fair trial not only as a prerequisite of the judicial process but also as a human right.<sup>61</sup> The European Council is not alone as the same has also been followed by the Human Rights Council of the UN<sup>62</sup> and pan-African bodies through the Banjul Charter.<sup>63</sup> Although the application to civil suits has not been directly mentioned in these conventions and they are considered to be issues between individuals not concerning a public matter, the applicability of the obligation has not been restricted to criminal cases either. The only subject matter excluded expressly is tax<sup>64</sup> matters and immigration issues as they are left for the sovereign to deal with in an appropriate manner.

The manner in which fair trial norms have been adopted by several countries differs on the lines of their constitutional framework. While some of them recognize a fair trial as constitutional directly, others infer the same from constitutional rights such as judicial protection rights<sup>65</sup> that prescribe the procedural norms that together ensure a fair trial. There are also countries like the USA in whose jurisdiction a due process is recognized

---

<sup>60</sup> International Convention on Civil and Political Rights 1996, art 14

<sup>61</sup> European Convention for the protection of Human rights and fundamental freedoms 1953, art 6

<sup>62</sup> Universal Declaration of Human Rights 1948, art 10

<sup>63</sup> African Charter on Human and People's Rights 1981, art 7

<sup>64</sup> *Dombo Beeher B.V. v Netherlands* [1993] ECHR 49

<sup>65</sup> Chapter of Fundamental Rights and Freedoms 1991

instead of a fair trial, the cores of which remain the same. A few other countries do not explicitly recognize the doctrine for civil suit matters but adopt it from the procedural norms established in criminal cases.<sup>66</sup>

In the USA, the importance of a fair trial governs all forms of litigation and mechanisms to resolve disputes under the San Jose Pact.<sup>67</sup> Just like in India, where “fair trial” is most often than not considered along the same lines of “natural justice” even though both differ in terms of the former being one of the core components of the latter, in the common law country of USA too, fairness in proceedings is considered to be at the same footing as “due process.” Fair trial too differs from due process in the sense that due process can be of either procedural nature or substantive nature. However, procedural fairness is usually ascribed to be imbibed to a larger extent in the concept of due process of a procedural norm.<sup>68</sup> Unlike the ICCPR, the fair due process principle also brings under its ambit the decisions made by courts or even administrations to protect the individual interests of the public. This extension is also followed by Canadian authorities as against other signatories of the international convention *via* the enactment of the charter titled “Canadian Charter of Rights and Freedoms”<sup>69</sup> to ensure a fair hearing.

To keep up to standards of fair hearing and allowing the party to make its claims, the U.S. Supreme Court has recognized the right of the defendant to be notified of a claim as a fundamental condition.<sup>70</sup>

Abiding by the fundamental conditions and preserving the objective of justice, the European Court of Human Rights had also directed a UK court to ensure that access to justice also includes the right to prepare one’s case which is essential for being heard.<sup>71</sup>

Therefore, several international conventions also propound the theory of fair trial in their own manner and a uniform way to follow it does not exist. The basic principles remain common to all countries including India as well.

---

<sup>66</sup> Ana Harvey, ‘Right to a Fair Trial in Civil Cases’, in Max Planck Encyclopaedia of Comparative Constitutional Law (2018)

<sup>67</sup> American Convention on Human Rights 1969, art 8

<sup>68</sup> PJ Rubin, ‘Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights’ (2003) 103 Columbia L. Rev. 836

<sup>69</sup> Christos Rozakis, ‘The Right to a Fair Trial in Civil Cases’ (2004) 4(2) Judicial Studies Institute J. 96-106

<sup>70</sup> *Fuentes v Shevin* [1972] 407 [US] 67

<sup>71</sup> *Fayed v U.K.* [1994] 393 Eur. Ct. Hr.

## **6. Conclusion**

The concept of a fair trial is not a novel one and has developed throughout years of contributions across jurisdictions, giving it a very rich history that also goes a long way in making it one of the foundational principles of justice. Nevertheless, the concept does not have a rigid definition, nor does it have a fixed formula. Initially inscribed only in criminal cases, in India fair trial is achieved through a number of procedures and formalities such as the issuance of summons, and the manner in which written statements should be filed among others. Together, these procedures aim to achieve fairness in any trial. Despite the ambiguity surrounding the constituency of a fair trial, it remains crystal clear that a trial in which bias has been rooted is not a good trial in law.

The rich jurisprudence, particularly the contribution of the Supreme Court has strengthened the foundations of a fair trial by elaborating on its nature and scope. The CPC has been amended several times and in multiple cases, various trends of its interpretation have been observed. These interpretations depend on the circumstances of the case; however, the objectives of a fair trial have to be achieved in all cases irrespective of anything else. Even at a global level, “fair trial” is called under different terms and the procedural laws of each country differ. But what is common is that the basic principles are strictly followed by giving flexibility wherever required to avoid circumstances where strict adherence to the procedure results in injustice. Under the Indian legal framework too, exceptions have been provided to ensure that the following technicalities do not get prioritized over the objective of fairness and justice.

It is suggested that the courts hereon aim to achieve the basic principles by following the crux of the procedural code and applying reasoning in different circumstances by deprioritizing the technicalities of a fair trial when needed.