



**Discovery Procedure: A comparative analysis between India and
China**

- *Era Gupta*

ABSTRACT

The discovery procedure in civil procedural laws in India and China have quite the contrasting procedures with the focal dissimilarity being the codification of Indian law but not of the Chinese. The mantle of judges in Chinese law is more inclusive and nuanced when it comes to investigation whereas burden to prove guilt or innocence falls upon the parties in Indian law. But there's one thing standard in both the laws that the two are oriented towards delivering justice to the aggrieved. The ensuing objective is to impart justice irrespective of the procedure followed. The applicability of law at times becomes incredibly subjective that an advanced and all-inclusive procedure is required to achieve the object of the exercise. This paper compares the discovery procedures of Indian Civil procedural law to that of Chinese to accentuate the distinctions. Moreover, it makes use of the exemplifications to illustrate the dissimilitude between both the laws when applied practically. In fine, it puts forward certain provisions Indian procedural law could pick from China to further upgrade its sweep and applicability

Keywords: Civil Procedural laws, India, China, discovery procedure



DISCOVERY PROCEDURE- A COMPARATIVE ANALYSIS BETWEEN INDIA AND CHINA

Hypothetical A'- J possessed an enormous farm with assorted crops and gardens adjoining those crop fields in a village Mind. The gardens were adroitly nurtured and adorned with exotic plants and flowers. Mind was encircled by other tiny villages and was home to the government offices which residents from nearby used to approach for their official chores. A few people visiting Mind presumed J's garden to be a lounge site and entered the garden. They littered the place and plucked the flowers and fruits off the plants which upset the setting. J filed a suit for compensation.¹

Hypothetical B'- M used to erect his mobile food stall next to a construction site. On the twelfth floor where cement work was being effectuated, a few workers negligently left a part of the cement contrivances on while going for their lunch break. The apparatus misbehaved to result in the cement dripping down on the cooking equipage which resulted in clement bodily injury and damage to the equipage. Undergoing a drop in business, he filed a suit for compensation against construction intendancy.²

The legal measures for civil suits are steered by the civil procedure law of the apposite jurisdiction. The cessation of the case is achieved only through the due procedure. Quite entrancingly, a party might be the victor on observing one jurisdiction's procedure but might be bested in a different dominion. For instance, *in A' all the people who visited Mind that day will have a joint liability to compensate unless they can corroborate their truancy from the scene under civil procedure law of China³ whereas no one will be culpable unless plaintiff can substantiate their presence under Civil procedure of India⁴.*

In the thick of the procedures such as filing a suit to the decree, the discovery procedure props up a prominent pedestal. In the legal verbatim it means procedure for conducting the process of discovery; any of various procedures used for obtaining the disclosure of facts, such as requests, interrogatories, etc.⁵ After laying the plaint, plaintiff and defendant are capacitated to get wholly acquainted to the posture of their opponent's case in order to buoy up one's case and arraign the opponent's. This essay comparatively analyses the discovery procedures of India and China. The

¹ The hypothetical is for illustration purposes throughout the essay. The illustrations are original and any relation to the actual scenario is unintended and unknown by the authors.

² Supra note 1

³ Civil Procedure Law of People's Republic of China

⁴ The Code of Civil Procedure 1908

⁵ Concise Oxford English Dictionary (2002)



evidence discovery stratagem of both the countries contains an immanent incongruity but concomitantly redress each other.

DISCOVERY PROCEDURE IN INDIA

Civil Procedure Code, 1908 under various orders administers a prospect of bartering the evidence to avoid any potential ambivalence during the trial procedure. The guiding probity of the same is the acknowledgement of the right to a fair trial and to know the reasoning and outcome.⁶ There are several strands of discovery procedure in India.

DISCOVERY AND INSPECTION FOR THE PARTIES

Section 30 and Order 11⁷ allows the dispensing of inscribed interrogatories⁸ only with court's concession and must be relevant to any matters in issue⁹. The party to whom an interrogatory is addressed must respond through an affidavit and dereliction of the same may culminate in the dismissal of their suit or defence.¹⁰ The right¹¹ to moot interrogatories is a valuable one and a party can't be deprived of the same.¹² *In B' the defendant could ask M to furnish his medical expenses and particulars and photographs of the damaged stall.* The second kind of discovery is discovery of documents¹³. Rule 12¹⁴ authorizes a party to impel the adversary to divulge the documents in their keeping which are apropos to the matter in question. Producing privileged documents¹⁵ isn't incumbent. Non-observance of the same may lead to penalties specified in Rule 21.¹⁶

⁶ Bajpai M, "Common Law Right to Defense and Disclosure in India" (*Harvardilj.org*, 2017) <<https://harvardilj.org/2018/08/common-law-right-to-defense-and-disclosure-in-india/>>

⁷ The Code of Civil Procedure 1908, Rules 1-11

⁸ In a civil action, an interrogatory is a list of questions one party sends to another as a part of the discovery process; "Interrogatory" (LII / Legal Information Institute)

⁹ *Indira Nebru Gandhi v. Shri Raj Narain & Anr* [1975] AC 887

¹⁰ The Code of Civil Procedure 1908, Order 11, R 8

¹¹ *Union of India v Ibrahim Uddin* [2012] AC 1374

¹² *Ramlal Sao v Tan Singh* [1952] AIR 135

¹³ Discovery of documents means to compel the adversary party to disclose the facts and documents which it has in its possession and power; "Discovery and Inspection of Documents" (*Law Times Journal*, August 28, 2017)

¹⁴ The Code of Civil Procedure 1908, Order 11

¹⁵ Privilege is a legal right which allows persons to resist compulsory disclosure of documents and information. The fact that a document is sensitive or confidential is not a bar to disclosure, although privileged documents must be confidential; "Privileged Documents under CPC An Analytical Insight" (*Legal Articles in India*, June 27, 2018).

¹⁶ *Supra* note 14



ADMISSIONS AND AFFIDAVIT

Admissions¹⁷ hold prodigious seriousness as what a party admits is reasonably presumed to be true.¹⁸ Admissions can be tabled during interrogatories or during examinations by the court¹⁹ or by the parties through notice.²⁰ Whenever deemed necessary, Judges pronounce judgements based wholly on admission. Whereas, affidavits are sworn in statements by the persons which can't be used as evidence under evidence act. Natheless, if courts discover that a particular fact can be corroborated by the affidavit, Rule 1 Order 19 is evoked²¹ and rival parties has the right to cross-examine the same.

DISCOVERY AND INSPECTION FOR THE COURTS

Courts hold the faculty to issue summons²² to the defendants to appear before the court and produce the documents or evidence required by the court.²³ Unlike summons, Subpoenas²⁴ issued by courts can be purveyed to any person to come to court or produce documents or evidence. *In A' court may subpoena the gardener hired by J to present himself and give testimony regarding the damage.* Courts may impound the documents for further scrutiny.²⁵ Neglecting a summon or subpoena may result in penalties.

DISCOVERY PROCEDURE IN CHINA

The evidence discovery procedure is modulated under Civil procedure law of People's Republic of China. Evidence investigation and evidence is merged under the Chinese procedure due to a

¹⁷ A person's, in particular, a party's statement acknowledging that a certain fact is true or silence after another party's assertion of a fact that, if false, would typically elicit a denial; "Admission" (LII / Legal Information Institute)

¹⁸ *Rani Chandra Kumvar v Chandburi Narpat Singh And Raja* [1906] 9 BOMLR 267

¹⁹ The Code of Civil Procedure 1908, Order 10, R 1&2

²⁰ The Code of Civil Procedure 1908, Order 12, R 4

²¹ *State of Jammu and Kashmir v Bakshi Ghulam Mohammad* [1966] SCR (4) 1

²² Summons, also called citations, in law, document by the issued by a court ordering a specific person to appear at a specific time for some specific purpose, often to answer charges or a complaint filed against him/her; "Summons | Law" (Encyclopedia Britannica)

²³ The Code of Civil Procedure 1908, Order 13, R 1

²⁴ A legal document ordering someone to appear in a court of law or to produce documents; "SUBPOENA | Meaning in the Cambridge English Dictionary" (dictionary.cambridge.org)

²⁵ The Code of Civil Procedure 1908, Order 13, R 8



dearth of a stipulated procedure.²⁶ The leading rectitude is to seek the truth through the facts, and to correct any wrong verdict. The salient aspects to the discovery in China are:

INVESTIGATION²⁷ AND DISCOVERY BY THE PARTIES

Since evidentiary substance is a requisite condition to be appended to the plaintiff's complaint and defendant's confutation,²⁸ parties may exhibit the evidence that they hitherto possess. *In B' M can produce his medical expenses and in A' J can produce the photographs of his littered and damaged site.* When the parties don't hold the evidence, their lawyers can orchestrate investigations to procure the evidence.²⁹ The attorneys customarily interrogate the witnesses or inquire the opponents through written communication.³⁰ *For instance, in B' the defending attorney may solicit the medical expositions of M to determine the gravity of injury.* Howbeit, there is no penance for not returning the inquiry.

Besides, Chinese law provides for notarization where an approbated agency takes up securing and preserving the evidence by surveying the scene, transcribing witness statements and pulling photographs of the scene.³¹ Courts hold notarized evidence more tenable than any other.³² *In A' Notaries may interrogate and take note of the alibis of the people visiting Mind that day.*

INVESTIGATION BY THE COURTS

One conspicuous fact about Chinese procedure is the active engagement of courts in orchestrating evidence discovery and especially when parties are unable to procure sufficient evidence.³³ The court's involvement prevails in two categories; one when court enterprisingly takes charge of the investigation and two, when parties advance the petition for the same.³⁴ Trial personnel of the People's Court conduct inspections investigate the location, articles or objects in question by

²⁶ Richard W Wigley and Xu Jing, "Dispute Resolution" (China Law Insight, April 15, 2011) <<https://www.chinalawinsight.com/2011/04/articles/dispute-resolution>>.

²⁷ In Chinese procedure, the word investigation is clubbed with the discovery methods and the word inspection isn't used; Tan Wei Jang, "Theoretical Positions of the Legislation of Civil Evidence 294" (2010)

²⁸ Civil Procedure Law of People's Republic of China, Article 64 (s 1), Article 121

²⁹ Civil Procedure Law of People's Republic of China, Article 61

³⁰ Supra note 26

³¹ Notarization Law of the People's Republic of China, Article 11 (9)

³² Huang Hui, "China's Evidence Rules Explained" (2010) <<http://www.wanhuida.com/Portals/1/YRNewsAttachment/1072/China's%20Evidence%20Rules%20Explained/>>.

³³ Civil Procedure Law of People's Republic of China, Article 64, s 2

³⁴ Niels J Philipsen, "The Law and Economics of Professional Regulation: What Does the Theory Teach China?" (2007)



means of examination, photograph, and survey, either personally or by delegating to an appropriate person.³⁵ Moreover, Courts can secure the official government documents very straightforwardly. Besides, court amass evidence by examining and scrutinizing the witnesses and documents during trial. *In A' a defendant may claim that he was at the office the entirety of time and judge may beseech him to produce evidence or alibi.*

EXPERT EVALUATION

Courts being effectual at investigating under Chinese procedure regards the expert³⁶ evaluation in a fervent manner since this evaluation assists the judge to fathom the case better. Experts are engaged after the parley between the opposing parties to bolster impartiality and avoid any unjust favour towards one party.³⁷ It is imperative for the experts under the procedure law to avow in the courts or otherwise their opinion is discarded.³⁸ *In A' forensic experts may probe the footprints and chalk out the approximate number of people who used the garden. In B' expert may evaluate the exact setting from where the cement fell.*

EXCHANGE OF EVIDENCE

Comparatively parallel to Indian discovery procedure, Chinese procedure law, too, entails the oppugnant parties to unveil their evidence to each other before the initiation of questioning so that both parties have better cognizance of the stance of their opposition's and their own case in order to abbreviate the litigation process.³⁹ People's courts convene the evidence exchange forums.⁴⁰ Judges are then obliged to put on record the paramount disputed facts to ascertain crucial issues. *In A', for the reason of computing the compensation value, court may order both the sides to officially exchange their evidence.*

³⁵ Dan Harris, "How to Sue a Chinese Company, Part 2: Discovery" (China Law Blog, November 9, 2010)

³⁶ Persons selected by the courts or the parties in a cause on account of their knowledge or skill to estimate, examine, and ascertain things, and make a report of their opinions; "Expert" (*The Free Dictionary*)

³⁷ Mo Zhang and Paul J Zwier, "Burden of Proof: Developments in Modern Chinese Evidence." (2002)

³⁸ Civil Procedure Law of People's Republic of China, Article 78

³⁹ Paul J Schmidt, "A Review of China's New Civil Evidence Law." (2003)

⁴⁰ New Evidence Rules of People's Republic of China



ADVANTAGES, DISADVANTAGES, PANORAMA OF SIMILITUDE AND INCONGRUITY

UNDERPINNING OF THE PROCEDURES

The disparity between Indian and Chinese procedure is passably striking. The most perceptible difference is of the configuration of discovery procedure. Indian courts observe an attorney supervised discovery model and Chinese courts follow a judge led model. However, in India, courts may, at times, ordain an investigation intercession to take over whenever it deems requisite⁴¹, whereas in China, courts welcome the attorney led discovery while basing the procedure on judge led model. In an attorney emanated procedure, the lawyers have the chartered interest because of the monetary perks and that's why they exhibit stupendous zeal in directing investigations. So much so, owing to their defined knowledge of the circumstantial scenario of their side and their opponent's, they broach a specific search tailor made to the case at hand. Attorneys at their own entente reconcile through out of the court settlements thereby obviating the judge's role and time. The adversarial nature of lawyer-conducted discovery, balanced by judicial intervention, early and repeated when necessary, often leads to more satisfactory results for clients.⁴² Conversely, a judge led investigation is effectual in eluding prolonged litigations due to the streamlined setup. Proactive involvement of the court in investigation ensures objectivity in the procedure from its commencement itself. It mitigates the usage of decimated and extraneous facts and aims at the focal point of case. Good points aside, a weighty snag of attorney led model is that it's very extortionate and prolonged. Secondly, concerning the full disclosure, attorneys often employ coercive and vituperative methods to get hold of the evidence from third parties which ultimately threatens justice. Whilst, the judge led model mislays the role place of the judge from judging facts to discovering facts.⁴³ While putting a redundant burden on judges, it violates the principle of separation of prosecution and trial with judge being neutral in the trial.⁴⁴

⁴¹ Vijay Pal Dalmia, "Process Of Trial Of Civil Cases/Suits In India - Litigation, Mediation & Arbitration - India" (www.mondaq.com, December 11, 2017) <<https://www.mondaq.com/india/civil-law/654652/process-of-trial-of-civil-casesuits-in-india>>.

⁴²Beisner (2009)

⁴³ John J Capowski, "China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law" (2012).

⁴⁴ Supra note 42



Another evident variance between the two procedures is the stipulation of the procedural code. India has a coded procedural law which has a steadfast nexus with the evidence act⁴⁵. Quite the reverse, China doesn't have an appositely laid procedure. However, the Civil procedure law⁴⁶ administers the system for "investigating and collecting evidence".⁴⁷ The Lawyer's Law in china provides for them some definite guidelines but there is no particularization on how the representatives to collect and preserve evidence and their rights and duties regarding the same.⁴⁸ The precedents and cross scientific knowledge of the judges are imperative for the proceedings in the Chinese procedure. But an appropriate and punctilious procedure guards the process of justice. Infringement of the rights, no consciousness of one's duties engendering unjust punitive actions and miscarriage of justice are jointly caused by the lack of a formal stipulated procedure.

DISCOVERY TOOLS

The discovery tools actuated by both the countries are relatively analogous with some systemic dissimilarities. The operation of discovery through interrogatories is customary in both. But in India, the stipulated procedure ordains that delivering interrogatories is a right⁴⁹ and interrogatories must speak to the question of fact.⁵⁰ Remissness of the same may ensue the dismissal of the suit or the defence.⁵¹ On the contrary, responding to the lawyer's interrogation letter isn't indispensable in China. Refusal of the same attracts no penalty in the Chinese courts. The procedure of document discovery is identical to that of interrogatories in India. A party may appeal to the court for adjuring the opponent in order to inspect their documents.⁵² The court may refuse such application. Non-observance of this court order will subject the party to penalty or sanction.⁵³ Unlike India, in china court itself convenes the evidence exchange meetings parties to present

⁴⁵ Indian Evidence Act 1972

⁴⁶ Civil Procedure Law of People's Republic of China

⁴⁷ Supra note 28

⁴⁸ Elizabeth Fahey and Zhirong Tao, "The Pretrial Discovery Process in Civil Cases: A Comparison of Evidence Discovery Between China and the United States" (Boston College International and Comparative Law Review The Pretrial Discovery Process in Civil Cases: A Comparison of Evidence Discovery Between China and the United States 2014) <<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1722&context=iclr>>

⁴⁹ Supra note 12

⁵⁰ *Model Farm Dairies v. Newman, Hambro, third party* [1943] 59 T. L. R. 8, C. A.

⁵¹ The Code of Civil Procedure 1908, Order 11, R 21

⁵² The Code of Civil Procedure 1908, Order 11, R 12. ; *M.L. Sethi v R.P. Kapur* [1972] AIR 2379

⁵³ Supra note 50



evidence and submit examination opinion on the veracity, legality and relevance of evidence.⁵⁴ If a party delays to submit the evidence, the court may impose fine or discard their evidence.⁵⁵ Further, the notary system in India is limited to the notarization of documents. Section 85 of evidence act states that the Court shall presume that every document purported to be Power of Attorney, which has been duly executed before and authenticated by Public Notary can be taken to have been so executed and authenticated.⁵⁶ Notarization to sustaining and authenticating the evidence is limited to the documents by notary officers. While on the contrary, under Chinese procedure the Notarization agency visits the incident locus, objectively obsecrate the real objects, takes photographs or record videos and records the testimony of witnesses.⁵⁷ Apart from that, the agency notarizes or attests the documents too. The appraisal of evidence by expert witnesses is common in both countries. The distinction is that in India, court appoints the expert witness during the trial and parties have no role in the same.⁵⁸ Whereas, in china, parties negotiate and single out an expert witness for their case during pre-trial. Other discovery tools such as physical and mental examination of the witnesses and other inanimate objects are mostly during trial in India and China both.

TAKEAWAY

Even after the inception of New evidence Rules, Chinese Civil Procedure Law is yet not formally codified. India, with an aptly laid procedure nevertheless could assimilate certain segments of Chinese procedure. To make the delivery of justice less arduous and expensive, India could adopt a procedure where the discovery model is led by the attorneys/parties and judges both correspondingly in which attorneys will have the already existing role but judges will begin to interfere more. This will ensure that the evidence collected is double-checked and will partly halt the illegal obtaining of evidence. Indian procedure heretofore has the provision for court-initiated

⁵⁴ Liu C and Tang H, "LITIGATION IN MAINLAND CHINA UNDER NEW EVIDENCE RULES: YOUR 50 QUESTIONS" (*Arbitration notes*, May 4, 2020) <<https://hsfnotes.com/arbitration/2020/05/04/litigation-in-mainland-china-under-new-evidence-rules-your-50-questions/>>

⁵⁵ Supra note 53

⁵⁶ Vijay Pal Dalmia and Pavit Singh Katoch, "Power of Attorneys Executed Out of India - Requirement of Notarization & Evidentiary Value Before Courts of India - Litigation, Mediation & Arbitration - India" (*www.mondaq.com*, April 26, 2017)

⁵⁷ Supra note 30

⁵⁸ Indian Evidence Act 1972, Section 45-46



investigations⁵⁹ but it calls for strengthening of the same. The provision of judgement based on admissions⁶⁰ will cease to be used impetuously and will make more sense if court personnel take part in cross checking the basic factual evidence. Further, India could augment the notary procedure by not just limiting it to the authentication of the documents but by broadening the scope of authority vested with notary officers just akin China. Likewise, China too could adopt certain Indian procedures to fill some gaps in its procedure. Inclusively, the discovery procedures of both the countries are inherently incongruous but both provide ways to amend the other.

REFERENCE: [HTTPS://LEXFORTI.COM/LEGAL-NEWS/](https://lexforti.com/legal-news/)

⁵⁹ Supra note 40

⁶⁰ The Code of Civil Procedure 1908, Order 12, R 6