KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

CIVIL PROCEDURE CODE AND LIMITATION ACT

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

Compiled by

Mr. Prasad H, Asst. Prof.

Reviewed by

Dr. Mahesh R.S., Asst. Prof.

KLE Society's Law College, Bengaluru

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UNIT - 1

Synopsis

1. Substantive and Procedural Law
   - Distinction between Substantive Law and Procedural Law
2. History of the Code of Civil Procedure
3. Application of the Code
4. Jurisdiction of the Civil Courts
5. Suits of Civil Nature
6. Doctrine of Res Sub Judice
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7. Doctrine of Res Judicata
8. Foreign Judgment
9. Place of Suits
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Substantive and Procedural Law

The Substantive and Procedural Laws are the two important branches of Law. The terms "Substantive" and "Adjective" seem to have been invented by ***Bentham*** in 1843. ***Austin*** criticized the distinction' saying "it cannot be made the basis of a just division.". ***Holland*** in his *'Treatise on Jurisprudence'* popularized the terms "Substantive" and "Adjective" and that have been accepted by writers in general. In this lesson we will discuss the 'Juristic Approach' towards distinction between these two branches of law as both the laws are important and one could not be effective in the absence of other. Though there may be some overlapping between these two branches of Law. It is not an easy task to state with precision the exact nature of the distinction between the two. But it can be said that without laws of a Substantive Nature, Procedural Law would not have much to regulate, and in absence of Procedural Law, fair and consistent application of Substantive Law is not possible.

Bentham has propounded that the 'Substance Law' and 'Procedural Law' can be clearly and sharply separated. He has stated that "By procedure, is meant the course taken for the execution of the laws .... Laws prescribing, the course of procedure have on a former occasion been characterized by the term Adjective Laws. This is in contradiction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, Substantive Laws". ***Holland*** in his book *'Treatise on Jurisprudence'* has stated: "Law – defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, 'Substantive Law.' So far as it

provides a method of aiding and protecting, it is 'Adjective Law', or Procedure." However Salmond, on the other hand, holds the view that separation "is sharply drawn in theory but in practical operation many procedural rules are "wholly or substantially equivalent to rules of Substantive Law". ***Salmond*** has noted that if one takes the view of the fact that 'the administration of justice in its typical form consist in the application of remedies to the violations of rights', this may mean that the Substantive Law is that which defines the rights, while Procedural Law determines the remedies. But this distinction between '*jus and remedium'* (right and remedy) is inadmissible as there are many rights (in the wide sense) which belong to the sphere of procedure; for example, a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, and so on. In the second place, rules defining the remedy may be as much a part of the Substantive Law as are those which define the right itself. The substantive part of the Criminal Law deals, not with crimes alone, but with punishments also. So, in the Civil Law, the rules as to the measure of damages pertain to the Substantive Law, no less than those declaring what 'damage' is actionable. Thus, to define procedure as concerned not with rights, but with remedies, is to confront the 'remedy' with the process by which it is made available. ***Salmond*** has stated that 'The Law of Procedure may be defined as that branch of the law which governs the process of litigation. It is law of action. The entire residue is Substantive Law, and relates, not to the process of litigation, but to its purposes and subject-matter…. Substantive Law is concerned with the ends which the administration of justice seeks. It determines their conduct and relations in respect of the matters litigated. Procedural Law deals with the means and instruments by which those ends are to be attained. It regulates the conduct and relations of courts and litigants in respect of the litigation itself'. Further he pointed that "Procedural Law is concerned with affairs inside the courts of justice" while "Substantive Law deals with matters in the world outside."

Another juristic view is that there is no distinction between "Substance" and "Procedure". "The distinction between Substantive and Procedural Law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. Professor Cook in, "Substance" and "Procedure" in the Conflict of Laws had arrived at a tri- chotomy. There are: (i) "substance," (ii) "procedure," and (iii) apenumbra, a "twilight zone," a "no-man's land," which may be "substance "or "procedure" conditioned on the end to be attained

Meaning & Nature of Substantive Law

The Substantive Laws are basically derived from Common, Statutory, Constitution and from the Principles found in judicial decisions following the legal precedents to cases with similar facts and situations. With the passage of time and creation of new Statutes, the volume of Substantive Law has increased. For Example:- Penal Law, Law of Contract, Law of Property, Specific Relief Act, etc., are Substantive Law. It can be concluded out from writings of various professional texts that Substantive Law deals with the legal relationship between subjects (individuals) or the subject and the State. Substantive Law is a Statutory Law that defines and determines the rights and obligations of the citizens to be protected by law; defines the crime or wrong and also their remedies; determines the facts that constitute a wrong -i.e. the subject-matter of litigation in the context of administration of justice. The Substantive Law, defines the 'remedy' and the right; includes all categories of Public and Private Law and also includes both Substantive Civil and Criminal Law.

In short, it can be said that Substantive Law is a Statutory Law that deals with the relationship between the people and the State. Therefore, Substantive Law defines the rights and the duties of the people. Substantive Law deals with the structure and facts of the case; defines the rights and duties of the citizens and cannot be applied in non-legal contexts.

Substantive Civil Law

The Civil Law includes any private wrong, a 'Tort', which unfairly causes someone else to suffer loss or harm resulting in legal liability for the person who commits the tortious act. Substantive Law defines to charge the 'Tort'. Substantive Civil Law also includes the Law of Contract- defines what is essential elements required for formation of contract; real property. The Indian Succession Act, 1925 deals with Substantive Law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindu and Muslims in India. Other Acts that provides for Substantive Civil Law in India are Indian Contract Act, 1872; Transfer of Property Act 1882; Specific Relief Act; Indian Trust Act, 1882.

Substantive Criminal Law

The Indian Penal Code (IPC) in India defines various penal offences and lists the elements that must be proved to convict a person of a crime. It also provides for punishment applicable to these offences. For example Substantive Criminal Law defines what constitutes 'Murder', 'Robbery', 'Rape', 'Assault' etc.

Meaning & Nature of Procedural Law

Procedural Law (or Adjective Law) deals with the enforcement of law that is guided and regulated by the practice, procedure and machinery. This law is very important in administration of justice. Procedural law functions as the means by which society implements its substantive goals. Procedural law is derived from constitutional law, Statutes enacted by legislature, law enforcement agencies promulgating written regulations for their employees, which may not have the force of law but their violation may result in internal sanctions; and the rules and procedural guidelines laid down by the Supreme Court. According to Holland, Adjective law, though concerns primarily with the rights and acts of private litigants, touches closely on topics, such as the organization of Courts and the duties of judges and sheriffs, which belong to public law. It comprises of (i) jurisdiction (in the conflicts sense); (ii) jurisdiction (domestic sense); (iii) the action, including summons, pleadings, trial(including evidence); (iv) judgment; (v) appeal; (vi) execution. Procedural Law is that law which prescribes method of enforcing rights or obtaining redress for their invasion; machinery for carrying on a Suit. The Code of Civil Procedure, 1908; Code of Criminal Procedure, 1973;Indian Evidence Act, 1872; Limitation Act, 1963; The Court Fees Act 1870; The Suits Valuation Act, 1887 are examples of Procedural Law in India.

The Procedural Law can be said, is a law that:

i. Lays down the rules with the help of which law is enforced.
ii. Relates to process of litigation and determines- what facts constitute proof of a 'wrong' or 'Tort'.
iii. In the context of administration of justice -the law of procedure defines the modes and conditions of the application of remedies to violated rights.
iv. Are the adjective rules, prescribing the mode in which the State, as such a personality, may sue or be sued.

v. Provides for mechanism for: obtaining evidence by police and judges, conduct of searches, arrests, bail, and presentation of evidence at trial and process of sentencing.
vi. It is the law of action that includes all legal proceedings, civil or criminal.

Law of Civil Procedure

Civil Procedural Law consists of the rules and standards which courts follows while conduct civil trials. These rules govern how a civil suit or case may be commenced, what kind of service of process (if any) is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function. Civil actions concern with the judicial resolution of claims by private individual or group, companies or organisations against another and in addition, governments (or their subdivisions or agencies) may also be parties to civil actions. In India Code of Civil Procedure, 1908 consolidates and amend the laws relating to the procedure of the Courts of Civil Judicature.

Law of Criminal Procedure

Law relating to criminal procedure provides or regulates the steps by which one who violates a criminal statute is punished. Procedural Criminal Law can be divided into two parts, the investigatory and the adjudicatory stages. In the *investigatory phase*, investigation primarily consists of ascertaining of facts and circumstances of the case by police officers and arrest of suspect of criminal offence. The *adjudicatory phase* begins when with the trial of suspect for the alleged criminal conduct in the court of Law. In India Criminal Procedure Code, provides the procedure of getting the penal offences prosecuted and punished by the criminal courts. It also lays down the details regarding the arrest, investigation, bail, jurisdiction, appeals, and revisions and compounding of offence etc., with regards to the various offences.

Distinction between Substantive Law & Procedural Law

SUBSTANTIVE LAW	PROCEDURAL LAW
The Substantive law defines and determines the obligations and rights of people and legal entities.	Procedural law lays down the method of aiding, the steps and procedures for enforcement of Civil and Criminal Law.
When a particular law defines rights or crimes or any status, it is called Substantive Law. It defines how a crime or tort will be charged and how the evidence and case facts will be presented and handled. Eg- The definition of 'manslaughter' is substantive.	The laws that determine how the rights of the plaintiff and defendant will be protected and enforced throughout the course of the case Procedural Laws. It includes procedure, pleading, and evidence. Eg-The right to a speedy trial for a person accused of 'manslaughter' is procedural.
A Substantive Law also provides for Prohibitions administered by courts which behaviors are to be allowed and which are prohibited- such as law providing prohibition	Procedural Laws provides rules to determine, how the Substantive Laws are to be administered, enforced, changed, and used in the mediation of disputes -such as

against murder or the sale of narcotics.	filing charges or presenting evidence in court.

Here are some examples illustrating distinction between Substantive Law and Procedural Law.

i. A right of appeal is a substantive right and is creature of the statute. Rules of Limitation pertain to the domain of Adjective Law.
ii. Right to recover certain property is a question of Substantive Law (for the determination and the protection of such rights are among the ends of the administration of justice); but in what courts and within what time the person may institute proceedings are questions of Procedural Law (for they relate merely to the modes in which the courts fulfil their functions).
iii. So far as the administration of justice is concerned with the application of remedies to violated rights, the Substantive Law defines the 'remedy' and the right, while the Law of Procedure defines the modes and conditions of the application of the one to the other.
iv. The law that to possess 'cocaine' is crime in Substantive Law. Criminal Procedure sets the rules for discovering and adjudicating violations of that criminal statute — for example, police may not subject suspects to unreasonable searches and seizures, or coerce confessions. If the police violate these or other procedural rules, various procedural consequences may arise, such as exclusion of evidence at trial or dismissal of the charge.
v. Whether an offence is punishable by fine or by imprisonment is a question of Substantive Law. But whether an offence is punishable summarily or only on indictment is a question of procedure and is, therefore, a question of Procedural Law.

Substantive and Procedural Law – Prospective or Retrospective

In general, all Procedural Laws are retrospective unless a legislature specifies so.

In ***Nani Gopal Mitra v. State of Bihar' (AIR 1970 SC 1636),*** the Court declared that amendments relating to procedure operated retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure.

In ***Hitendra Vishnu Thakur and others etc. etc. v. State of Maharashtra and others (1994) 4 SCC 602*** the Court summed up the legal position with regard to the Procedural Law being retrospective in its operation and the right of a litigant to claim that he/she be tried by a particular Court, in the following words:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.
(ii) Law relating to form and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.
(iii) Every litigant has a vested right in Substantive Law but no such right exists in Procedural Law.

(iv) A Procedural Statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

In ***Rajasthan State Road Transport Corporation and Anr. v. Bal Mukund Bairwa' (2009) 4 SCC 299*** the Court relied upon the observations made by Justice Benjamin N. Cardozo in his famous compilation of lectures *The Nature of Judicial Process* – that "in the vast majority of cases, a judgment would be retrospective. It is only where the hardships are too great that retrospective operation is withheld."

History of the Code of Civil Procedure

Before 1 July 1859, there were no less than nine different systems of civil procedure simultaneously in force in Bengal. The systems of procedure in other parts of British India were equally numerous. The evils arising from this state of things had been felt, and they were to a certain extent, remedied by the Code of 1859. However, the Code of 1859, as passed, did not apply to Supreme Court, or to the Presidency Small Cause Courts, nor did it extend to non-regulation provinces. In course of time, it was extended to almost the whole of British India, and it was also made applicable to the High Courts by virtue of their respective charters. As the Code was ill drawn, ill arranged and incomplete, a fresh Code had to be passed in 1877. A few months' experience, however, showed that several amendments were desirable, and after five years, another Code was passed, namely the Code of 1882. The Code of 1882 remained in operation for more than a quarter of a century and to remedy the defects experienced during that period, a comprehensive revision of the Code was undertaken in the first decade of 20th century, and the Code of 1882 was supplanted by the present Code in the year 1908 – ***Dr.Whitley Stoke's Anglo Indian Codes, Vol II, pages 380-86***. There have been extensive amendments to the Code in the year 1976. The objects behind such amendments were to ensure more expeditious disposal of civil suits and proceedings consistent with accepted principles of natural justice and to simplify the procedure to a certain extent. Having regard to the fact that the procedural niceties were becoming potential source of motivated delays at the hands of unscrupulous litigants that the necessity to cut short the delays at various levels was considered and the Code was drastically amended by the Code of Civil Procedure (Amendment) Act, 1999, which proposed several changes to the Code. However, the same was not notified and some of the proposed changes under the Amendment Act, 1999 were deleted or substituted through the Code of Civil Procedure (Amendment) Act, 2002, consistent with the demands of fair play and justice which came into force on 1 July 2002. The important changes in the Code brought about by these amendments fix the time limit for doing certain things, permit the parties to adduce evidence by affidavits, and further the provision for settlement of disputes through arbitration, conciliation, Lok Adalats and mediation. The Supreme Court in ***Salem Bar Association v. UoI, AIR 2995 SC 3353*** has held the amendments in the Code brought into forced with effect from 1 July 2002 as constitutionally valid. It is a moot point, howeverif the provisions achieved their intended objective, and interventions of higher courts have been inconsistent and in many cases liberal, with the ambit of discretion exercised by the trial Courts in the matter of dealing against litigants who manipulate to deliberately cause delays.

The Code of 1882 contained 49 chapters, each chapter consisting of several Sections, the total number of Sections being 652. The arrangement of the present Code is a novel one. It proceeds upon the lines of the Judicature Acts and the Rules framed under those Acts. It consists of two parts – the first containing provisions which are more or less of a substantive character, and the second containing provisions which relate to matters of mere machinery. The Sections which form the body of the Code constitute the first part. The orders and rules comprised in Schedule I constitute the second part. As regards the Sections, they cannot be altered or amended except by the legislature. As regards the rules, the High Courts are empowered to annul, or add to, all or any of the said rules, provided that they are not inconsistent with the provisions of the sections–***Director of Inspection of Income Tax v. Pooran Mal & Sons, AIR 1975 SC 67***. The High Courts have been showing considerable agility in exercising this power, and the work of annulling, altering and adding to the rules has been going on an extensive scale. As regards High Courts, it has to be observed that they have the power under Sec.129 to make rules to regulate their own procedure in the exercise of original jurisdiction. Such rules may be inconsistent with the provisions of the Code, but they must not be inconsistent with the Letters Patent(those established under the Royal Charter of the British, before advent of the Constitution of India) establishing those Courts.

The Code was enacted with the object of consolidating and amending the laws relating to the procedure of the Courts of civil judicature. It is a complete Code in itself as regards the subject it deals with. It would govern All actions of a civil nature, unless otherwise provided for – ***Iridium Indian Telecom ltd. v. Motorola Inc, (2005) 2 SCC 145,*** and thus, its provisions are to be construed as exhaustive with regard to the matters dealt within it – ***Manohar Lal v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527.***However, when there is no specific provision in the Code, Courts must be guided by the principles of natural justice, equity and good conscience –***Ram Chand & Sons Sugar Mills Pvt. Ltd. Barabanki (Uttar Pradesh) v. Kanhayalal Bhargava, AIR 1966 SC 1899***. Some of the provisions do make certain exceptions and it is necessary to notice them –***Iridium Indian Telecom Ltd. v. Motorola Inc., (2005) 1 CTC 204 (SC).***

Application of the Code

The present Code came into force on 1 January 1909. It extends to the whole of India except the areas mentioned in Sec.1, but it does not apply in its entirety to all the Courts in India. Its preamble states that the Code was enacted to consolidate and amend the law, relating to the procedure of the Courts of civil judicature, but the expression 'Courts of civil judicature' is not defined in the Code. However, by judicial process, it will be determined in each case, whether the Code is applicable to a particular Court or forum and if yes, to what extent. Its applicability can be extended or restricted by legislatures. For instance, the Code applies to proceedings in the testamentary and intestate jurisdiction, except as otherwise provided by Indian Succession Act, 1925. Insolvency Courts are Courts of civil judicature, but their procedure is regulated by special Acts. The Code also makes certain specific provisions to this effect. Thus, only a few portions extend to the presidency small cause Courts, and those portions are declared by Sec.8 and Order 51. As regards provincial small cause Courts, the whole of the Code extends to these Courts, except the portions specified in Sec.7 and in Order 50. As regards High Courts in the exercise of their ordinary original civil jurisdiction, the whole of the Code extends to those Courts, except the portions specified in Sec.117 and Sec.120, and in Order 49, Rule 3.

The Code is in two parts:

i) The body of the Code which contains Secs.1 to 158; and

ii) The first schedule containing Order 1 to 51 and rules thereunder. While Sections lay down the general principles of the jurisdiction, the orders and rules prescribe the method and manner in which that jurisdiction may be exercised. Further, if the rules are inconsistent with the Sections, the latter shall prevail, the former being secondary in nature. However, the Sections and the rules have to be read together and construed harmoniously.

The Code, being a procedural law, is retrospective in operation and its provisions apply to the proceedings pending at the time of its having come into force. However,the procedure correctly adopted and concluded under the previous (repealed) law cannot be reopened for the purposes of applying new procedure –***Nani Gopal Mitra v. State of Bihar, AIR 1970 SC 1636***. At the same time it shall not affect the vested rights except where the amendment has been expressly or by necessary implication been made retrospective –***Mohan Lal v. Sawai Man Sigh, AIR 1962 SC 73***. The legal position has been aptly summarized saying that 'all procedural laws are retrospective unless the Legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted –***Sudhir G. Angur v. M Sanjeev (2006) 1 SCC 141.***

Jurisdiction of the Civil Courts

The term 'jurisdiction' has not been defined in the Code. The word is derived from two Latin terms 'juris' and 'dicto' which means 'I speak by the law'.

Stated simply, 'jurisdiction' means the power or authority of a Court of law to hear and determine a cause or a matter. It is the power to entertain, deal with and decide a suit, an action, petition or other proceeding – ***Concise Oxford Dictionary***. In other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision –***Official Trustee v. Sachindra Nath, AIR 1969 SC 823***.Thus jurisdiction means the power or authority of a court to inquire into the facts, to apply the law and to pronounce a judgment and to carry it into execution –***Ujjam Bai v. State of UP, AIR 1962 SC 1621.***

Kinds of Jurisdiction

Jurisdiction of a Court may be classified under the following categories:

1. Civil & Criminal Jurisdiction

Civil jurisdiction is that which concerns and deals with disputes of a 'civil nature'. Criminal jurisdiction, on the other hand, relates to crimes and punishes offenders.

2. Territorial or Local Jurisdiction

Every Court has its own local or territorial limits beyond which it cannot exercise its jurisdiction. These limits are fixed by the government. The District Judge has to exercise jurisdiction within his District and not outside. The High Court has jurisdiction over the territory of a State within

which it is situate and not beyond it. Again, a Court has no jurisdiction to try a suit for immovable property situated beyond its local limits.

3. Pecuniary Jurisdiction

The Code provides that a Court will have jurisdiction only over those suits the amount or value of the subject-matter of which does not exceed the pecuniary limits of its jurisdiction. Some Courts have unlimited pecuniary jurisdiction, e.g., High Courts and District Courts have no pecuniary limitations. But there are other Courts having jurisdiction to try suits UP to a particular amount. Thus, a Presidency Small Causes Court cannot entertain a suit in which the amount claimed exceeds Rs.1000.

4. Jurisdiction as to subject-matter

Different Courts have been empowered to decide different types of suits. Certain Courts are precluded from entertaining certain suits. Thus a Presidency Small Causes Court has no jurisdiction to try suits for specific performance of a contract, partition of immovable property, foreclosure or redemption of a mortgage, etc. Similarly, in respect of testamentary matters, divorce cases, probate proceedings, insolvency proceedings, etc., only the District Judge or Civil Judge (Sr.Dn.) has jurisdiction.

5. Original and Appellate Jurisdiction

Original jurisdiction is jurisdiction inherent in, or conferred upon a Court of first instance. In the exercise of that jurisdiction, a Court of first instance decides suits, petitions or applications. Appellate jurisdiction is the power or authority conferred upon a superior Court to rehear by way of appeal, revision, etc., of causes which have been tried and decided by Courts of original jurisdiction.

Munsiffs Courts, Courts of Civil Judges, Small Cause Courts are having original jurisdiction only, while District Courts, High Courts have original as well as appellate jurisdiction.

6. Exclusive and Concurrent Jurisdiction

Exclusive jurisdiction is that which confers sole power on one Court or tribunal or try, deal with and decide a case. No other Court or authority can render a judgment or give a decision in the case or class of cases.

Concurrent or co-ordinate jurisdiction is jurisdiction which may be exercised by different Courts or authorities between the same parties, at the same time and over the same subject-matter. It is, therefore, open to a litigant to invoke jurisdiction of any of such Court or authority.

7. General and Special Jurisdiction

General jurisdiction extends to all cases comprised within a class or classes of causes. Special or limited jurisdiction, on the other hand, is jurisdiction which is confined to special, particular or limited causes.

8. Legal and Equitable Jurisdiction

Legal jurisdiction is a jurisdiction exercised by common law Courts in England, while equitable jurisdiction is a jurisdiction exercised by equity Courts. Courts in India are Courts of both, law and equity.

9. Municipal and Foreign Jurisdiction

Municipal or domestic jurisdiction is a jurisdiction exercised by municipal Courts, i.e., Courts in a country. Foreign jurisdiction means jurisdiction exercised by a Court in a foreign country. A judgment rendered or decision given by a foreign Court is a 'foreign judgment'.

10. Expounding and Expanding Jurisdiction

Expounding jurisdiction means to define, clarify and explain jurisdiction. Expanding jurisdiction means to expand, enlarge or extend the jurisdiction. It is the duty of the Court to expound its jurisdiction. It is, however, not proper for the Court to expand its jurisdiction.

Suits of Civil Nature

Sec.9 of the CPC reads as follows:"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all ***suits of a civil nature*** excepting suits of which their cognizance is either expressly or impliedly barred."

Here, a question arises as to what is a suit of a civil nature.

There is no definition provided in the Code nor any guidelines mentioned to determine the 'civil nature'. A suit can be said to be of civil nature if it involves determination of civil rights. Civil rights mean the rights and remedies vested in a citizen, within the domain of private law as distinct from rights related to criminal or political matters and public law –***PMA Metropolitan v. Moran Mar Marthoma, AIR 1995 SC 2001***.

The civil rights can be of a private individual or other known legal entities as distinguished from groups or associations which have no distinct legal personality or recognition.

However, it does not follow that such groups or associations can never bring actions in Court of law. Certain religious denominations, such as mutts established following certain philosophy, say, mutts believed to have been established by Sankara, Ramanuja and Madhvacharya, may have peculiar rights pertaining to that denomination. They are constitutionally protected as under freedom of religion guaranteed under the constitution but they shall be still subject to public order, morality and health –***Commissioner, Hindu Religious Endowments, Madras v. Sri. Lakshmindra Thirtha Swamiar of Sri. Shirur Mutt, AIR 1954 SC 282.***Rules of reservation in education and public employment may have caste as basis and there is no reason to suppose, post constitution, the legitimacy of caste outfits that espouse the causes of its members belonging to that caste. The test shall be to examine whether the rights canvassed could be legally supported through any constitutional or legislative provisions and whether the legal action is only to uphold such rights. If a person is expelled from his caste, a suit will lie for declaration that his expulsion was unlawful and for damages –***Jagannath v. Akali, (1894) ILR 21 Cal 463***. Any suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature. Suits for vindication of mere dignity attached to an office are not suits of a civil nature. In ***Devchand v. Ghanshyam, AIR 1935 Bom 136***, it was held that a suit to decide whether sutpanth cult is within Vedic religion or not or whether it is abhorrent to the feelings of Leva Patidar community as a whole is not a suit of a civil nature. A claim by a priest that he is entitled to receive certain honours in a specific manner will not be entertained by a civil Court. Following this Rule, Courts have refused to entertain claims for precedence in worship of deity and to receive gifts on ceremonial occasions – ***Narayan v. Krishnaji, (1886) 10 Bom 233.***If one has to trace the underlying principle behind such and other decisions of similar nature, it can be safely stated that the relations between parties in all such cases were governed by either social or moral code of conduct. Therewas no legal right which was sought to be enforced. In the absence of such legal

right, Courts wisely refrained from regulating behaviour of public on the basis of any social or moral Code of conduct which obviously did not possess any legal sanction. Such litigation must now be rare, but the underlying principle should be grasped so that new situations in different garbs meet the same fate, if rights or obligations sought to be enforced are not based upon, or derived from, statutes or contract.

However, the fact that determination of a question relating to civil rights depends upon the decision of a caste question as regards religious rites and ceremonies, does not take out the suit from the category of civil suits.

Doctrine of Res Sub Judice

Sec.10 declares that no Court should proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties and the Court before which the previously instituted suit is pending is competent to grant the relief sought –***Indian Bank v. Maharashtra State Co-operative Marketing Federation Ltd., AIR 1998 SC 1952.***

The Rule applies to trial of a suit and not the institution thereof. It also does not preclude a Court from passing interim orders, such as, grant of injunction or stay, appointment of receiver etc. - ***Indian Bank v. Maharashtra State Co-operative Marketing Federation Ltd., AIR 1998 SC 1952.***

Object

The object of the Rule contained in Sec.10 is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of law is to confine a Plaintiff to one litigation, thus obviating the possibility of two contradictory verdicts by one and the same Court in respect of the same relief –***Bal Kishan v. Kishan Lal, (1889) ILR11 All 148.***

Conditions

Section 10 of the Civil Procedural Code, 1908 deals with the conditions required to apply the principle of res sub judice. The conditions in the process of application of res sub-judice are:

Where the matter in issue is same

Section 10 clearly states that the matter in issue in both the suits must be directly or substantially be the same. In other words there must be two suits one that is previously instituted and another that is subsequently substituted. The issues of both the suits should be same to get the benefit of this principle, it is not sufficient if only one or two issues are common. In the circumstances were the entire issues are not the same, the court may exercise its power under Section 151 and stay the trial in a subsequent suit or the trial of the suit may be consolidated. The power of courts to stay the trial under Section 151 is discretionary in nature and can be exercised only when there is an abuse of process of court and if it defeats the ends of justice.

According to Indian Evidence Act, 1872 “matter in issue” are of two kinds:

Matter directly and substantially in issue - Here “directly” means immediately i.e. without any intervention. The word “substantially” implies essentially or materially.

Matter collaterally and incidentally in issue– the words 'directly and substantially in issue'have been used in Section 11 in contradistinction to the words 'collaterally or incidentally in issue'is just contrary to the matter directly or substantially in issue.

Where the parties in suits are same

The two suits should have the same parties or their representatives.

Where the title of the suit is same

The title of both the suits for which the parties are litigating should also be same.

Where the suit must be pending

The former suit must be pending in the court while the latter suit is instituted. The word pending is for the previously instituted suit, where the final decision has not been arrived at.

In a competent court

Section 10 also specifies that the former suit must be pending before a court which is competent to carry out the trial. If the former suit is pending before an incompetent court, no legal effects can flow from it.

Illustrations:

'X' and 'Y' decide to enter into a contract for the sale of machine. 'X' is the seller and 'Y' is the purchaser. Y defaulted in paying the amount of the sale to X. X first filed a suit for recovery of the entire amount in Bangalore. Subsequent to this, X filed another suit at Bombay High Court demanding Rs. 20,000 as outstanding balance. In X's suit Y took the defence that X's suit should be stayed since both the suits are on similar issue. However court of Bombay held that since X's first suit and the second suit have similar issues similar to the first suit, the subsequent suit is liable to be stayed.

'P' was an agent in Patna who agreed to sell goods in Odisha to 'M'. 'P' the agent then filed a suit for balance of accounts in Patna. 'M' sues the agent 'P' for accounts and his negligence in Odisha; while the case was pending in Patna. In this case, Patna court is precluded from conducting trial and can petition Odisha Court to direct a stay of proceedings in Patna Court.

The moment the above conditions are satisfied, a court cannot proceed with the subsequently instituted suit since the provisions contained in Section 10 are mandatory and the court cannot exercise its discretion. The order of stay can be made at any stage of the proceedings.

However, Section 10 takes away the power of the court to examine the merits of the case thoroughly. If the court is satisfied with the fact that the subsequent suit can be decided purely on legal point, it is open for the court to decide in such a suit.

In ***Neeta vs. Shiv Dayal Kapoor & Others***, ***(2014) 1 ICC 851***, it was held that the subsequent matter cannot be stayed if the conditions mentioned in Section 10 are not fulfilled. In the apparent case, the two courts which tried the same issues were not the courts having concurrent jurisdiction. Therefore, the proceedings in the subsequent court were not stayed.

Distinction between Res judicata and Res sub judice

The rule of res judicata is readily distinguished from the Rule in s 10 for the latter relates to a res sub judice, that is, a matter which is pending judicial inquiry; while the Rule in the present section relates to res judicata that is, a matter adjudicated upon or a matter on which the

judgment has been pronounced. Section 10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previous suit. The present section bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit.

Moreover, public policy requires that there should be an end of litigation. The question whether the decision iscorrect or erroneous has no bearing on the question whether it operates or does not operate as res judicata - ***Tarini Charan v. Kedar Nath, AIR 1928 Cal 777***; otherwise, every decision would be impugned as erroneous and there would be no finality - ***Behari v. Majid, (1901) ILR 24 All 138.***

While s 10 relates to res sub judice, that is, a matter which is pending a judicial adjudication, Sec.11 relates to res judicata, that is to say, a matter already adjudicated upon by a competent court. Whereas s 10 bars the trial of asuit in which the matter directly and substantially in issue is pending adjudication in a previous suit, s 11 barsthe trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicatedupon in a former suit. The object of both the sections is similar, namely, to protect the parties from being vexedtwice, for the trial of the same cause and to achieve the public policy that there should be an end of litigation.

Therefore, one of the objects of s 10 is to prevent competent courts of concurrent jurisdiction from having to tryparallel suits in respect of the same matter in issue, and thereby to pave the way for the application of the Rule of res judicata contained in the next following section. So, what the court has really to see is if the decision ofthe matter directly and substantially in issue in the former suit will or will not lead to the decision of the matter directly and substantially in issue in the subsequent suit, and if it is satisfied that it will, then it must stay the trialof the subsequent suit and await the decision in the former suit - ***Fulchand Motilal v. Manhar Lal, AIR 1973 Pat 196***.

Doctrine of Res Judicata

Sec.11 of the CPC embodies the doctrine of res judicata or the Rule of conclusiveness of a judgment, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the parties. It enacts that once a matter is finally decided by a competent Court, no party can be permitted to reopen it in a subsequent litigation. In the absence of such a Rule there will be no end to litigation and the parties would be put to constant trouble and harassment and expenses –***Satyadhyan Ghosal v. Deorjin Debi, AIR 1960 SC 941.***

The doctrine of res judicata has been explained in the simplest possible manner by Das Gupta, J. in the case of ***Satyadhyan Ghosal v. Deorjin Debi, AIR 1960 SC 941.***

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter-whether on a question of fact or on a question of law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Sec.11 of the Code of Civil Procedure; but even where Sec.11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed

on the basis that the previous decision was correct. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?

Object

The doctrine of res judicata is based on three maxims:

a) Nemo debet bis vexari pro una et eadem causa – No man should be vexed twice for the same cause.
b) Interest republicae ut sit finis litium –It is in the interest of the state that there should be an end to litigation.
c) Res judicata pro veritate accipitur –a judicial decision must be accepted as true and correct.

Conditions of res judicata

In order to constitute a matter as res judicata, the following conditions must be there:

(i) There must be two suits one former suit and the other subsequent suit;
(ii) The Court which decided the former suit must be competent to try thesubsequent suit;
(iii) The matter directly and substantially in issue must be the same either actuallyor constructively in both the suits;
(iv) The matter directly and substantially in issue in the subsequent suit must havebeen heard and finally decided by the Court in the former suit;
(v) The parties to the suits or the parties under whom they or any of them claimmust be the same in both the suits;
(vi) The parties in both the suits must have litigated under the same title.

We wouldmake an attempt here to explain all the above conditions.

(*i) Former suit* - The term "former suit" means previously decided suit though in factthat is instituted subsequent - Prabha Singh Surjit Singh v Sanka Narasimha Rao, AIR 1957 AP 992.Explanation I attached to the section confirms theaforesaid view. Expression "former suit" distinctly shows that there must be two suitsor proceedings - Maganbhai v Chetan Lal, AIR 1968 Raj 81. Even when there are two suits a decision given simultaneouslycannot be a decision in the former suit - Ibid

The word "suit" means a valid suit. Thus, a suit against a dead man is not a valid suit atall and cannot be regarded for the purposes of this Section - (1907) 9 Bom LJ 274. Further the word "suit"means proceedings in action in Courts of first instance as distinguished fromproceedings in Appellate Courts - Lachhmi v Bhulli, AIR 1927 Lah 289.Thus, rule of res judicata refers not to the date of the commencement of the litigationbut to the date when the judge is called upon to decide the issue - ***Sheodan Singh v Daryao Kunwar, AIR 1966 SC 1332***.

Where two appeals arising out of two cross-suits are filed by same party, one is dismissed and the other is allowed and subsequently an appeal is filed by special leavein latter appeal, it has been held by the Supreme Court in ***Ram Prakash v Mohammad Ali,AIR 1973 SC 1269 : (1973)***

2 SCC 163 : (1973) 3 SCR 893 that the decision in formerappeal would not operate as res judicata when question in issue in latter appeal could not be and was not in fact considered in former appeal.

Affirming its earlier decision in ***Lonankutty v Thomman, AIR 1976 SC 1645 : (1976) 3SCC 528*** the Supreme Court has held in ***Venkataswara Prabhu v Krishna Prabhu, AIR 1977 SC 1268 : (1977) 2 SCC 181*** that "The expression "former suit", according toExplanation I of section 11, Civil Procedure Code, 1908, makes it clear that if a decisionis given before the institution of the proceeding which is sought to be barred by resjudicata, and that decision is allowed to become final or becomes final by operation oflaw, a bar of res judicata would emerge" - AIR 1977 SC 1268.

The effect and relevance of any proceedings which have attained finality shall be dulyconsidered in the pending suit - ***Shri Ram Chandra Mission v P Rajagopalachari, (2008) 15 SCC 533 (537).***It has, however, been held by the Supreme Court in ***AB Abdul Kadir v State of Kerala, AIR 1976 SC 182 : (1976) 3 SCC 219 : 1976 Tax LR 1293*** that any decision between thesame parties earlier to the passing of the Act, invalidating a previous levy will notoperate as res judicata.

(ii) Competency of Court trying former suit - Under section 11, it is necessary that theCourt trying the former suit should have been competent to try the subsequent suitItself - ***Mylavarapu C Sanyasi Prasad Rao v Runku Lakshamayya, AIR 1977 AP 143***. The plain and grammatical meaning of the word "suit" occurring in clause "in aCourt competent to try such subsequent suit or the suit in which such issue has beensubsequently raised" of section 11 of Code of Civil Procedure, 1908 includes the wholeof the suit and not a part of the suit. It is whole of the suit which should be within thecompetence of the Court at the earlier time and not a part of it - ***Gulab Bai v Manphool Bai, AIR 1962 SC 214***. It is the Court whichdecides the former suit, whose jurisdiction to try the subsequent suit has to be considered and not the Court in which the former suit may have been filed - ***Sheodan Singh v Daryao Kumar, AIR 1966 SC 1332***.

In conclusion, we may say that in order that a decision in a former suit may operate as

res judicata, the Court which decided that suit must have been either:

(a) a Court of exclusive jurisdiction, or

(b) a Court of concurrent jurisdiction "competent to try subsequent suit" at the timewhen the first suit was instituted - ***Mohd Khalid v Chief Commissioner, AIR 1968 Del 13***.

Explanation VIII was inserted by the Amending Act of 1976 in order to ensure that thedecisions of the Courts of limited jurisdiction, in so far such decisions are within thecompetence of the Courts of limited jurisdiction, must operate as res judicata in asubsequent suit, although the Courts of limited jurisdiction may not be competent to trysuch subsequent suit.

(c) Res judicata operates on judgments of Courts of Exclusion Jurisdiction.— A plea ofres judicata on general principles can be successfully taken in respect of judgments ofCourts of exclusive jurisdiction. These Courts are not entitled to try a regular suit andthey only exercise special jurisdiction conferred on them by the statute - ***Raj Lakshmi Dasi v Banamali Sen, AIR 1953 SC 33 (40)***.

(d) Expression "the Court of Limited Jurisdiction" is wide enough.—The expression "theCourt of limited jurisdiction" in Explanation VIII is wide enough to include a Court whose jurisdiction is

subject to pecuniary limitation and other cognate expressionsanalogous thereto. An order or an issue which had arisen directly and substantiallybetween the parties or their privies and decided finally by a competent Court or tribunal,though of limited or special jurisdiction, which includes pecuniary jurisdiction, willoperate as res judicata in a subsequent suit or proceeding - ***Sulochana Amma v Narayanan Nair, AIR 1994 SC 152***.

The Explanation VIII to this rule has retrospective application and applies to all the suitspending on the date of its enforcement - ***Rajendra Kumar v Kalyan, AIR 2000 SC 3335***.

Where in a suit filed by the bank against a firm for recovery of balance on cash creditaccount, the firm had contended that it was entitled to the adjustment of the amountreceived by the Bank from the insurer in respect of the goods pledged by the firm withthe bank and that claim was put in issue and decided in favour of the firm, it has beenheld by the Supreme Court in ***Gurbax Rai v Punjab National Bank, AIR 1984 SC 1012***reversed that the finding inter parties become res judicata.

(iii) Matter directly and substantially in issue - According to Mulla, the matters in issuemay be classified in two broad heads—(1) matters directly and substantially in issueand (2) matters collaterally or incidentally in issue.

(a) Matters directly and substantially in issue - Matters directly and substantially inissue have further been sub-divided into: (A) Actually in issue and (B) Constructively inissue.

(A) Actually in issue - The question whether a matter was directly and substantially inissue in the former suit has to be decided (a) on the pleadings in the former suit; (b) theissue struck therein and; (c) the decision in the suit.

The question whether a matter was directly and substantially in issue in the former suithas to be decided (a) on the pleadings in the former suit, (b) the issue struck therein,and (c) the decision in the suit. Further, it depends upon whether a decision on such an issue will materially affect the decision of the suit - ***Isher Singh v Sarwan Singh, AIR 1965 SC 948***.

If an issue was "necessary" to be decided for adjudicating on the principal issue andwas decided. Then it would have to be treated as directly and substantially in issue andif it is clear that the judgment was in fact based upon that decision then it would be resjudicata in a latter case. The expression "Collaterally and incidentally" in issue implies that there is another matter which is "directly and substantially" in issue - ***Sajjadnashin Syed Md BE Edr v Musa Dadabhai Ummer, AIR 2000 SC 1238***.

If parties and the Court have dealt with the matter as if it formed a direct and principalissue, it must be taken to have been directly and substantially in issue though in thefirst instance it was not raised properly or was raised only as an ancillary or incidentalissue - ***Narayani v Durgalal, AIR 1968 Raj 94.*** Questions raised and decided at the express request of the parties must betaken to have been directly and substantially in issue - ***Benaras Ice Factory v Amar Chand Vadnagar, AIR 1961 Cal 422.*** The "matter cannot be directlyin issue" unless it has been alleged by one party and either denied or admittedexpressly or impliedly by the other (Explanation III). It is not enough that the matter wasalleged by one party. At the same time it is not necessary that a distinct issue shouldhave actually been framed - ***Narayani v Durgalal, AIR 1968 Raj 94.*** A matter must be held to be directly and substantially in issue if the Court considers the adjudication of the issue to be material and essentialfor its decision - ***Laxman v Saraswathi, AIR***

1959 Bom 125. In case of alternative findings, each would be res judicata, if thedecision rests on all of them - ***Laxman Prasad v CIT, AIR 1963 All 172.***

Decisions are rendered by courts on the basis of facts pleaded before them and issuesarising out of those pleaded facts. The issue whether respondent's private companyhad committed breach of contractual obligations/fraud was not an issue in formerproceedings. Hence, the later issue was not foreclosed. Hence, no res judicata - ***UOI v Ramesh Gandhi, (2012) 1 SCC 476.***

Where the subject matter of two proceedings that is interpleader suit and appeals

arising there from and writ petitions filed, not directly and substantially same then,principle of res judicata not attracted - ***Purushottam Das Tandon v Military Estate Officer, AIR 2014 SC 3555.***

A wrong decision by a Court having jurisdiction is as much binding between the partiesas a right one. Such a decision may be superseded only by appeals to higher tribunalsor other procedure like review which the law provides - ***State of WB v Hemant Kumar, AIR 1966 SC 1061 (1066).***

Again, a decision on a mixed question of law and fact is as much res judicata as one ona question of fact - ***Tarini Charan Bhattacharjee v Kedar Nath Haldar, AIR 1928 Cal 777 (FB).*** A finding on an issue of law which was directly and substantiallyin issue in the former suit would be res judicata between the same parties in asubsequent suit, however erroneous it may be - ***Bhagwan Dass Sharma v Gaya Sah, AIR 1967 Pat 254.***

Foreign judgment

Foreign Judgment not by a competent Court.

It is a fundamental principle of law that the judgment or order passed by the Court which has no jurisdiction is null and void. Thus, a judgment of a foreign Court to be conclusive between the parties must be a judgment pronounced by a Court of competent jurisdiction –***R.Vishwanathan v. Rukn-ul-Mulk Syed Abdul, AIR 1963 SC 1.***

In the case of ***Moloji Nar Singh Rao v. Shankar Saran - AIR 1962 SC 1737,*** a suit was filed by the plaintiff in a foreign Court for recovery of some amounts against the defendants. The Defendants did not appear despite service of the writ of summons. The suit thereafter was proceeded ex parte against the defendants. The claim was decreed. The decree was brought to the local court for execution. After a round of litigation on the executability of the foreign decree the matter came up before the Supreme Court of India. The major issue which came up before the Court for consideration was "what conditions are necessary for giving jurisdiction to a foreign court before a foreign judgment is regarded as having. extra-territorial validity." The Supreme Court in order to answer this issue relied upon the Halsbury's Laws of England Vol. III p. 144 para 257 (3rd Edition) and held that none of those conditions were satisfied in the present case. The Court while applying those conditions observed that:

(a) The respondents (defendants) were not the subjects of Gwalior (foreign country).

(b) They did not owe any allegiance to the Ruler of Gwalior and therefore they were under no obligation to accept the judgments of the Courts of that state.

(c) They were not residents in that state when the suit was instituted.

(d) They were not temporarily present in that State when the process was served on them.

(e) They did not in their character as plaintiffs in the foreign action themselves select the forum where the judgment was given against them

(f) They did not voluntarily appear in that court.

(g) They had not contracted to submit to the jurisdiction of the foreign court.

Therefore the Supreme Court held that the foreign decree was a nullity and could not be executed in the local courts. The Supreme Court further relied upon a Privy Council decision in the case of ***Sirdar Gurdial Singh v. Maharaja of Faridkot, (1895) 22 Cal 222 (PC),*** delivered by Lord Selbourne, where it was held that

"In a personal action to which none of these causes of jurisdiction previously discussed apply, a decree pronounced in absentem by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity, by the Courts or every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced." Ibid

In the case of ***Andhra Bank Ltd.. v R. Srinivasan - AIR 1962 SC 232,*** an interesting issue came up before the Court. In this case a suit had been filed against a guarantor in the proper jurisdiction. However during the pendency of the suit the guarantor/defendant died and the legal representatives of the said defendant were brought on record. When the decree was passed and came up for execution, the legal representatives questioned the executability of the decree on the basis that since they did not submit to the jurisdiction of the Court, therefore the decree was not executable against them under S. 13(a) of CPC. Now the Supreme Court was faced with the issue that whether, even if the suit is validly instituted, but during the pendency of the suit one of the defendants expires and his non-resident foreign legal representatives are brought on record, does the rule of private international law in question (as referred to above in the case of *Sirdar Gurdial Singh's* case) invalidate the subsequent continuance of the said suits in the court before which they had been validly instituted? The Supreme Court after referring to a catena of cases, observed that the material time when the test of the rule of private international law is to be applied is the time at which the suit was instituted. Therefore it was held that the legal representatives, although foreigners were bound by the decree and the S. 13(a) could not help them in any way.

In the case of *Kukadap Krishna Murthy v. Godmatla Venkata Rao,* AIR 1962 A.P. 400, while relying upon the case of *Sirdar Gurdial Singh's* it was held by a Full Bench of the Andhra Pradesh High Court that a decree passed in absentem was a total nullity as a foreign judgment, in other words, it is not a valid foreign judgment, the execution of which could be levied in Courts situated in a foreign territory. The Court further held as follows:

"Judged by Municipal Law, the adjudicating Court has no doubt jurisdiction to entertain proceedings when certain requirements are fulfilled. But that does not invest judgments rendered by such courts with validity, if they could not be regarded as Courts of competent jurisdiction. It cannot be open to much doubt that a decree of a court without jurisdiction is null and void. We are not persuaded that the interpretation placed by the Full Bench of the Bombay High Court on the passage in question is warranted by the language thereof. It is true, as remarked by the learned Judges that S. 20 CPC vests in courts in British India a power to entertain suits in all cases where the cause of action has arisen within the territorial limits of that Court. To that

extent, the jurisdiction to take cognizance of suits by that forum is authorized by special local legislation. This section enables Courts in British India to pass decrees which are capable of execution as domestic judgments. It deals only with matters of domestic concern and prescribes rules for the assumption of territorial jurisdiction by British Indian Courts in causes with their cognizance. The operation of the decrees passed by these Municipal Courts is confined to the limits of their jurisdiction as conferred on them by the relevant provisions of the CPC. As foreign judgments, they have no validity and they are, as it were non est so far as the area outside the jurisdiction of the adjudicating Courts is concerned, if they do not conform to the principles of Private International Law. Such a judgment is an absolute nullity in the international sense.", Ibid

In the case of *R.M.V. Vellachi Achi v. R.M.A. Ramanathan Chettiar,* AIR 1973 Mad. 141, it was alleged by the respondent that since he was not a subject of the foreign country, and that he had not submitted to the jurisdiction of the Foreign Court (Singapore Court), the decree could not be executed in India. The Appellant, in defense of this argument, stated that the Respondent was a partner of a firm which was doing business in Singapore and had instituted various suits in the Singapore Courts. Therefore, the Appellant argued, that the Respondent had accepted the Singapore Courts jurisdiction. The Court held that it was the firm which had accepted the jurisdiction of the foreign Court and the Respondent, in an individual capacity, had not accepted the jurisdiction – Ibid. This was one of the reasons for which the High Court held that the decree against the Respondent was not executable.

In the case of ***K.N. Guruswami v. Muhammad Khan Sahib, AIR 1933 Mad 112,*** it was alleged that since the defendants were carrying on business in a partnership in the foreign state on the date of the action, and that the suit related to certain dealings with the firm, the issue of jurisdiction should be presumed against the defendants although an ex parte decree had been passed against them. The Court held that a mere fact of entering into a contract in the foreign country, does not lead to the inference that the defendant had agreed to be bound by the decisions of the Courts of that country. Therefore it was held that the decree was passed against the defendants without any jurisdiction.

The High Court in the above case had referred to a decision of the Madras High Court in the case of ***Ramanathan Chettiar v. Kalimuthu Pillai AIR 1914 Mad 556,*** which lays down the circumstances when the foreign courts would have jurisdiction under this Section. The circumstances mentioned are as follows:

(a) Where the person is a subject of the foreign country in which the judgment has been obtained against him on prior occasions.

(b) Where he is a resident in foreign country when the action is commenced.

(c) Where a person selects the foreign Court as the forum for taking action in the capacity of a plaintiff, in which forum he is sued later

(d) Where the party on summons voluntarily appears

(e) Where by an agreement a person has contracted to submit himself to the forum in which the judgment is obtained.

However, the Madras High Court in the case of ***Oomer Hajee Ayoob Sait v. Thirunavukkarasu Pandaram, AIR 1936 Mad. 553,*** distinguished the ratio in the case of *Ramanathan Chettiar*, by holding that a person who has filed suits in a Court having jurisdiction to try them, cannot by

implication be taken to submit himself to the jurisdiction of the same Court in cases where that Court has no jurisdiction.

In the case of ***Sankaran v. Lakshmi, AIR 1974 SC 1764,*** an interesting situation arose for the Supreme Court's consideration. The issue was whether the minors had an opportunity of contesting the proceedings in the English Court, if notices of the proceedings were served on their natural guardians but they did not appear on behalf of the minors although they put in appearance in the proceedings in their personal Capacity and what could the foreign court do except to appoint a court guardian for the minors. The Supreme Court held that since the natural guardians had not entered appearance on behalf of the minors, the minors through the guardians could not be said to have submitted to the foreign court's jurisdiction and therefore the judgment qua them was a nullity. ibid

In the case of ***Y. Narasimha Rao v. Y. Venkata Lakshmi(1991)3 SCC 451***, the Supreme Court in respect of a matrimonial dispute held that only those Courts which the Act (statute) or the law under which the parties are married recognizes as a court of competent jurisdiction can entertain the matrimonial disputes in that regard unless both parties voluntarily, and unconditionally subject themselves to the jurisdiction of that court.

In the case of ***Satya v. Teja AIR 1975 SC 105,*** while dealing with a matrimonial dispute, the Supreme Court held that the challenge under S. 13 was not limited to civil disputes alone but could also be taken in criminal proceedings. In this case a foreign decree of divorce obtained by the husband from the Nevada State Court in USA in absentum of the wife without her submitting to its jurisdiction was held to be not binding and valid upon a criminal court in proceedings for maintenance - ibid

In the case of ***Ramkisan Janakilal v. Seth Harmukharai Lachminarayan AIR 1955 Nag. 103,*** a division bench of the Nagpur High Court while following the decision in the case of Sirdar Gudayal Singh, held that a mere fact that a contract was made in the foreign country did not clothe the foreign court with jurisdiction in an action 'in personam'. Further it was held that a person cannot be held to have submitted to the jurisdiction of a foreign court if his attempt to get the ex-parte judgment set aside fails. It was held that the submission to the jurisdiction of a foreign court has to be before the foreign decree is passed.

The case of ***I&G Investment Trust v. Raja of Khalikote***, involved an action initiated in England against an Indian subject (Respondent) on the basis of a contract which was governed by the English Law. In this regard, the Calcutta High Court, while considering that under Order XI of the Supreme Court Rules of England, summons could be served upon a person outside the jurisdiction of the English Courts (assumed jurisdiction), on the basis that a contract governed by English law had been breached, held that since only the payments were governed by English law, a willingness to submit to the English Jurisdiction could not be shown. The Court in obiter dictum observed that even though it is held that the contract is governed by the English law, it could not be assumed to give jurisdiction in the International sense, although it may give rise to a cause of action. On this basis the Calcutta High Court held that the decree was not executable in India.

In the case of ***Narappa Naicken v. Govindaraju Naicken,*** it was held that failing in an action to set aside a foreign decree in the foreign Courts does not amount to submission to jurisdiction, however, in case the decree is set aside and the party is allowed to plead and a new decree is

passed then the defendant would be deemed to have submitted to the jurisdiction of the foreign court.

In the case of ***Thirunavakkaru Pandaram v. Parasurama Ayyar,*** it was held that if a party has once appeared before a foreign court in the character of the plaintiff, it does not mean that he is forever afterwards to be regarded as having submitted to the jurisdiction of the foreign court in any subsequent action, by any person or upon any cause of action, which may be brought against him.

In the case of ***VithalBhai ShivaBhai Patel v. Lalbhai Bhimbhai,*** the Bombay High Court held that the mere fact that the transaction on which the suit had been instituted in the foreign Court, was effected during the time the defendant's agent, holding a power of attorney of the defendant, which on the date of institution of the suit had expired, was living in the foreign Country, does not amount to submission to the jurisdiction of the foreign Court. However in obiter dictum the Court observed that in case the power of attorney holder is in the foreign Court and the summons are served upon him, then it may amount to submission to the jurisdiction of the Court.

The following are the cases in which the Courts have held that there is jurisdiction with the foreign Court.

The Supreme Court in the case of ***Shalig Ram v. Firm Daulatram Kundanmal,*** held that filing of an application for leave to defend a summary suit in a foreign court amounted to voluntary submission to the jurisdiction of the foreign Court.

In the case of ***Chormal Balchand Firm v. Kasturi Chand,*** the Calcutta High Court while considering the issue of submission to jurisdiction held that in case a defendant appears in the Court where the suit is instituted and questions both the jurisdiction and challenges the action on merits, he is said to have submitted to the jurisdiction voluntarily.

In the case of ***Oomer Hajee Ayoob Sait v. Thirunavukkarasu Pandaram,*** the Madras High Court while dealing with the issue of submission to jurisdiction held that mere conduct or circumstances indicative of intention to submit to the jurisdiction is enough to derive a conclusion of submission to jurisdiction. In the present case, during the pendency of the suit, plaintiff effected attachment before judgment of certain property of the defendant and the defendant by a letter acknowledged the attachment and requested merely for a concession, which was not a conditional request and when the offer is refused and the defendant remained ex parte and the suit was decreed, it was deemed that the defendant submitted to the jurisdiction of the foreign Court.

In the case of ***V. Subramania Aiyar v. Annasami Iyer,*** the Madras High Court while dealing with the issue whether there was submission to the jurisdiction of a foreign Court in the circumstances that the defendant had appeared in the foreign Court due to a Commission having been appointed to get the defendant summoned and examined as a witness, and that the defendant pleaded that the Court had no jurisdiction to try the suit and he objected to the questions put to him in examination and got himself cross examined, it was held that the defendant had submitted to the jurisdiction of the foreign Court.

In the case of ***British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries Ltd.*** the Supreme Court held that even though the defendant had taken the plea of lack of jurisdiction before the trial Court but did not take the plea before the Appeal Court or in the Special Leave Petition before the Supreme Court, it amounted to submission to jurisdiction.

PROPOSITION

By reading the aforesaid cases under Section 13(a) of CPC the following proposition may be laid:

In case of actions-in-personam, a Foreign Court may pass a decree or judgment against an Indian defendant, who is served with the summons but has chosen to remain ex parte. But the said judgment or decree may be enforceable against such a defendant in India, only if by fulfilling any of the following conditions it can be shown that the Foreign Court had jurisdiction upon the Indian defendant:

(f) Where the person is a subject of the foreign country in which the judgment has been obtained against him on prior occasions.

(g) Where he is a resident in foreign country when the action is commenced.

(h) Where a person selects the foreign Court as the forum for taking action in the capacity of a plaintiff, in which forum he is sued later

(i) Where the party on summons voluntarily appears

(j) Where by an agreement a person has contracted to submit himself to the forum in which the judgment is obtained.

2. Foreign judgment not given on the merits of the case:

The following are the cases in which the Courts have held that the judgments were not passed on the merits of the case and hence were inconclusive.

The fountainhead of all decisions under this head has been the decision of the Privy Council in the case of ***D.T. Keymer v. P. Viswanatham.*** In this case, a suit for money was brought in the English Courts against the defendant as partner of a certain firm, wherein the latter denied that he was a partner and also that any money was due. Thereupon the defendant was served with certain interrogatories to be answered. On his omission to answer them his defence was struck off and judgment entered for the plaintiff. When the judgment was sought to be enforced in India, the defendant raised the objection that the judgment had not been rendered on the merits of the case and hence was not conclusive under the meaning of S. 13(b) of CPC. The matter reached the Privy Council, where the Court held that since the defendant's defence was struck down and it was treated as if the defendant had not defended the claim and the claim of the plaintiff was not investigated into, the decision was not conclusive in the meaning of S. 13(b) and therefore, could not be enforced in India.

The aforesaid decision of the Privy Council was relied upon and further explained in the case of ***R.E. Mahomed Kassim & Co. v. Seeni Pakir-bin Ahmed*** by a full bench of the Madras High Court. In this case the defendants were properly served however they did not appear. According to one of the rules of procedure of the foreign Court, in case defendants are properly served but do not appear and contest and the judgment is given for the plaint claim without any trial, judgment was entered up in favour of the plaintiff as a matter of course. This is what had happened in the present case and the judgment had been entered in favour of the plaintiff as a matter of course without any trial. The judgment was brought to India for enforcement. The defendants resisted the enforcement on the basis that the judgment was not conclusive since it was not passed on the merits of the case. The matter reached the Full Bench of the Madras High Court, wherein it was held that a decree obtained on default of appearance of the defendant

without any trial on evidence is a case where the judgment must be held not to have been on the merits of the case. In the obiter dictum the Court observed that in a case where there was default in appearance, but however the claim of the plaintiff was tried in full on evidence and the plaintiff proved his case, the decision may be treated as a judgment on the merits of the case.

In the case of ***Gudemetla China Appalaraju v. Kota Venkata Subba Rao,*** an interesting issue arose concerning S. 13(b) of CPC. In this case it was questioned whether a consent decree obtained in a foreign court could be regarded as a decision given on the merits of the case within the meaning of S. 13 of CPC. The Court held that a decree to be conclusive within the meaning of S. 13 of CPC, there should be a controversy and an adjudication thereon. It was further observed since in the present case there was no controversy and that there was no dispute before the Court to decide, the decree was passed mechanically in accordance with a prescribed Rule. Therefore the Court held that the judgment was not on the merits of the claim and therefore was not conclusive within the meaning of S. 13 of CPC.

In the case of ***Gurdas Mann v. Mohinder Singh Brar,*** the Punjab & Haryana High Court held that an ex parte judgment and decree which did not show that the plaintiff had led evidence to prove his claim before the Court, was not executable under S. 13(b) of the CPC since it was not passed on the merits of the claim.

In the case of ***K.M. Abdul Jabbar v. Indo Singapore Traders P. Ltd.,*** the Madras High Court held that passing of a decree after refusing the leave to defend sought for by the defendant was not a conclusive judgment within the meaning of S. 13(b) of CPC.

In the case of ***Middle East Bank Ltd. V. Rajendra Singh Sethia,*** the Calcutta High Court held that a judgment and decree given by default under a summary procedure contemplated by Order 14 of the Supreme Court Rules of England, in the absence of appearance by the defendant and filing of any defence by him, and without any consideration of the plaintiff's evidence is not a judgment given on the merits of the case and hence is not conclusive within the meaning of S. 13(b) of CPC. Therefore the decree is not executable in India.

In the case of ***M.K. Sivagaminatha Pillai v. K. Nataraja Pillai,*** the Madras High Court held that even though a decree in a foreign court may be passed ex parte, it will be binding if evidence was taken and the decision was given on a consideration of the evidence. In this case the defendant was ordered to pay a part of the suit claim as a security for the purpose of defending the claim. However the defendant failed to make the payment of the security and on that basis the court passed the decree against the defendant. The court on the above principle held that the judgment and decree was not enforceable in India under S. 13.

In the case of ***Y. Narsimha Rao v. Y. Venkata Lakshmi,*** the Supreme Court while interpreting S. 13(b) of CPC held that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. The Court further held that a mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the Court, or an appearance in the court either in person or through a representative for objecting to the jurisdiction of the court, should not be considered as a decision on the merits of the case.

In the case of ***R.M.V. Vellachi Achi v. R.M.A. Ramanathan Chettiar,*** the Madras High Court held that if the foreign judgment is not based upon the merits, whatever the procedure might be in the foreign country in passing judgments, those judgments will not be conclusive.

In the case of ***B. Nemichand Sowcar v. Y.V. Rao,*** a suit was instituted in the foreign Court where the defendant entered appearance and filed his written statement. On the day of the hearing the defendant remained absent. The court passed a decree without hearing any evidence. The Madras High Court held that the decree was not passed on the merits of the case and hence inconclusive within the meaning of S. 13(b) of CPC.

In the case of ***Firm Tijarati Hindu Family Joint Kesar Das Rajan Singh v. Parma Nand Vishan Dass,*** a peculiar situation arose. In this case the plaintiff had filed a suit on the basis of a promissory note. However, the plaintiff himself left the country and in subsequent proceedings since he was unable to provide the promissory note to his advocate in the foreign country the suit got dismissed. The plaintiff later on filed another suit in the local courts. The defendant took the plea that the present suit was barred by res judicata. The Court held that the judgment on the previous suit since it did not touch upon the merits of the case, therefore could not be held to be res judicata for the present suit.

In the case of ***A.N. Abdul Rahman v. J.M. Mahomed Ali Rowther***, it was held that a decision on the merits involves the application of the mind of the court to the truth or falsity of the plaintiff's case and, therefore, though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte, a decision passed without evidence of any kind and merely on the pleadings cannot be held to be a decision on the merits.

In the case of ***Algemene Bank Nederland NV v. Satish Dayalal Choksi*** the facts were that a summary suit was filed against the defendant in a foreign country. The defendant was granted unconditional leave to defend the suit. He filed his defence but at the final hearing he failed to appear. Hence an ex parte decree was pronounced in favour of the plaintiff. The judgment stated that "the defendant having failed to appear and upon proof of the plaintiff's claim" judgment is entered for the plaintiff. The Single Judge of the Bombay High Court after verifying the exhibits filed by the Plaintiff before the foreign Court observed that the foreign Court seems to have proceeded to pronounce the judgment in view of the defendant's failure to appear at the hearing of the case to defend the claim on merits. On that basis the Court held that the judgment was not on the basis of the merits of the case. This decision was appealed against in Appeal No. 869 of 1990 whose decision is hereinbelow.

In ***Algemene Bank Nederland NVv. Satish Dayalal Choksi (Appeal No. 869 of 1990, unreported judgment decided on 03.08.1992),*** the Bombay High Court reversed the findings of the Single Judge after appreciating the additional evidence which was led in the Appeal Court. The Court held that the judgment and decree was passed after investigating the claim and therefore it was passed on merits. However the Court further held that in their judgment "an ex parte judgment can be held to be not on merits only in cases where a judgment is delivered on the ground of limitation or want of jurisdiction or where the defence is struck off as in the case before the Privy Council. In such cases, the Court declines to examine the merits because the suit is barred by limitation or the Court lacks jurisdiction to entertain the suit or the defendant is prevented from defending the suit. It is only in these kind of exceptional cases that it is possible to suggest that the decree is not passed on merits."

The following are the cases in which the Courts have held that the judgments were passed on the merits of the case.

In the case of ***Ephrayim H. Ephrayim v. Turner Morrison & Co.,*** it was held that where no defence is raised and only an adjournment is sought, and the request for adjournment is refused and the judgment is proceeded on the evidence of the Plaintiff, it cannot be said that the judgment is not on the merits of the claim. Therefore S. 13(b) of CPC will not be able to come to the rescue of the defendant.

In the case of ***Gajanan Sheshadri Pandharpurkar v. Shantabai,*** the Bombay High Court held that the true test for determining whether a decree is passed on the merits of the claim or not is whether the judgment has been give as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. Since in the present case, although the defendant was considered to be ex-parte, the claim of the plaintiff was investigated into, the objection under S. 13(b) was held to be unsustainable.

In the case of ***Trilochan Choudhury v. Dayanidhi Patra,*** the defendant entered appearance in the foreign Court and filed his written Statement. However, on the appointed day for hearing the defendant's advocate withdrew from the suit for want of instructions and also the defendant did not appear. The defendant was placed ex parte. The Court heard the plaintiff on merits and passed the decree in his favour. The Court held that the foreign decree and the judgment was passed on the merits of the claim and was not excepted under S. 13(b) of the CPC.

In the case of ***Mohammad Abdulla v. P.M. Abdul Rahim,*** the defendant had passed on a letter of consent to the plaintiff that the decree may be passed against him for the suit claim. The Court held that since the defendant agreed to the passing of the decree against him, the judgment could not be said to be not on the merits of the claim.

In the case of ***(Neyna Moona Kavanna) Muhammad Moideen V. S.K.R.S.K.R. Chinthamani Chettiar,*** the defendant entered appearance. The defendant also filed his written statement. However, when the matter was posted for trial, a joint application was moved wherein it was agreed that the matter be postponed for three months with a view to settlement and that if not settled judgment be entered for plaintiffs as prayed for with costs less Rs. 50 and that the property mortgaged with the plaintiff be sold. Subsequently the defendant did not appear and the matter was also not settled. Therefore the Court passed a decree in favour of the plaintiff in terms of the joint application. During execution it was contended that the judgment and decree was not on the merits of the case and therefore was not executable. The court held that since the defendant deliberately chose not to insist on their plea and not to adduce evidence of it, the matter was not in the purview of S. 13(b) of CPC. It was further held that the consent operated as estoppel against the defendant.

In the case of ***Wazir Sahu v. Munshi Das,*** the Patna High Court held that if one of the issues had not been dealt with, that itself would not justify a finding that the decision was not upon the merits.

In the case of ***Vithalbhai Shivabhai Patel v. Lalbhai Bhimbhai,*** it was held that where the Court had taken evidence and examined witnesses and after taking all the oral evidence and considering the same together with the documents had decreed the claim, the decision must be treated as given on merits and the fact that the defendant did not appear cannot make it otherwise.

In the case of ***S. Jayam Sunder Rajaratnam v. K. Muthuswami Kangani,*** it was held that though the judgment and decree of a foreign court might have been passed ex parte, if it was passed on a consideration of the evidence adduced in the case, the decision must be deemed to have been on the merits.

PROPOSITION

By reading the aforesaid cases under Section 13(b) of CPC the following proposition may be laid:

A judgment or decree passed by a Foreign Court against an Indian defendant, who has chosen to remain ex-parte, may not be enforceable against him, until unless it can be shown that the said judgment was passed after investigation into, and leading of evidence on the plaintiff's claim.

3. Where the foreign judgment is passed disregarding the Indian Law or the International Law.

The case of ***Anoop Beniwal v. Jagbir Singh Beniwal*** relates to a matrimonial dispute between the parties. The facts of the case are that the plaintiff had filed a suit for divorce in England on the basis of the English Act that is the Matrimonial Causes Act, 1973. The particular ground under which the suit was filed was "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." This ground is covered by S. 1(1)(2)(b) of the Matrimonial Causes Act, 1973. The decree was obtained in England and came to India for enforcement. The respondent claimed that since the decree was based on the English Act, there was refusal by the English Court to recognise the Indian Law. The Court held that under the Indian Hindu Marriage Act under S. 13(1)(ia), there is a similar ground which is "cruelty" on which the divorce may be granted. Therefore the English Act, only used a milder expression for the same ground and therefore there was no refusal to recognise the law of India. Thus the decree was enforceable in India.

In the case of ***I & G Investment Trust v. Raja of Khalikote***, a suit was filed in the English Jurisdiction to avoid the consequences of the Orissa Money Lenders Act. The Court held that the judgment was passed on an incorrect view of the International law. The Court further observed that, although the judgment was based on the averment in the plaint that the Indian law did not apply, however there was no "refusal" to recognise the local laws by the Court.

In the case of ***Ganga Prasad v. Ganeshi Lal,*** it was alleged by the defendant that since the suit if it was to be instituted in the domestic Courts, it would have been time-barred but under the foreign law it has been decreed and therefore there was a refusal to recognise the Indian law. The Allahabad High Court in this situation held that there was no refusal to recognise the Indian Law. The Court further held that the general rule is that the Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action, or the propriety of the decision.

In the case of ***Panchapakesa Iyer v. K.N. Hussain Muhammad Rowther,*** the facts were that the foreign Court granted the probate of a will in the favour of the executors. The property was mostly under the jurisdiction of the foreign Court, but some of it was in India. A suit came to be filed by the wife of the testator against the executors for a claim of a share in the property. The suit of the widow was decreed and a part of it was satisfied. The remaining part the widow assigned in favour of the Plaintiff in the present suit. In the present suit the Plaintiff relied upon the foreign judgment for a claim against the defendants for a share in the property within the jurisdiction of the domestic Court. One of the defences which was taken for resisting the suit was

that the widow's claim was founded upon a breach of a law in force in India. The Court observed that

"She made as the Learned Subordinate Judge has found in another part of his judgment, a claim which could not be entirely supported by the law of British India; but that is a different thing from founding a claim on a breach of the law in British India, for instance a claim in respect of a contract which is prohibited in British India."

Another issue which fell for the Courts consideration was that whether the foreign Court had decreed the suit on an incorrect view of International Law. In this regard the Court held that the foreign Court had adopted an incorrect view of International Law, since a foreign Court does not have jurisdiction over the immovable property situated in the other Country's Court's jurisdiction. Therefore the judgment was declared to be inconclusive and unenforceable in India.

PROPOSITION

By reading the aforesaid cases under Section 13(c) of CPC the following proposition may be laid:

(i) A judgment or decree passed by a foreign Court upon a claim for immovable property which is situate in the Indian territory may not be enforceable since it offends International Law.

(ii) A judgment or decree passed by the foreign Court to where before a contrary Indian law had been shown, but the Court had refused to recognise the law, then that Judgement or decree may not be enforceable. However if the proper law of contract is the foreign law then this may not be applicable.

4. Where the proceedings in which foreign judgment was obtained are opposed to natural justice

In the case of ***Hari Singh v. Muhammad*** Saidthe Court found that the foreign Court did not appoint a person willing to act as a guardian ad litem of the minor defendant. The court also held that proceedings could not have proceeded ex-parte against the minor. The Court further held that the minor defendant did not have any knowledge of the suit being pending against him even after he became a major which was before the judgment was passed. On this basis the court held that the passing of the judgment against the minor was opposed to natural justice within the meaning S. 13(d) of CPC. The Court also held that since the legal representatives of one of the defendants were also not brought on record, this also amounted to denial of natural justice. Therefore the judgment was held to be inconclusive qua these defendants.

In the case of ***R. Vishwanathan v. Rukn – Ul- Mulk Syed Abdul Wajid,*** the Supreme Court got an occasion to interpret S. 13(d) of CPC. The facts of this case are that the family members of the testator challenged the will by filing caveat when the probate proceedings were initiated with regard to property A in the jurisdiction of Court A. The caveat was dismissed and the appeals therefrom also stood dismissed. Therefore the probate was confirmed. Applications for probate of the will concerning properties at B & C were also filed. (C was a foreign Country). The family members of the testator thereafter filed suits against the executors and other persons for establishing their title to and for possession of the estate disposed of by the will of the testator. The plea taken by the plaintiffs in the suit was that the will was inoperative and the property was a joint family property. The suits were resisted by the executors of the will on the basis that the property was self-acquired amongst other grounds. The suits of the plaintiffs before Court A & B was decreed. Before the Appeal Court, the parties were asked to settle the dispute amicably by the Court and upon that the case was adjourned for six months. Thereafter the plaintiffs claimed

upon the settled position between the parties. However, the court declined to enter upon an enquiry as to the alleged compromise because in their view the compromise was not in the interest of the public Trust created by will. Since there was a difference of opinion between the two judges comprising of the division bench, the matter was posted before a full bench consisting of three Judges. It so happened that one of the judges of the division bench was included in the present full bench also. No arguments were made by the plaintiffs before the Full Bench and therefore the appeal was allowed and the suits dismissed. The Application for review was also dismissed. Before the C court the executors took the stand that the decision in the A&B Court was res judicata and therefore the present suit should also be dismissed. The plaintiffs before the C Court contended that since judgment concerned properties at A&B, the immovable properties at C would not be affected. The plaintiff further contended that the judgment was not conclusive since the judges showed bias before and during the hearing of the appeals and that they were incompetent to sit in the full bench and "their judgment was coram non judice." The plaintiff's suit before C Court was decreed on this basis. The executors appealed against the judgment and order. The High court in appeal held that the A&B Court could not have affect the immovables at the C but could affect the movables at C. Against this judgment of the High Court the parties came to the Supreme Court. The plaintiff contended before the Supreme Court that the judgment of A&B Court was not conclusive between the parties in the C Court suit, for the A&B Court was not a Court of competent jurisdiction as to property movable and immovable outside the territory of A&B Court, that the judgment was not binding because the Judges who presided over the Full Bench were not competent by the law of the A&B Court to decide the dispute and that in any event it "was coram non judice" because they were interested or biased and the proceedings before them were conducted in a manner opposed to Natural Justice. Upon consideration of the facts, the Supreme Court observed as follows:

"By S.13 of the Civil Procedure Code a foreign judgment is made conclusive as to any matter thereby directly adjudicated upon between the same parties. But it is the essence of a judgment of a Court that it must be obtained after due observance of the judicial process, i.e. the court rendering the judgment must observe the minimum requirements of natural justice- it must be composed of impartial persons, acting fairly, without bias and in good faith, it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A foreign judgment of a competent court is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured correctness of the judgment in law or on evidence is not predicated as a condition for recognition of its conclusiveness by the Municipal Court. Neither the foreign substantive law, nor even the procedural law of the trial be the same or similar as in the Municipal Court. … The words of the statue make it clear that to exclude a judgement under cl.(d) from the rule of conclusiveness the procedure must be opposed to natural justice. A judgment which is the result of bias or want of impartiality on the part of a judge will be regarded as a nullity and the "trial coram non judice""

In the case of ***Lalji Raja & Sons v. Firm Hansraj Nathuram,*** the Supreme Court held that just because the suit was decreed ex-parte, although the defendants were served with the summons, does not mean that the judgment was opposed to natural justice.

In the case of ***Sankaran Govindan v. Lakshmi Bharathi,*** the Supreme Court while interpreting the scope of S. 13(d) and the expression "principles of natural justice" in the context of foreign judgments held as follows:

"… it merely relates to the alleged irregularities in procedure adopted by the adjudicating court and has nothing to do with the merits of the case. If the proceedings are in accordance with the practice of the foreign court but that practice is not in accordance with natural justice, this court will not allow it to be concluded by them. In other words, the courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case. … The wholesome maxim audi alterem partem is deemed to be universal, not merely of domestic application, and therefore, the only question is, whether the minors had an opportunity of contesting the proceeding in the English Court. If notices of the proceedings were served on their natural guardians, but they did not appear on behalf of the minors although they put in appearance in the proceedings in their personal capacity, what could the foreign court do except to appoint a court guardian for the minors."

In this case it was held that since the natural guardians who were served with the notices did not evince any interest in joining the proceedings, the appointment of an officer of the court to be guardian ad litem of the minors in the proceedings was substantial compliance of the rule of Natural justice.

In the case of ***Firm Tijarati Hindu Family Joint Kesar Das Rajan Singh v. Parma Nand Vishan Dass,*** the suit of the plaintiff was dismissed for non-production of the pro note. The Court in this regard held as follows:

"Apart from this it appears to me that the summary dismissal of the suit in this manner offends the principles of natural justice in that the plaintiff had fled to India and in October 1947 it was certainly not practicable either for him to send the pro note to his counsel at Bannu through the post or go there in person with it or to send it though any messenger from this side, and in such circumstances the refusal to allow any further adjournment for the production of the pro note appears to me to be extremely harsh and arbitrary."

In the case of ***I&G Investment Trust v. Raja of Khalikote,*** the Court held that although the summons were issued but were never served and the decree was passed ex-parte, the proceedings were opposed to principles of natural justice and thus inconclusive.

PROPOSITION

By reading the aforesaid cases under Section 13(d) of CPC the following proposition may be laid:

The Foreign Court which delivers the judgment or decree must be composed of impartial persons, must act fairly, without bias in good faith, and it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case, in order to avoid any allegation of not fulfilling the principles of natural justice in case the judgment or

decree comes to the Indian court for enforcement. Unless this is done the judgment or decree passed by a foreign Court may be opposed to Principles of Natural Justice.

5. Where it has been obtained by fraud

In the case of ***Satya v. Teja*** Singh the Supreme Court held that since the plaintiff had misled the foreign court as to its having jurisdiction over the matter, although it could not have had the jurisdiction, the judgment and decree was obtained by fraud and hence inconclusive.

In the case of ***Sankaran v. Lakshmi*** the Supreme Court held as follows:

"In other words, though it is not permissible to show that the court was mistaken, it might be shown that it was misled. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely that on the merits, the decision was one which should not have been rendered but that it can be set aside if the Court was imposed upon or tricked into giving the judgment."

In the case of ***T. Sundaram Pillai v. Kandaswami Pillai,*** the plaintiff filed a suit against two defendants on the basis that the money extended by him towards the marriage of the plaintiff's daughter to Defendant No. 1 was repayable by the two defendants jointly. The defendants were set ex-parte. However, defendant No.2 got the ex parte order set aside and filed his written statement in which he took the plea that there was no jurisdiction with the Court. But defendant No. 2 did not appear, thereafter and was set ex-parte. The decree was passed in favour of the plaintiff. When the decree came for execution, the defendant No. 2 took the plea that it was obtained by fraud. The Court held as follows:

"All that can be said on this point is that the case brought by the plaintiff was a false case and that defendant 1 assisted him in obtaining a decree by withdrawing from any resistance. It does not seem to me that the words "by fraud" can possibly be applied to circumstances such as these. It cannot be argued that merely because a plaintiff obtains a decree upon evidence which is believed by the Court but which in fact is not true, he has obtained that decree by fraud. There must be fraud connected with the procedure in the suit itself to bring the matter within this clause. This clause also therefore does not apply to the present case."

In the case of ***Maganbhai Chhotubhai Patel v. Maniben,*** the court held that since the plaintiff had misled the court regarding his residence (domicile), the decree having been obtained by making false representation as to the jurisdictional facts, the decree was obtained by fraud and hence was inconclusive.

PROPOSITION

By reading the aforesaid cases under Section 13(e) of CPC the following proposition may be laid:

In case the plaintiff misleads or lies to the Foreign court and the judgment is obtained on that basis, the said Judgment may not be enforceable, however if there is a mistake in the judgment then the Indian courts will not sit as an appeal Court to rectify the mistake .

6. Where Foreign Judgment sustains a claim founded on a breach of any law in force in India

In the case of ***T. Sundaram Pillai v. Kandaswami Pillai,*** (facts already stated above), the plea of the defendant was that the judgment was obtained in breach of the Contract Act since the

defendants at the relevant time were minors when the contract was entered into and since under the Contract Act they were not competent to enter into a contract, the claim was founded on the breach of the Indian Law. The Court held as follows:

"This claim is founded partly perhaps upon a breach of the contract Act, but also partly upon a claim under the Contract Act which in no way involves its breach. Whether that claim is a good one or a bad one is not for me now to decide. The District Munsiff of Trivandrum has given a decree to the appellant and that decree sustains a claim which was not wholly founded upon a breach of the Contract Act. It seems to me therefore that the appellant cannot be prevented by clause (f) of S. 13 from executing his decree in British India."

In the case of ***I&G Investment Trust v. Raja of Khalikote,*** it was held as follows:

"It is argued that the Orissa Money Lender's Act precludes a decree being passed for more than double the principal amount and in passing a decree, based on a claim which violates that rule, the English Court sustained a claim founded on the breach of a law in force in the State of Orissa. I am unable to accept the argument. The claim was not based on the law as prevailing in India at all. Rightly or wrongly, the plaintiffs alleged that the parties were governed not by the Indian law but the English Law. The English Court accepted that plea and were consequently not sustaining a claim based on any violation of the law in India. Suppose, that the defendant had submitted to the jurisdiction of the English Court and that Court passed a decree. Such a decree would by implication have decided that the defendant was bound by English Law and that the Orissa Money Lender's Act did not apply. Such a decision would be binding from the international point of view and the point could not be further agitated in these Courts."

PROPOSITION

By reading the aforesaid cases under Section 13(f) of CPC the following proposition may be laid:

A judgment or a decree, passed by a foreign court, on a claim founded on a breach of any law in force in India may not be enforceable. However, in case it is based upon a contract having a different "proper law of the contract" then it may be enforced.

CONCLUSION

It will be seen from the above that even if a judgment or a decree is passed by a foreign Court against an Indian defendant, the judgment or decree may not be enforceable against him due to the operation of S. 13 of CPC. It can be seen that, the plaintiff has to come to the Indian courts to either get the foreign judgment executed under S. 44A or file a fresh suit upon the judgment for its enforcement. Therefore by getting a decree in the foreign Court, the plaintiff is only avoids the inconvenience of leading evidence in the Indian Courts but runs a much bigger risk under S. 13. Therefore it may advisable for a foreign plaintiff to institute claims in India itself in case the defendant is in India. Since internet transactions would involve more of documentary evidence and that comparatively leading of evidence may not be that inconvenient, it may be advisable to avoid the risk under S. 13 and file claims in India itself.

Place of Suits

Before instituting a suit on behalf of a client, the first thing to be determined is the Court in which the suit should be brought. To do this, first of All, the place of suing must be determined. The expression 'place of suing' refers to the venue of trial in India and has nothing to do with the

competency of the Court. The questions of pecuniary and subject-matter jurisdiction come subsequently, i.e., only after the question of territorial jurisdiction is answered, but there may be as many as three Courts of different grades in that place, namely the District Court, the subordinate judges' Court, and the Munsiff's Court. The next thing, therefore to be determined is, in which particular Court in that place the suit should be instituted, having regard to the value of the suit, and the subject-matter thereof.

Secs.15 to 20 of the Code regulate the venue where a suit can be filed and apply only to those places where the Code is in force. The important provisions as to place of suing are contained in Secs.16, 17 and 20 of the Code, and are imperative for the suitor.

For the purpose of the present context, suits may be divided into three classes, namely:

i. Suits for immovable property (Secs.16-17)
ii. Suits for compensation for wrong done to the person or to movableproperty (Sec.19)
iii. Suits of all other kinds (Sec.20)

Under suits for immovable property there are five kinds of suits referred to in clause (a) to (e) of Sec.16 of the Code, namely, suits:

a) For the recovery of immovable property;
b) For the partition of immovable property;
c) For foreclosure, sale or redemption in the case of a mortgage of, or charge upon, immovable property;
d) For the determination of any other right to or interest in, immovable property, e.g., a suit by a purchaser for specific performance of a contract for the sale of a house to him;
e) For compensation for wrong to immovable property, e.g., trespass and nuisance.

The property within the meaning of Sec.16 of the Code refers only to property situated in India.

a) Suits for the recovery of immovable property – Sec.16 (a)

A suit for the recovery of immovable propertysituated in the city of Bombay must be instituted in a court in Bombay having jurisdiction to entertain the suit.

The Small Cause Court in Bombay has no jurisdiction to try such a suit –***Sec.19 of Presidency Small Cause Courts Act 1882***. The suit must, therefore, be broughtin the High Court of Bombay or the City Civil Court depending upon the monetary value of the subject matter ofthe suit. Hence, it is that the section commences with the words subject to the pecuniary or other limitationsprescribed by any law. The insertion of the words with or without rent or profits is intended to remove anydifficulty there may be where the defendant does not reside within the local limits of the courts within whose jurisdiction the property is situated.

Since the allotted land under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, weresituated in Jullundur District and the appellants were not claiming declaration of ownership of land in Pakistan,the High Court was palpably wrong in holding that the civil court has no jurisdiction to declare that theappellants were owners of land in Pakistan and entitled to retain the possession of land allotted to them in lieu thereof - ***Dalip Chand v. Union of India, 1995 Supp (1) SCC 233.***

The court within whose jurisdiction property which has been mortgaged is situated shall have the jurisdiction toentertain and try this suit. Operations of all provisions of s 20 are not relevant, when provision is adequatelymade by s 15 - ***Praking v. State Bank of Indore, AIR 1996 MP 28***.

b) Suit for the partition of immovable property – Sec. 16(b)

If part of the property is outside India, the court will deal with the property in India while declining jurisdiction as to the rest - ***Nachiappa Chettiar v. Muthu Karuppan Chettiar, AIR 1946 Mad 398.*** The Lahore High Court held that a British court can in apartition suit deal with property situated in an Indian State - ***Ram Kishan v. Ranshan, AIR 1923 Lah 551***; but, this is incorrect. Suit was filed for the partitionof joint Hindu family properties, and for accounts. Properties were situated in Delhi, Jullundur and the State ofJammu and Kashmir. It was held that the Delhi High Court had territorial jurisdiction to entertain and decide the suit in respect of properties situated in the State of Jammu and Kashmir also. Although, strictly speaking, Secs.16and 17 of the Code were not attracted and the doctrine enunciated by court of equity in England in terms wasnot applicable in the circumstances of the case and the peculiar situation prevailing in our country, a newequitable doctrine was to be evolved. That doctrine was that the principles of enforceability or executabilityjustified a decision in favour of maintainability of the suit - ***Dewan Izzat Rai Nanda v. Dewan Iqbal Nath Nanda, AIR 1981 Del 262.***

A very interesting case relating to jurisdiction came up before the Supreme Court. In that case the plaintiff had filed a suit seeking a negative declaration that the Will allegedly made at Delhi and relied upon by defendants was never made. In fact relief claimed in the suit was for partition and declaration in respect of propertiessituate outside the jurisdiction at Delhi and the negative declaration sought for was superfluous and unnecessary. It was held by the Supreme Court that the suit comes within the purview of s 16 (b) and (d). Therelief of partition, accounting and declaration of invalidity of sale deed executed in respect of immovableproperty situate outside the jurisdiction of Court at Delhi, could not entirely be obtained by personal obedience to the decree by the defendants in the suit. It was further held that by ingeniously introducing the pleasregarding oral Will, the property which was outside the jurisdiction of Court could not be brought withinjurisdiction to get the relief of partition - ***Begum Sabiha Sultan v. Nawab Mansur Ali Khan, AIR 2007 SC 1636.***

c) Suit for foreclosure, sale or redemptionin the case of a mortgage of or charge upon immovable property – Sec.16(c)

A mortgages certain immovable property to B tosecure payment of money lent to him by B. Here, A is the mortgagor and B is the mortgagee. If A does notrepay the loan on the due date, B may institute a suit against A for sale of the mortgaged property, so that themortgage-debt may be paid out of the sale proceeds of the property, or he may sue for foreclosure of the mortgage. The decree in a foreclosure suit provides that if the mortgagor fails to pay the amount that may befound due to the mortgagee within a time specified by the court (generally six months), the mortgagor shall beabsolutely debarred of all right to redeem the property - Transfer of Property Act 1882, ss 8687, now O 34, rr. 23. If A offers payment of the mortgage-debt to B, but Bdisputes the amount and refuses to reconvey, A may sue B for redemption of the mortgage, and the court willpass a decree ordering an account to be taken of what will be due to B, and directing that upon A paying to Bthe amount so due, B shall reconvey the property to A - Transfer of Property Act ss 9393, now O 34, rr. 78 Suits for foreclosure, sale or redemption must beinstituted in the court within the local limits of whose jurisdiction the mortgaged property is situated. In view ofthe commencing words of the section, a case directly under cl (c), s 20 cannot be called in aid - ***Rosy Joseph v. Union Bank of India, AIR 1978 Ker 209,*** where theimmovable property regarding which an equitable mortgage was created as a collateral security for loanadvanced by the plaintiff is situated at Jagadhari in the State of Haryana. Here, a suit for

foreclosure or sale ofsuch mortgaged property could be instituted only before the civil courts at Jagadhari, in view of explicit andmandatory provisions contained in cl (c) of s 16 of the Code of Civil Procedure - ***Central Bank of India v. Eleena Fasteners Pvt. Ltd., AIR 1999 HP 104***.

A court cannot declare a charge on property wholly outside its jurisdiction and if it does, a purchaser under such a decree would be in no better position than a purchaser under a money decree - ***Gudri Lall v. Jagannath, (1886) ILR 8 All 117***.

d) Suits for the determination of any other right to or interest in immovable property – Sec.16(d)

Thereis no definition of immovable property in the Code. Immovable property is defined in the General Clauses Act,1897, s 3, cl (25) as including land, benefits to arise out of land and things attached to the earth or permanentlyfastened to anything attached to the earth. Trees standing on land are immovable property - ***Sakharam v. Vishram, (1895) ILR 19 Bom 207***;but, once the trees are severed from the land, they become movable property; so also, coal cut and raised from the mine - ***Mannibai v. Cambetta, AIR 1948 Nag 286***.

Growing-crops are movable property - See s 2, cl (13). Land includes water and a right of fishery in an enclosed water isimmovable property - ***Shibu Haldar v. Gopi Sundari, (1897) ILR 24 Cal 449***. Benefits to arise out of land include incorporeal hereditaments such as a right of ferry - ***Krishna v. Akilanda, (1887) ILR 13 Mad 54***,pensions and allowances charged upon land and rents. Thus, a haat is immovable property - ***Surendra v. Bhai Lal, (1897) ILR 22 Cal 449***, and so is the lifeinterest of a widow in the rents and profits of her husband's estate - ***Natha v. Dhunbhaiji, (1898) ILR 23 Bom 1***, Immovable property as stated above,includes benefits to arise out of land. Rent that has already accrued due is movable property, for it is a benefitwhich has arisen out of land, but rent that is to accrue due is immovable property, for it is a benefit to arise outland. Hence, a suit for arrears of rent is governed not by the provisions of this section, but by those of s 20, andit may be instituted in any one of the courts specified in that section, although in such suit the plaintiffs title tothe property for which the rent is claimed may incidentally come in question - ***Chintaman v. Madhavrao, (1869) 6 BHC AC 29***.

A suit for specific performance and possession of immovable property agreed to be sold falls under clause (d) of s 16 of the Code of CivilProcedure - ***Ranjana Nagpal v. Devi Ram, AIR 2002 HP 166***, A suit for refund of premium paid by a lessee on the ground that the lease had become impossibleof performance is not a suit for the determination of any right to or interest in immovable property and is governed not by s 16 but by s 20 of the Code - ***Dada Siba Estate v. Dharan Dev Chand, AIR 1961 Punj 143***; but, a suit for a declaration of the plaintiffs right to rent where such right is denied comes under cl (d) of the present section, and must be instituted in the court within thelocal limits of whose jurisdiction the property is situated - ***Keshav v. Vinayak, (1899) ILR 23 Bom 22***. So also, a suit for rent and ejectment under s 66 ofthe Bengal Tenancy Act - ***Kunja v. Manindra, AIR 1923 Cal 619***, A suit to recover a share of the sale proceeds of land which have already beenrealised is a suit for money governed by the provisions of s 20 - ***Venkata v. Krishnasami, (1883) ILR 6 Mad 344***; but, a suit by a vendor of land for the recoveryof unpaid purchase money against the buyer who refuses to complete the purchase, is a suit for thedetermination of any right to or interest in immovable property within the meaning of cl (d) - ***Maturi v. Kota, (1905) ILR 28 Mad 227;*** A claim for abeneficial interest under an endowment cannot be considered de hors the immovable properties covered by theendowment and therefore, such a claim would fall under this clause. A suit by a mortgagee to recover themortgage-debt from the mortgagor personally is a suit for debt governed by the provisions of

s 20 ; but if inaddition to the claim against the mortgagor personally, the mortgagee seeks to recover the mortgage-debt bysale of the mortgaged property, the suit will come under cl (c) of the present Section - ***Vithalrao v. Vaghoji, (1893) ILR Bom 570***.A suit by a mortgagee complaining of the deprivation of the whole of the security by or in consequence of a wrongful act by themortgagor is in the nature of a wrong done to immovable property and therefore, can only be filed in the Court within whose jurisdiction it is situated - ***Hadibandhu v. Chandra Shekar, AIR 1973 Ori 141***. Clause (d) relates to such suits in which the determination of any rightto or interest in immovable property not covered by cls (a), (b) and (c) is involved. Hence, a suit for injunction restraining interference with the plaintiffs possession of land and his operating a tube-well therein, is a suitfalling under cl (d) - ***Om Prakash v. Anar Singh, AIR 1973 All 555***. Wherein a suit for maintenance the plaintiff claims that she is entitled to a charge on immovable property in the hands of the defendant, the case is one within cl (d) of this section; so where theclaim is for a decree by a Muhammedan lady with a prayer for declaring charge on her husband's immovableproperty, it falls within cl (d) of the Section - ***Mst Gauhar Jehan v. Mt Imteyaz Jehan, AIR 1948 Pat 384.*** Though a court has jurisdiction to declare a charge only overimmovable properties situated within its jurisdiction, it is competent under s 8 of the Bombay Hindu Divorce Act, of 1947, to declare a charge over properties outside its jurisdiction as security for the amount awarded asmaintenance to the wife - ***Ambalal v. Sarada Gowri, (1955) ILR Bom 759***. A suit for damages for breach of contract to assign a lease entered into at Madraswas filed in the subordinate court at Ottapalem in Malabar on the strength of a prayer that the decree amount should be charged on the leasehold estate which was within the jurisdiction of that court. It was held that thecourt at Ottapalem had no jurisdiction to entertain the suit under s 16 (d) as that section applied only if the dispute related to title or interest in immovable property existing at the date of the suit and not if it is to arise asa result of the decree - ***Pulikkal Estate v. Joseph, (1955) 2 Mad LJ 228***. It has been held by the High Court of Orissa that a suit for reduction of maintenance awarded by a decree and charged on immovable property does not fall within s 16 (1)(d) as the relief hasreference only to the quantum of maintenance and not to the subsistence of the charge therefore - ***Satyabhama v. Krishna Chandra, AIR 1961 Ori 69.*** A suit foraccounts of a dissolved partnership against a defendant who is residing within the jurisdiction of the court inwhich the suit is filed ismaintainable in that court, although the partnership assets in the shape of immovableproperties are situated in a foreign country. Such a suit does not fall under any of the clauses (a)-(e) of this Section - ***Dorairaj v. Karuppiah Ambalam, AIR 1970 Mad 119.***

A suit for dissolution of partnership with the usual ancillary reliefs is not a suit within cl (d) merely because apart of the partnership assets consist of a factory - ***Durga Das v. Jai Narain, AIR 1922 Bom 188***. Machinery is movable property unless it is shown to havebeen attached or permanently fastened to earth and a suit with reference thereto does not fall within cl (a) or (d)of s 16 - ***Standard Tubewell and Engg. Works Ltd. v. Jogindra, AIR 1959 Cal 461***.

e) Suits relating to compensation for wrong to immovable property – Sec.16(e)

This refers to torts affecting immovable property such astrespass - ***Crisp v. Watson, (1893) ILR 20 Cal 689,***shown to have been attached or permanently, nuisance, infringement of easement etc.

Where a reading of the plaint leads to one conclusion only, viz, that it was for damages relating to immovableproperty in Mathura, Sec.16 (e) of the Code of Civil Procedure would apply, then Sec.20 of the Code of CivilProcedure is of no avail to the plaintiff. The mere factum of the execution of the sale deed and payment of thesale consideration being in Delhi, does not

comprise any part of cause of action relating to the claim fordamages to immovable property raised in this suit. Even if Sec.16 (e) is assumed not to have any applicability tothe facts of the case, Delhi courts do not possess territorial jurisdiction because the defendant does not have itsprincipal office in this city. The fact that it has a subordinate office in Delhi, seems to be of little consequences,since no part of cause of action voiced in the plaint has arisen in Delhi - ***Anant Raj Industries Ltd. v. Balmer Lawrie and Co. Ltd., AIR 2003 Del 367***,

f) Suits relating to recovery of movable property actually under distraint or attachment

Movable property underattachment constitutes an exception to the general rule that movables follow the person - ***Companhia de Mocambique v. British South Africa Co., [1892] 2 QB 358***. This exception isprobably based on the principle that a movable property under attachment is one in session of the Court - ***State of Assam v. Biraj Mohan, AIR 1965 Assam 35***. The Code follows this rule for the sake of convenience of judicial administration – **Woodroffe, Evidence.** The clause applies to courts inIndia, where movables are under an attachment by a foreign court and the defendant is a resident in India, andis able to get the attachment decree to recover the property - ***Kottich v. Udaya, (1912) Mad WN 524***.

Sec.17 Suits for immovable property situate within jurisdiction of differentCourts

This section supplements the provisions of s 16, and applies only to suits falling within clauses (a)-(e) of that Section - ***Satya Narayan Banerjee v. Radha Nath Das, AIR 1942 Cal 69***.It is intended for the benefit of suitors, the object being to avoid multiplicity of suit - ***Harchandar v. Lal Bahadur, (1894) ILR 16 All 359***. A sues B in a court in district X on a mortgage of two properties, one situated in district Xand the other in district Y. The court in district X has jurisdiction under this section to order the sale not only of the property in district X, but also of the property in district Y, and to sell execution of its decree the property in district Y - ***Maseyk v. Steel, (1887) ILR 14 Cal 661***.A is not obliged to bring two suits, one in the court of district X and the other in the court of district Y. He may bring only one suit in either court, and it matters not if the properties are several, one in each district, or one property extending over two or more districts - ***Shurrop Chander v. Ameerrunissa, (1882) ILR 8 Cal 703***.The same rule applies to suits for partition - ***Khatija v. Ismail, (1889) ILR 12 Mad 380***,and to suits for the recovery of immovable property - ***Kubra Jan v. Ram Bali, (1908) ILR 30 All 560***.A can sue in any court in which any part of the immovable property is situated and he has the right to select his own forum - ***Ratnagiri Pillai v. Vava Ravuthan, (1890) ILR 19 Mad 477***;though this right may be controlled by the court of appeal or the High Court; (see Secs.22 and 23 below); but, no partition can be made of property situated outside India - ***Ramacharya v. Anantacharya, (1894) ILR 18 Bom 989***.

A bona fide compromise will not divest the court of jurisdiction once jurisdiction has properly vested in it. A sues B in a court in district X to recover possession of two properties, one situated in district X and the other in district Y. The suit is compromised as regards the property situated in district X. This does not take away the jurisdiction of the court in district X to proceed with the suit as regards the property situated in district Y, unless it be shown that the compromise was a mere contrivance to defeat the policy of the rule of procedure as to local jurisdiction - ***Khatija v. Ismali, (1889) ILR 12 Mad 380***.

S. 18. Place of institution of suit where local limits of jurisdiction of Courts are uncertain

(1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or moreCourts any immovable property is situate, any one of those Courts may, if satisfied that there is groundfor the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as ifthe property were situate within the local limits of its jurisdiction:

Providedthat the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before anAppellate or Revisional Court that a decree or order in a suit relating to such property was made by aCourt not having jurisdiction where the property is situate, the Appellate or Revisional Court shall notallow the objection unless in its opinion there was, at the time of the institution of the suit, noreasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

S. 19. Suits for compensation for wrongs to person or movables

Section 16 refers to suits for immovable property which have to be filed in the localjurisdiction. Section 20 refers to personal act ions such as action in tort or contract, where jurisdiction depends upon the residence of the defendant or the accrual of the cause of act ion. Section 20 overlaps this Section which gives an option where the cause of action accrues in the jurisdiction of one court and the Defendant resides in the jurisdiction of another court. The section is limited to act ions in torts committed in India and todefendants residing or carrying on business or personally working for gain in India - ***Govindan Nair v. Achutha Menon, (1916) ILR 39 Mad 433***.It excludes suits for aninjunction and suits in respect of torts committed outside India. Such suits fall, where the defendant is residentin India, not under this section, but under s 20

Wrong means a tort or actionable wrong, i.e., an act which is legally wrongful as prejudiciallyaffecting a legal right of the Plaintiff - ***Templeton v. Laurie, (1900) 2 Bom LR 244,***but, it must be a tort affecting the plaintiffs person, or his reputation as inthe illustrations, or his movable property; for torts affecting immovable property such as trespass or nuisance or infringement of easement fall under s 16 (e). Likewise, when the tort for which the claim for compensation ismade is malicious prosecution, the suit will fall within the section only when the injury resulting therefrom is to the person or to reputation - ***Gokuldas v. Baldev Das, AIR 1961 Mys 188***.Where a vendor of goods continued in possession thereof after sale, a suit by thepurchaser for damages for non-delivery of goods is not a suit for wrong done to property within s 19 but one fordamages for breach of contract and must be instituted under s 20 in the court within whose jurisdiction thedefendant resides or the cause of act ion has arisen wholly or in part - ***Misrilal v. Moda, (1951) ILR Raj 662***.

The plaintiff may sue either where the defendant resides or the wrong was committed - ***Haveli Shah v. Painda Khan, AIR 1926 Cal 88***.A wrong may, however,consist of a series of acts and it is sometimes not easy to specify the place where it was committed. Thus, in a case from Burma - ***Re Ma Myity Shwe Tha, (1917) 3 LBR 164***the defendant at Pyapon wrongfully obtained a magistrates order for the seizure of plaintiffsboats at Rangoon and it was held that the Rangoon court had jurisdiction as the wrong was done at Rangoon.

In an act ion for malicious prosecution, the court within whose jurisdiction the plaintiff was served with the summons in the criminal case instituted against him has jurisdiction to entertain

the suit. The reason given isthat though such service is not part of the cause of action for such a suit, the essence of malicious prosecutionis the malicious abuse of the process of the court viz service of the summons. Hence, the court within whose jurisdiction such abuse has taken place can entertain such a suit under this Section - ***Khandchand v. Harumal, (1964) 66 Bom LR 829***,but it is only at either ofthe two places mentioned in the section that the suit lies - ***Sreepathi Hosiery Mills v. Chitra Knitting Co., AIR 1977 Mad 258***.The High Court of Bombay, however, has extendedthe meaning of the words wrong done to include not only the place where the wrong was done but also theplace where its consequences occurred. Hence, a plaintiff may also file his suit at the place where damage ofthe wrong was sustained - ***State v. Sarvodaya Industries, AIR 1975 Bom 197***.According to the Gauhati High Court, the expression wrong done, in s 19, coversnot only the act which caused the wrong, but also the effect of the act - ***State of Meghalaya v. Jyotsna Das, AIR 1991 Gau 96***.However, a Tribunal is constituted under s 165 of the MV Act, for the purpose of adjudicating upon claims for compensation in respect of accidentsinvolving the death of, or bodily injury to, persons arising out of the use of motor vehicles or damage to anyproperty of a third party. Section 165 does not authorise such a Tribunal to adjudicate upon any claim fordamages to property of the insured or the 1st party - ***Jahar Deb v. National Insurance Company Ltd., AIR 2006 143***.

Sec. 20 - Other suits to be instituted where defendants reside or cause of action arises

ILLUSTRATIONS

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and request A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Shimla, B at Calcutta and C at Delhi. A, B and C being together at Benaras, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Benaras, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

This is a general section embracing all personal actions. At common law, act ions are either personal or real. Personal actions are also called transitory because they may occur anywhere, such as act ions for tort to persons or to movable property or suits on contracts. Real actions are act ions against the res or property and are called local because they must be brought in the forum where the immovable property is situated. An action may also be a mixed act ion being partly real and partly personal. Torts to immovable property such as trespass and nuisance are mixed actions and are referred to in s 16 (e). Otherwise, s 16 deals with real and local actions, while ss 19 and 20 deal with personal or transitory actions. Thus, a suit for a declaration that certain documents are void as having been obtained fraudulently and for injunction restraining the defendant from using them is one of the personal reliefs falling under this section and not under s 16 (d) as it is not for determining any right to or interest in an immovable property though such property is the subject matter of the impugned documents - ***Shyama Sundari Dasi v. Ramapati, AIR 1973 Cal 319***. The principle underlying s 20 (a) and s 20 (b) is, that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble - ***Union of India v. Ladulal Jain, AIR 1963 SC 1681***.

The limitations mentioned in this section exclude the real and mixed act ions of s 16 and confine the section to personal actions. The plaintiff has the option of suing either: (i) where the cause of act ion has accrued; or (ii) in the forum of the defendant, i.e., where the defendant resides, or carries on business or personally works for gain - ***Ratnagiri v. Syed Vava, (1896) ILR 19 Mad 477***. This alternative is shown in the illustrations which are taken from two old cases, the first from ***Winter v. Way, (1863) 1 Mad HC 200***and the second from ***DeSouza v. Coles, (1868) 3 Mad HC 384***. Before the jurisdiction of a court can be invoked under thissection, it must be shown that the defendant was actually and voluntarily residing or carrying on business orpersonally working for gain within its jurisdiction at the time of the suit. Neither the fact that he once residedthere nor that he became a resident thereafter the suit was instituted would confer jurisdiction on the court if hewas not residing there at the commencement of the suit - ***Permnath v. Kandoomal, AIR 1958 Punj 361***.

Transfer of Cases

As a general Rule, a Plaintiff as arbiter litis or dominus litis has a right to choose his own forum where a suit can be filed in more than one Court. Normally, this right of the Plaintiff cannot be curtailed, controlled or interfered with –***Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358.*** But the said right is controlled by the power vested in superior Courts to transfer a case pending in one inferior Court to another Court to another or to recall the case to itself for hearing and disposal.

Secs.22 to 25 enact the law as regards transfer and withdrawal of suits, appeals and other proceedings from one Court to another. Secs. 22 to 23 enable a Defendant to apply for transfer of a suit while Secs. 24 and 25 empower certain Courts to transfer any suit, appeal or other proceeding either on an application made by any party or by the Court suo motu.

Object

The primary and paramount object of every procedural law is to facilitate justice. A fair and an impartial trial is a sine qua non and an essential requirement of dispensation of justice. Justice can only be achieved if the Court deals with both the parties present before it equally, impartially and even-handedly. Hence, though a Plaintiff has the right to choose his own forum, with a view to administer justice fairly, impartially, and even-handedly, a Court may transfer a case from one Court to some other Court.

To which application lies

The Code specifies the Court to which an application for transfer can be made:

1. where several Courts having jurisdiction are subordinate to the same appellate Court, an application for transfer can be made to that appellate Court – Sec.23(1)

2. where such Courts are subordinate to the same High Court, an application can be made to the High Court – Sec.23(2)

3. where such Courts are subordinate to different High Courts, an application can be made to the High Court within the local limits of whose jurisdiction, the Court in which the suit is instituted is situate –Sec.23(3)

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UNIT – 2

Synopsis:

1. Institution of Suits
2. Summons
3. Interest and Costs
4. Pleading: Fundamental Rules of Pleadings
5. Plaint
6. Written Statement
7. Return and Rejection of Plaint
8. Counterclaim
9. Parties to Suit
10. Misjoinder of Causes of Action

Institution of Suit

Sections 26 to 35-B and Orders 1 to 20 of the First Schedule deal with the procedure relating to suits. Orders 1, 2 and 4 provide for parties to suit, frame of suit and institution of suit.

Sec.26 – Institution of suits *- Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.*

Order 4, Rule 1. Suit to be commenced by plaint –

(1) Every suit shall be instituted by presenting plaint in duplicate to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).

Suit – A proceeding started on an application made under the UP Agriculturists' Relief Act was treated as a suit – ***AIR 1949 All 100.*** The word suit ordinarily means and apart from context, must be taken to mean a civil proceeding instituted by Plaint – ***AIR 1933 PC 63.***The essential provisions as to procedure in suits are incorporated in Secs.28 to 35A.

There is a conflict of authorities on the question whether a pauper suit is instituted when the application to sue as pauper is presented or after permission is granted by the Court. The weight of authority is in favour of the former view, and that it is submitted, is the better opinion – ***AIR 1955 Nag 259.*** A proceeding under the Hindu Marriage Act is a suit, though initiated by a petition –***(1967) Jub LJ 712.*** And so is an application under Sec.20 of the Arbitration Act, 1940 – ***AIR 1966 Cal 259***. A proceeding under the Land Acquisition Act is not a suit – ***AIR 1970 Ker 30.***

Summons (Sec.26, Or.4 and Sec.27, 28, 31 and Or.5)

27. Summons to defendants. - *Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed on such day not beyond thirty days from date of the institution of the suit.*

28. Service of summons where defendant resides in another State.—*(1) A summons may be sent for service in another State to such Court and in such manner as may be prescribed by rules in force in that State.*

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

(3) Where the language of the summons sent for service in another State is different from the language of the record referred to in sub-section (2), a translation of the record,—

(a) in Hindi, where the language of the Court issuing the summons is Hindi, or

(b) in Hindi or English where the language of such record is other than Hindi or English, shall also be sent together with the record sent under that sub-section.

29. Service of foreign summonses - *Summonses and other processes issued by-*

(a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extend, or

(b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India, or

(c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply, may be sent to the Courts in the territories to which this Code extends, and served as if they were summonses issued by such Courts.

Comments

Meaning:

A summons is a document issued from an office of a Court of a justice, calling upon the person to whom it is directed to attend before a Judge or an officer of the Court for a certain purpose. It is a written order that legally obligates someone to attend a Court of law at a specified date – ***Concise Oxford Dictionary.***

When a Plaintiff files a suit, the Defendant must be informed about it. The intimation which is sent to the Defendant by the Court is technically known as 'summons'. A summons can also be used to witnesses. Service of summons can be effected in any of the modes recognised by the Code.

Object of Issuing Summons

When a suit is filed by the Plaintiff against the Defendant and a relief is claimed, the Defendant must be given an opportunity as to what he has to say against the prayer made by the Plaintiff. This is in consonance with the principle of natural justice as no one can be condemned unheard *(audi alteram partem)*. If the Defendant is not served with the summons, a decree passed against him will not bind him.

Summons to Defendant: Sec.27; Or.5 R.1

Order 5 deals with summons to a Defendant while Order 16 deals with summons to witnesses. When a suit has been duly filed by presentation of a plaint, the Court must issue summons to the Defendant calling upon him to appear and answer the claim of the Plaintiff by filing a Written

Statement within thirty days from the date of service of summons – S.27, Or.5 R.1(1). No summons, however, will be issued by the Court if, at the time of presentation of a plaint, the Defendant is present and admits the Plaintiff's claim – First Proviso to R.1(1).

Appearance in person: Rule 3

A Defendant to whom a summons has been issued, may appear i) in person; or ii) by a pleader duly instructed and able to answer all material questions relating to the suit; or iii) by a pleader accompanied by some person able to answer all such questions – R.1(2). The Court however may order the Defendant or Plaintiff to appear in person – R.3.

Mode of Service of Summons: Rules 9-30

The service of summons is of primary importance as it is fundamental rule of the law of procedure that a party must have a fair and reasonable notice of the legal proceedings initiated against him so that he can defend himself. The problem of service of summons is one of the major causes of delay in the progress of the suit. It is common knowledge that Defendants try to avoid service of summons. The Law Commission considered the problem and it was felt that certain amendments were necessary in that direction and a Defendant can be served by a Plaintiff or through modern means of communication. Accordingly, amendments were made in the code in 1976, 1999 and 2002 – ***AIR 2005 SC 3353.***

The Code prescribes five principal modes of serving a summons to a Defendant:

1) *Personal or Direct Service – Rules 10-16, 18*

Rules 10 to 16 and 18 deal with personal or direct service of summons upon the Defendant. This is an ordinary mode of service of summons. Here the following principles must be remembered:

i) Wherever practicable, the summons must be served to the Defendant in person or to his authorized agent – Rule 12
ii) Where the Defendant is absent from his residence at the time of service of summons and there is no likelihood of him being found at his residence within a reasonable time and he has no authorized agent, the summons may be served on any adult male or female member of the Defendant's family residing with him – Rule 15 – A servant, however, cannot be said to be a family member – Explanation to R.15
iii) In a suit relating to any business or work against a person, not residing within the territorial jurisdiction of the Court issuing the summons, it may be served to the manager or agent carrying on such business or work – Rule 13
iv) In a suit for immovable property, if the service of summons cannot be made on the Defendant personally and the Defendant has no authorized agent, the service may be made on any agent of the Defendant in charge of the property – Rule 14
v) Where there are two or more Defendants, service of summons should be made on each of Defendant – Rule 11

2) Service by Court – Rule 9

Summons to Defendant residing within the jurisdiction of the Court shall be served through Court office or approved courier service – Rule 9(1), (2)

3) Service by Plaintiff – Rule 9-A

The Court may also permit service of summons by the Plaintiff in addition to service of summons by the Court.

4) Substituted service – Rules 17, 19-20

Substituted service means the service of summons by a mode which is substituted for the ordinary mode of service of summons. There are two modes of substituted service. They are:

a) i) Where the Defendant or his agent refuses to sign the acknowledgement; or ii) where the service officer, after due and reasonable diligence, cannot be find the Defendant who is absent from his residence at the time of service of summons and there is no likelihood of him being found at his residence within a reasonable time and there is no authorized agent nor any other person on whom service can be made, the service of summons can be made by affixing a copy on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on his business or personally works for gain. The serving officer shall then return the original to the Court from which it was issued with a report endorsed thereon stating the fact about affixing the copy, the circumstances under which he did so, and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed – Rule 17.
b) Where the Court is satisfied that there is reason to believe that the Defendant avoids service or for any other reason the summons cannot be served in the ordinary way, the service may be effected in the following manner:
    i) By affixing a copy of the summons in some conspicuous place in the Court-house; and also upon some conspicuous part of the house in which the Defendant is known to have last resided, carried on business or personally worked for gain; or
    ii) In such manner as the Court thinks fit – Rule 20(1)

5) Service by post

When an acknowledgement purporting to be signed by the Defendant or his agent is received by the Court, or the Defendant or his agent refused to take delivery of summons when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the Defendant – AIR 1976 SC 869. The same principle applies in a case where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due; and the acknowledgement is lost or not received by the Court within 30 days from the date of issue of the summons. Where the summons sent by registered post is returned with an endorsement 'refused', the burden is on the Defendant to prove that the endorsement is false – AIR 1959 Ker 297.

Interests

Meaning: the term 'interest' is not defined in the Code. It may mean "a charge that is paid to borrow for use of money". It is thus a compensation allowed by law to the person who has been prevented to use the amount to which he was entitled – Concise Oxford English Dictionary

Award of interest – Where the decree is for payment of money, the Court may award interest at such rate as it thinks reasonable on the 'principal sum adjudged'

Divisions of interest – Interest awarded by the Court may conveniently be divided under three heads:

i. Interest prior to filing of the suit;

ii. Interest *pendente lite*, i.e., from the date of the suit to the date of the decree; and
iii. Interest from the date of decree till the payment.

i. Interest prior to filing of the suit;

Sec.34 has no application to interest prior to the institution of the suit since it is a matter of substantive law. It can be awarded only when there is an agreement, express or implied, between the parties; or mercantile usage; or under a statutory provision; or by way of damages – ***Union of India Vs. Watkins Mayor & Co., AIR 1966 SC 275.***

ii. Interest pendente lite

The award of interest from the date of the suit to the date of the decree is at the discretion of the Court – ***Mahabir Prasad Vs. Jage Ram & Ors., AIR 1971 SC 742***. The discretion, however must be exercised on sound judicial principles. As a general rule, the Court should award interest at the contractual rate except where it would be inequitable to do so – ***Rangalal Vs. Utkal Rashtrabhasa Prachar, AIR 1975 Ori 137.***

iii. Interest from the date of decree

The award of interest from the date of decree to the date of payment is also at the discretion of the Court – ***Amar Chand Vs. Union of India, AIR 1964 SC 1658***. The proviso as added by the amendment act of 1976 empowers the Court to grant further interest at a rate exceeding six per cent per annum but not exceeding the contractual rate of interest, and in the absence of a contract to that effect, at the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions, provided that the liability arises out of a commercial transaction.

Rate of interest – Rate of interest is also at the discretion of the Court. If there is an agreement between the parties, normally, the Court will adhere to it and will award interest as agreed unless there are reasons to depart therefrom – ***Mahesh Chandra Vs. Krishna Swaroop, (1997) 10 SCC 681***. From the date of the suit such rate would be six per cent per annum – ***Indian Insurance & Banking Corpn Ltd. Vs. Mani Paravathu, (1971) 3 SCC 893***. Where the Plaintiff is a Bank or financial institution, the rate of interest would be that on which advance is made by such an institution – ***Union Bank of India Vs. Narendra Plastics, AIR 1991Guj 671***

Recording of Reasons – Where the Court grants interest at the agreed rate, it need not record reasons. But where it awards interest at a lesser rate than the agreed rate between the parties, it should record reasons so that it can be considered whether the discretion has been exercised judicially or not – ***Vijaya Bank Vs. Art Trend Exports, AIR 1992 Cal 12***.

Commercial transactions – Where the transaction in question is commercial transaction i.e., transaction connected with industry, trade or business, the rate of interest would be that on which moneys are lent or advanced by nationalized banks in relation to commercial transactions – Proviso to Sec.34(1).

Compound interest – Compound interest means interest on interest. Normally, compound interest is not allowed by a Court under Sec.34 of the code. But if there is an agreement to that effect or it has been charged during the course of transaction, such interest can be awarded – ***Panna Lal Vs. Nihai Chand, AIR 1922 PC 46.***

Inflation – In some cases, judicial notice of inflation has been taken by Courts for awarding higher rate of interest. "Inflation is a phenomenon of which this Court (Supreme Court) has to

strike a balance between the competing equities – ***Union of India Vs. Muffakam Jah, AIR 1995 SC 498.***

Costs – Secs.35, 35-A, 35-B; Order 20-A

Meaning & Definition - "cost is a pecuniary allowance made to the successful party for his expenses in prosecuting or defending a suit or a distinct proceeding with a suit" – ***Black's Law Dictionary***

'Costs' are statutory allowance to a party to an action for his expenses incurred in the action. They are in the nature of incidental damages allowed to the successful partyto indemnify him against the expenses of asserting his rights in Court, when the necessity for so doing is caused by the other's breach of legal duty.

Otherwise defined, costs are the sums prescribed by law as charges for the services enumerated in the fee bill. They have reference only to the parties and the amounts paid them, and only those expenditures which are by statute taxable and to be included in the judgement fall within the term 'costs' - ***American Jurisprudence, Second Edition, Volume XX, page 5***

Object - The primary object of levying costs under sections 35 and 35A CPC, is to recompense a litigant for the expense incurred by him in litigation to vindicate or defend his right. It is therefore payable by a losing litigant to his successful opponent – ***Mahindra Vs. Aswini (1920) 48 Cal 42***. The principle which the Court awarding the costs should always bear in mind is that it should order the payment of a sum commensurate with the costs, which in the opinion of the Court the party ready to proceed will have to incur owing to the adjournment. The amount to be awarded should not be one of the nature of penalty or of punishment. - ***Gajendra Shah v. Ram Charan, AIR 1930 Oudh 171***. "I have found in my experience, that there is one panacea which heals every sore in litigation and that is costs" – ***Bowen LJ, in Cropper Vs. Smith, (1884) 26 CD 700***

The object of awarding costs to a litigant is to secure to him the expenses incurred by him in the litigation – ***Nandlal Tanti Vs. Jagdeo Singh, AIR 1962 Pat 36***. Costs are not to enable a litigant to make anything in the way of gain or profit, over and above the expenses for maintaining or defending the action, not to give exemplary damages or smart money, by way of penalty or punishment on the opposite party – ***AIR 1954 SC 26***. The provisions for costs are intended to achieve the following goals:

a) Costs should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the Court.

c) Costs should provide adequate indemnity to the successful litigant for expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

d) Costs should not be a deterrent to a citizen with genuine or bona fide claim or to any person belonging to the weaker Sections of the society – ***Vinod Seth Vs. Devinder Bajaj, 2010, AIR SCW 4860***

Other objects:

To encourage early settlement of disputes

To enable judges to do justice in the cases before them

Costs shall follow the event…

This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him – ***Ghansham Vs. Moroba, (1894) 18 Bom 474***. The House of Lords has held that the expression 'the costs shall follow the event' means that the party who on the whole succeeds in the action gets the general costs of the action but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributively and the costs of any particular issue should go to the party who succeeds upon it.

Kinds of Costs – the Code provides for the following kinds of costs.

i. General Costs – Sec.35
ii. Miscellaneous Costs – Order 20-A
iii. Compensatory Costs for false and vexatious claims or defences – Sec.35-A; and
iv. Costs for causing delay – Sec.35-B

i. General Costs – Sec.35 provides for awarding of general costs. The object of awarding costs to a litigant is to secure to him the expenses incurred by him in the litigation – ***Nandlal Tanti Vs. Jagdeo Singh, AIR 1962 Pat 36***. It neither enables the successful party to make any profit out of it nor punishes the opposite party – ***N.Peddanna Ogeti Vs. Katta V. Srinivasayya Setti Sons, AIR 1954 SC 26***.

ii. Miscellaneous Costs – Order 20-A makes specific provision with regard to the power of the Court to award costs in respect of certain expenses incurred in giving notices, typing charges, inspection of records, obtaining copies and producing witnesses.

iii. Compensatory Costs – Sec.35-A provides for compensatory costs. This Section is an exception to the general Rule on which Sec.35 is based viz., that the 'costs are only an indemnity, and never more than an indemnity – ***Gundry Vs. Sainsbury, (1910) 1 KB 645***. This Section is intended to deal with those cases in which Sec.35 does not afford sufficient compensation in the opinion of the Court. Under this provision, if the Court is satisfied that the litigation was inspired by vexatious motive and was altogether groundless, it can take deterrent action – ***T.Arivandanam Vs. T.V.Satyapal, AIR 1977 SC 2421***. This Section applies only to suits and not to appeals or revisions.

iv. *Costs for causing delay* – Sec.35-B was added by the amendment act of 1976. It is inserted to put a check upon the delaying tactics of litigants. It empowers the Court to impose compensatory costs on parties who are responsible for causing delay at any stage of the litigation. Such costs would be irrespective of the ultimate outcome of the litigation.

Pleading: Fundamental Rules of Pleadings

Meaning - Pleadings shall mean 'plaint' and 'written statement' - ***Order 6, Rule 1***

Pleadings 'shall include plaints, WS, memo of appeals, cross-objections, original petitions, applications, counter statements, replies, rejoinders, and every statement setting out the case of a party in the matter to which the pleadings relate' - Sec.3(2) of Karnataka Civil Rules of Practice

Object – The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing - ***Throp Vs. Holdsworth, (1876) LR 3 ChD 637***. To attain this end, the plaintiff should state in his plaint all the facts which constitute his cause of act ion. No amount of proof can substitute pleadings which are the foundation of claim of a litigating party - ***Abubakar Abdul Inamdar v. Harun Abdul Inamdar, AIR 1996 SC 112***. The defendant should also state in his written statement the material facts on which he relies for his defence. When the result of the pleading on both sides is that a material fact, is affirmed on the one side and denied on the other, the question thus raised between the parties is called an issue of fact. When one party answers his opponents pleading by stating an objection in point of law, the legal question thus raised between the parties is called an issue of law – ***Order 14 Rule 1***.

Basic Rules of Pleadings – On analysis the general principles of pleading emerge as follows:

i. Facts and not law – The first principle of pleadings is that they should State only facts and not law. It is the duty of the parties to State only the facts on which they rely upon for their claims. It is for the Court to apply the law to the facts pleaded – ***Kedar Lal Vs. Hari Lal, AIR 1952 SC 47***. Thus, the existence of a custom or usage is a question of fact which must be pleaded. Similarly, intention is also a question of fact and it must be pleaded. Again, waiver or negligence is a plea of fact and must be pleaded in the pleading.

ii. Material facts – the second principle of pleadings is that they should contain a statement of material facts and material facts only. Material facts means All facts upon which the Plaintiff's cause of action or the Defendant's defence depends or in other words, All those facts which must be proved in order to establish the Plaintiff's right to relief claimed in the plaint or the Defendant's defence in the Written Statement - ***AIR 1977 SC 329***. In ***Udhav Singh Vs. Madhav Rao Scindia***, the Supreme Court has defined the expression 'material facts' in the following words: "All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are material facts". Whether a particular fact is or is not a material fact which is required to be pleaded by a party depends on the facts and circumstances of each case – ***Virender Nath Vs. Satpal Singh***.

iii. *Facts and not evidence* – the third principle of pleadings is that the evidence of facts, as distinguished from the facts themselves, need not be pleaded. In other words, the pleadings should contain a statement of material facts on which the party relies but not the evidence by which those facts are to be proved, ***AIR 1969 SC 692.***

The facts are of two types:

a) Facta Probanda - the facts required to be proved (material facts);
b) Fact Probantia – the facts by means of which they are to be proved (particulars of evidence)

The pleadings should contain only *facta probanda* and not *facta probantia*. The material facts on which the Plaintiff relies for his claim or the Defendant relies for his defence are called facta probanda, and they must be stated in the plaint or in the Written Statement, as the case may be. But the facts or evidence by means of which the material facts are to be proved are called *facta*

probantia and need not be stated in the pleadings. They are not the 'fact in issue', but only relevant facts required to be proved at the trial in order to establish the fact in issue. As observed by Lord Denman, C.J., in ***Williams Vs. Wilcox, 112 ER 857***: "it is an elementary rule in pleading, that, when a state of facts are relied on, it is not enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation.

iv. *Concise Form* – the fourth and the last general principle of pleadings is that the pleadings should be drafted with sufficient brevity and precision. The material facts should be stated precisely succinctly and coherently. The importance of a specific pleading can be appreciated only if it is realized that the absence of a specific plea puts the Defendant at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing what the Plaintiff wants to convey by a vague pleading. Therefore, the pleading must be precise, specific and unambiguous. A party cannot be allowed to keep his options open until the trial and adduce such evidence as seems convenient and handy – ***Charan Lal Sahu Vs. Giani Zail Singh, AIR 1984 SC 309***. The words 'in a concise form' are definitely suggestive of the fact that brevity should be adhered to while drafting pleadings. Of course, brevity should be adhered to while drafting pleadings. Of course, brevity should not be at the cost of excluding necessary facts, but it does not mean niggling in the pleadings. If care is taken in syntactic process, pleadings can be saved from tautology – ***Virendra Kashinath Vs. Vinayak N. Joshi, AIR 1999 SC 162***.

Amendment of pleadings - Different kinds of amendment. The occasion for amendment arises in five different ways, namely:

(i) Section 152 (amendment of clerical and arithmetical mistakes in judgments, decrees and orders).

(ii) Section 153 (amendment of proceedings in a suit by the court, whether moves thereto by the parties or not, for the purpose of determining the real question or issue between the parties).

(iii) Order 1, r 10, sub-r (2) (striking out or adding parties).

(iv) Order 6, r 16 (amending your opponents pleading: compulsory amendment).

(v) Order 6, r 17 (amending your own pleading: voluntary amendment).

On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings

(i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;

(ii) The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;

(iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

(iv) Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;

(v) Amendment of a claim or relief barred by time should not be allowed;

(vi) No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;

(vii) No party should suffer on account of the technicalities of law and the amendment should be allowed to minimise the litigation between the parties;

(viii) The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

(ix) Error or mistake, which if not fraudulent, should not be made the ground for rejecting the application for amendments of pleadings - ***Dilip Kaur v. Major Singh, AIR 1996 P&H 107***

Broadly stating, there is no injustice in granting the amendment if the opposite side can be compensated in costs - ***Pramada Prasad v. Sagarmal, AIR 1954 Pat 439.*** It is a tried proposition of law, culled from various pronouncements, that bona fide amendments, vital for adjudication of the real question in controversy between the parties, should be allowed however negligent the first omission and howsoever delayed the proposed amendment, if the opposite party can be compensated with costs and other terms to be imposed in the order. Conversely, amendment should be refused where it is not necessary for the purpose of determining the real question in controversy between the parties - ***Evelyn J. Disney v. Rajeshwar Nath Gupta, AIR 1996 Del 86***. Amendment should not be refused on technical grounds. It is the discretion of the court before which the application for amendment comes up. Rules of procedure are intended for the administration of justice and a party should not be refused just relief, merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure - ***Sant Ram Agarwal v. Civil Judge Mohan Lal Ganj, AIR 1994 All 99***. It is only when costs would not be adequate compensation that amendment will be refused - ***Subashini v. Krishna Prasad, AIR 1956 Assam 79: (1955) ILR Assam 434***. Amendments in general should not be refused in a mechanical and casual manner. When the law confers discretion upon an authority it is expected that the discretion will be exercised in a judicious manner. Thus, where in a case relating to motor vehicle accident claim wrong registration number of the vehicle was mentioned, it was held by Allahabad High Court that substituting the correct registration number for the wrong one would not change the nature of the claim - ***Manoj Kumari v. Gokaran Nath Misra, AIR 2009 All 178.***

Plaint

The expression ‘plaint’ has not been defined in the Code. However, it can be said to be a statement of claim, a document, by presentation of which the suit is instituted. Its object is to State the grounds upon which the assistance of the Court is sought by the Plaintiff.

The plaint shall certain the following particulars:

(a) the name of the Court in which the suit is brought;

(b) the name, age, description, place of residence and place of business, if any, of the plaintiff;

(c) the name, age, description, place of residence and the place of business, if any, of the defendant, so far as can be ascertained by the plaintiff;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect and in the case of a minor, his age to the best of the knowledge and belief of the person verifying the plaint;

(e) the facts constituting the cause of action and when it arose;

(f) the facts showing that the Court has jurisdiction;

(g) the relief which the plaintiff claims;

(h) where the plaintiff has allowed a set-off or relinquished a portion of the claim, the amount so allowed or relinquished; and

(i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

(j) where the suit is for accounts or mesne profits or for movables in the possession of the Defendant or for debts which cannot be determined, the approximate amount or value thereof;

(k) where the subject-matter of the suit is immovable property a description of the property sufficient to identify it, e.g., boundaries, survey numbers etc.;

(l) The interest and liability of the Defendant in the subject-matter of the suit;

(m) where the suit is time-barred, the ground upon which the exemption from the law of limitation is claimed

The plaintiff must give such particulars as will enable the Defendant and the court to ascertain from the plaint whether in fact and in law the cause of act ion did arise as alleged or not. The plaintiffs mere statement that it did arise or that he has a good cause of action is useless for this purpose - ***Ramprasad v. Hazarimull, AIR 1931 Cal 458: (1931) 58 Cal 418***. However, the pleadings need not reproduce the exact words or expressions as contained in the statute, nor the question of law is required to be pleaded - ***Ram Swarup Gupta v. Bishun Narian Inter College, (1987) 2 SCC 555.*** Further, the question whether the documents annexed to the plaint and averment made to that extent to the plaint is factually correct or not is the subject-matter of the suit which cannot be decided at the initial stage of filing of plaint - ***RDB Two Thousand Plus Ltd. v. Sarvideo, AIR 2000 Cal 107***. In a suit on a promissory note by an indorsee, he must state that notice of dishonour had been given to the indorser and if it was not given, he must state the facts which exempt him from giving notice - ***Kanhyalal v. Ramakumar, AIR 1956 Raj 129***. In a suit for ejectment of a tenant for default in the payment of rent, it is not necessary to state when the tenancy commenced - ***Jagannath v. Amarendranath, AIR 1957 Cal 479***, but the plaintiff must state the period for which the tenant has been in default as that is a matter within his knowledge ***Ramesh Chandra v. Surya Properties Ltd., AIR 1957 Cal 198***. The cause of act ion must subsist for instituting eviction petition on the date of filing of petition - ***C. Chandra Mohan v. Sengottaiyan, (2000) 1 SCC 451***. In a suit for injunction to restrain a breach of contract, the plaint should state the terms of the contract and state how they are threatened to be broken - ***A.J. Judah v. Ramapada Gupta, AIR 1959 Cal 715***. It is only necessary to state the facts constituting the cause of action and not the legal effect thereof - ***Purushotham Haridas & Co. v. Amruth Ghee Co. Ltd., AIR 1961 AP 143***. In a construction contract, cause of act ion arises on completion of the work. It is not postponed till final certificate is given. Final certificate is only for purpose of payment and does not constitute cause of action unless the contract specifically provides to the contrary - ***Jullundur Improvement Trust v. Kuldip Singh, AIR 1984 P&H 185***.

Return of Plaint

Where a suit filed in a revenue court is not triable by that court, the court should not dismiss the suit, but return the plaint to be presented to, the proper Court - ***Kallu v. Phudan, AIR 1946 All***

488. Likewise when a suit which is exclusively triable by a revenue court is filed in a civil court, it should be returned for presentation to the proper Court - ***Krishnaveni Ammal v. Corpn of Madras, AIR 1957 Mad 671***. A suit against two defendants, cognizable by a civil court as against the first and by the revenue court as against the second, was filed in a civil court. The Patna High Court directed that the plaint be returned for presentation to the revenue court, and that a copy of it should be retained on the record for trial of the suit as against the first Defendant - ***Secretary of State v. Natabar, AIR 1927 Pat 254***. The Allahabad High Court indicated two alternatives either to keep the original plaint on the record and give a certified copy for presentation to the revenue court, or other proper court or dismiss that part of the suit which is beyond its jurisdiction and proceed to try the rest or to strike out the bad part under O 6, R 16 - ***Latu v. Rani Mahalaxmi Bai, AIR 1942 All 130.***

Rejection of Plaint

The plaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action;

Comments: Under the Code of Civil Procedure 1882, Sec.53, it was not obligatory upon the court to reject a plaint if it did not disclose a cause of action. In a Bombay decision, it has however been held that the court has a discretion even under the new Code of Civil Procedure. ***Gaganmal Ramchand v. Hongkong and Shanghai Banking Corpn Ltd., AIR 1950 Bom 345***. Under the present rule, the court is bound to reject a plaint if it does not disclose a cause of act ion. A plea that there was no cause of action for the suit is different from the plea that the plaint does not disclose a cause of act ion. In the latter case, it is the duty of the court to decide the question before issuing summons ***Santi Ranjan v. Dasuram Mirzamal, AIR 1957 Assam 49***. The question whether the Plaintiff had any cause of action or not was to be determined on the basis of materials (other than the plaint), which may be produced by the parties at appropriate stage in the suit. For the limited purpose of determining whether the suit is wiped out under O 7, r 11(a) or not, the averments in the plaint are only to be looked into - ***Orissa Mining Corpn Ltd v. Klockner & Co., AIR 1996 Ori 163***. The question is whether the real cause of act ion has been set out in the plaint or something purely illusionary has been stated with a view to get out of O 7, r 11 of the Code of Civil Procedure. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint - ***ITC Ltd. v. Debt Recovery Appellate Tribunal, (1998) 2 SCC 70***. A plaint, of which the cause of act ion is barred by the Law of Limitation, does not mean that such a plaint does not disclose a cause of action. Such a plaint does disclose a cause of act ion, but the plaintiffs remedy in respect of it is barred by limitation - ***Ramniklal v. Mathurlal, AIR 1965 Guj 214***. Thus, where the appellant had pressed for rejection of application on the ground of s 21 (1)(a) of Uttar Pradesh Urban Buildings (Regulations of Letting, Rent and Eviction) Act of 1972, as not showing completed cause of act ion due to non-expiry of six months as stipulated by the Act, the appellant could have withdrawn the suit under O 23, r 1, sub-r 3 of the Code of Civil Procedure and filed a fresh suit after expiry of the stipulated time - ***Martin & Harris Ltd v. Sixth Additional District Judge, (1998) 1 SCC 732.*** It is the duty of the court to look into the averments of the plaint to see the cause of act ion saves limitation or not. It is not proper to defer the question of limitation to later stage by only reading the prayer portion. It is well settled in law that the limitation need not be set up as a defence under s 3 (1) of the Limitation Act 1963. It is the duty of the court to find so - ***Satyananda Sahoo v. Ratikanta Panda, AIR 1997 Ori 67***. Where from the statement of the plaint, it appears that the suit is barred by the limitation, the suit is to be dismissed as been barred

by the limitation - ***J. Patel & Co. v. National Federation of Industrial Co-operatives Ltd., AIR 1996 Cal 253***. Where the statement is made in the plaint that a suit within the limitation and cause of act ion arose on a particular date O 7, r 11 is not attracted - ***Mohan Lal Sukhadia University Udaipur v. Priya Soloman, AIR 1999 Raj 102***.

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

Comments:

If the relief claimed is undervalued and the valuation is not corrected within the time fixed by the court, the plaint must be rejected and such rejection is a dismissal of the suit - ***Annapurna Dassi v. Sarat Chandra, AIR 1935 Cal 157***; though the plaintiff may present a fresh plaint under O 7, r 13. In suits for a declaration where no consequential relief is prayed and in suits for an injunction, the plaintiff is entitled by s 7 of the Court Fees Act 1870 to put his own valuation on the suit, and in the absence of rules framed under s 9 of the Suits Valuation Act 1887, the court must accept the plaintiffs valuation - ***Naarayangunj v. Moulvi Mafizuddin, AIR 1934 Cal 448(FB***). If the correct valuation would render the court incompetent to entertain the suit, cl (b) does not apply. In such a case, the plaint must be returned under R.10 to be presented to the proper court and the deficient court-fee will be paid in the court having jurisdiction to hear the suit - ***Bethasami v. Nagarammal, AIR 1931 Mad 69***. In considering the question of correct valuation, the court is not confined to what appears on the plaint. It can, rely on admissions made in interlocutory proceedings - ***Kashinath v. Tukaram. AIR 1956 Nag 195***. When a suit is not correctly valued, the appropriate order to pass is to call upon the plaintiff to give the correct valuation and no order should be passed at that stage for payment of the deficient court-fee - ***Limbaji v. Ahmed, AIR 1956 Hyd 49: (1956) Hyd 138***. A composite order requiring the party to give the correct valuation and to pay deficient Court fee is not warranted - ***Abdul Ghani v. Vishunath, AIR 1957 All 337***. Where the court holds that the relief has been undervalued and orders it to be corrected, it is open to the plaintiff to amend the valuation at any time before an order rejecting the plaint is made so as to limit the claim to the court-fee paid - ***Mahant Narsidasji v. Bhai Jamna, AIR 1939 Bom 354***. In suit for accounts, in coming to the conclusion that the relief is undervalued the Court will have to take into account that in a suit for account the plaintiff is not obliged to state exact amount which would result after the taking of accounts. If he cannot estimate the exact amount he can put a tentative valuation upon the suit for accounts, which is adequate and reasonable. There must be a genuine effort on the part of the plaintiff to estimate his relief and not a deliberate under estimation - ***Meenakshi Sundram Chettiar v. Venkatachalam Chettiar, (1980) 1 SCC 616***. It is manifestly clear from the provisions of O 7, r 11(b) that a court has to come to a finding that a relief claimed has been undervalued, which necessarily means that the court is able to decide and specify proper and correct valuation of the relief and after determination of the correct value of the relief, requires the plaintiff to correct his valuation within a time to be fixed by the court. If the Plaintiff does not correct the valuation within the time allowed, the plaint is liable to be rejected - ***Commercial Aviation and Travel Co v. Vimal Panna Lal, (1998) 3 SCC 423***. In courts of limited pecuniary jurisdiction valuations assumes great importance. A plaintiff may over value or under value the suit for purposes of avoiding a court of a particular grade. In the former a plaint may be returned under O 7, r 10 for presentation in proper court but in latter it is liable to be rejected. Since undervalue goes to the root of the maintainability of the suit, a defendant is entitled to raise the objections irrespective of the nature of the suit - ***Sujir Keshav Nayak v. Sujir Ganesh Nayak, (1992) 1 SCC 751.***

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

Comments:

The following points are to be noted in connection with this clause:

(i) Where a plaint is written upon paper insufficiently stamped, the court is bound to give the plaintiff time to make good the deficiency. This follows from the terms of cl (c) itself - ***Achut v. Nagappa, (1914) 38 Bom 41***. Reasonable time must be allowed after the Court has decided that the court-fee paid is insufficient - ***Deoraj v. Kunj Behari, AIR 1930 Oudh 104***, and within the time allowed, if the plaintiff cannot pay, he may apply to continue the suit as a pauper - ***Bava Sahib v. Abdul Ghani, AIR 1933 Mad 498***.

(ii) If the plaintiff fails to supply the requisite stamp-paper within the period fixed by the court, the plaint may be rejected under this rule, even after it has been numbered and registered as a suit. The reason is that the power to reject a plaint under this rule is not exhausted when the plaint has been admitted and registered - ***Brahmomoyi Dasi v. Andi Si, (1900) 27 Cal 376***.

(iii) A plaint is presented on the last day allowed by the law of limitation. It is written upon paper insufficiently stamped. The plaintiff is ordered to supply the requisite stamp paper within a week. The order is complied with on the fourth day after the date of presentation of the plaint. This would necessarily be after the expiration of the period of limitation prescribed for the institution of the suit. Can the plaint be admitted under these circumstances? Under this Code it can be (see s 149). Under the Code of 1882 there was a conflict of decisions on the point. The High Courts of Calcutta - ***Moti Sahu v. Chhatri Das, (1892) 19 Cal 780***. Madras - ***Assam v. Pathumma , (1899) 22 Mad 494*** and Bombay - ***Dhondiram v. Taba Savadan, (1903) 27 Bom 330***, held that the Court had power to admit the plaint while the Allahabad High Court held that the Court had no such powers - ***Jainti Prasad v. Bachu Singh, (1893) 15 All 65***. The view taken by the Calcutta, Madras and Bombay High Courts was that the Court had power under Sec.54 of that Code, at any time and without any regard to limitation, to fix a time within which the requisite stamp-paper should be supplied, and if the stamp was made good within the period fixed by the Court, the suit was to be deemed to be instituted when the plaint was first presented and not when the requisite stamp-paper was supplied. On the other hand, the view taken by the Allahabad High Court was that though the Court had the power to give time to a plaintiff within which to supply the requisite stamp-paper, it must be a time within limitation, and that Sec.54 did not give any power to the Court to extend the period of limitation. This conflict has now been set at rest by the provisions of s 149 of this Code. That section gives effect to the Calcutta, Madras and Bombay decisions. The Allahabad decisions are no longer law - ***Ram Dayal v. Sher Singh, (1923) 45 All 518***. Section 149 empowers the court at any stage to allow a plaintiff to make up the deficiency of court-fees, and provides in effect that when the deficiency has been made up, the plaint is as valid as if it had been properly stamped when presented. It follows from the provisions of s 149 that where a plaint written upon paper insufficiently stamped is presented to the court on the last day allowed by the law of limitation, and the judge to whom the plaint is presented directs extra court-fee to be paid, but fixes no time for payment, and the plaintiff pays the extra court-fee though it be after the expiration of the

period of limitation and the court accepts it, the plaint should be treated as if the full fee had been paid in the first instance, and the suit cannot be held to be barred by limitation - ***Gaya v. Awadh, 37 IC 507***. Section 149 of the Code of Civil Procedure empowers the court to allow any person by whom the court fees payable, to pay the whole or part, as the case may be, of such court-fees. Upon such payment, the document in respect of which such fee is payable shall have the same force as such fee had been paid in the first instance. Section 149 has to be treated as an exception to s s 4 and 6 of the Court Fees Act 1970 and serves as a provision to those sections by allowing the deficit to be made good within the time fixed by the court but the power is subject to the discretion of the court to be exercised in accordance with judicial principles and cannot be claimed as of right. The words at any stage in s 149 contemplates that the deficiency can be ordered to be made good even after the period of limitation for filing appeal or the suit has expired. The discretion can be exercised even in the case of a plaint without any court-fees. Under the latter part of Sec.149, the defective plaint or appeal memorandum is validated with retrospective effect if the deficit court-fees is subsequently made up. The proper provision under which the time may be granted or extended is s 149 and not O 7, r 11, which only states the circumstances in which the plaint shall be rejected. In other words, r 11 of O 7 is not an enabling provision, but only a disabling one - ***V.O. Devassy v. Periyar Credits. AIR 1994 Ker 405.*** Even though as per the provisions in s 4 A of the Kerala Court fees and Suits Valuation Act 1959, and O 7, r 11 Code of Civil Procedure, restrictions have been imposed on the power of the court to extend the time for payment of court-fees as indicated in those provisions, such restrictions cannot override or cancel the general power conferred on courts in very wide terms to grant term for payment of the whole or any part of the court-fees in its discretion at any stage under s 149 of the Code of Civil Procedure - ***Shahjahan v. Kamala Narayanan, AIR 1997 Ker 203***. In a Patna case, the plaintiff was given a week of time in which to make up the deficiency. Before the expiry of the week, the court closed for the vacation. The amount in deficit was tendered two days after the reopening of the court and accepted and the plaint was registered. The period of limitation for the claim had expired prior to the date of the acceptance of the deficit, it was held that the acceptance of the fee, although tendered late, and the subsequent registration of the plaint, amounted to an exercise by the court of its discretion to allow the deficiency to be paid on the day when it was tendered, and therefore, the suit was not barred by limitation - ***Raghunandan v. Ram Sundar, AIR 1925 Pat 299***. Where the plaintiff had filed a suit on the last day of limitation with a stamp of Rs 1 and made good the deficiency within the time given by the court, it was held that the suit could not be dismissed on the ground that the reason given for not paying the full court-fee at the time of filing the plaint was not bona fide - ***Ramkishan v. Nathu, AIR 1959 Bom 86***. Where the balance court-fees could not be submitted in the court as the court-fees paper were not available in the treasury, such deficiency cannot be construed as fatal to the institution of the proceedings. The suit would still be considered filed on the date when it was filed on payment of deficit court-fees - ***Manipal Industries Ltd. v. Fertilizer Corpn of India Ltd., AIR 1996 Kant 355***.

An order rejecting a plaint under this rule should be made only after the plaintiff is given an opportunity to correct the valuation and pay the deficient court-fee and he fails to do so - ***Sriramulu v. Raju, (1950) 1 Mad LJ 180***.

(d) where the suit appears from the statement in the plaint to be barred by any law;

Comments:

Where a suit appears from statements in the plaint to be barred by the law of limitation, but the plaint is not rejected when presented, the court may, in proper case, allow the plaint to be amended at the hearing - ***Gunnaji v. Makanji, (1910) ILR 34 Bom 250***. It is submitted that this view requires reconsideration. Order 7, R 11 casts a duty on the court to reject the plaint for non-disclosure of cause of act ion and it cannot be left to the event of an objection in this respect to be raised by one party. Irrespective of any objection taken by the defendant, it is the duty of the court to see if the plaint really discloses any cause of action or if the plaint is barred under the provisions of any law. For this reason, it is the plaint only, which is to be seen for a decision under O 7, r 11 - ***ITC Ltd. v. Rakesh Behari Srivastava, AIR 1997 All 323***. O 7, r 11(d) applies to those cases only where the statement made by the plaintiff in the plaint without any doubt or dispute show that the suit is barred by any law in force. Where the plaintiff in the plaint makes a statement that suit was within limitation as the cause of act ion arose on a particular date, the provisions of O 7, r 11(d) cannot be attracted - ***Mohan Lal Sukhadia University v. Priya Soluman, AIR 1999 Raj 102***. However, where the plaint appears to be barred by time even after considering the averments of the acknowledgment of the debt in the plaint, the plaint can be rejected under O 7, r 11 - ***J. Patel & Co v. National Federation of Industrial Cooperatives Ltd., AIR 1996 Cal 253***. There remains no doubt that the question of limitation would be a mixed question of law and fact - ***Khaja Quthubullah v. Government of Andhra Pradesh, AIR 1995 AP 43***. Where a suit is brought against the Secretary of State without giving the notice required under s 80, the plaint should be rejected under this clause - ***Bachchu v. Secy. of State, (1903) ILR 25 All 187***. Where in a suit against the government, the plaint does not allege that notice has been served as required by s 80 - ***Union Territory of Tripura v. Indu Bhusan. AIR 1963 Tri 48***, or where the suit has been filed before the expiry of the period prescribed therein - ***Gotilingam v. State of Andhra Pradesh, AIR 1961 AP 488***, the plaint is liable to be rejected under this provision. When a suit instituted against a number of defendants is as against some of them barred, but not as against the others, this rule has no application. The proper order to pass in such a case is to strike out the plaint against those defendants against whom it is barred and proceed with the suit as against the rest - ***Phoolsundari v. Gurbans Singh, AIR 1957 Raj 97***.

S.B. Sinha, J., speaking for the Bench in the above case, observed as follows in Para 7:

> "An application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the court would not be entitled to consider the case of the defence" - ***C. Natarajan v. Ashim Bai, AIR 2008 SC 363***.

It was further observed Para 9:

> "The question which was raised before the learned Trial Judge was different from the question raised before the High Court. Before the learned Trial Judge, as noticed herein before, the provisions of the Limitation Act were brought in with reference to the identification of the property. It was not contended that the suit was barred by limitation of the property. It was not contended that the suit was barred by limitation in terms of Art. 58 of the Limitation Act, 1963. The

High Court, therefore, in our opinion, ex facie committed an error in arriving on the aforementioned finding" - ***C. Natarajan v. Ashim Bai, AIR 2008 SC 363.***

(e) where plaint is not in duplicate

Comments:

The plaint has to be filed in duplicate. If the said requirement is not complied with the plaint will be rejected.

(e) where the Plaintiff fails to comply with the provisions of Rule 9

Written Statement

Order VIII Rule1 provides that the defendant must file written statement within 30 days of the service of summons on him. The court may extend the period by recording reasons up-to 90 days. Thus, extension can be given only for a period of 60 days, however, it is the discretion of the Court to extend the time further - ***Ramesh Chand Ardawatiaya V. Anil Panjwani, AIR 2003 SC 2508***; ***Debjani Mishra V. Uttam Kumar Mishra, (2004) 13 SCC 627***; ***Iridion India Telecom Ltd. V. Motorola Inc, (2005) 2 SCC 145; Kailash V. Nanhku & Ors., AIR 2005 SC 2441; Salem Advocate Bar Association, Tamil Nadu V. Union of India, AIR 2005 SC 3353; Shaikh Salim Haji Abdul Khayumsab V. Kumar & Ors., AIR 2006 SC 396; and Aditya Hotels (P) Ltd. Bombay Swadeshi Stores Ltd. & Ors., AIR 2007 SC 1574 and Sandeep Thapar v. SME Technologies Private Limited (2014) 2 SCC 302). In R.N. Jadi & Bros. & Ors. V. Subhashchandra, (2007) 6 SCC 420,*** the Apex Court held that it would be proper to encourage the belief of the litigants that the imperative nature of Order 8 Rule 1 must be adhered to, and that only in rare and exceptional cases a delay thereof, should be condoned. In ***Andhra Bank V. A.B.N. Amro Bank NV & Ors., (2007) 6 SCC 167***, the Apex Court held that a few days' delay in filing the written statement should be condoned considering the facts of a particular case. ***In Zolba V. Keshao & Ors., AIR 2008 SC 2099***, the Court had taken a similar view observing that the provisions are not mandatory.

Order VIII Rule 5 provides that, every allegation of fact in the plaint must be specifically and necessarily denied, not admitting any of the pleadings otherwise it will be assumed that the defendant has admitted the allegation(s) - ***Tek Bahadur Bhujil V. Debi Singh Bhujil & Ors, 1966 SC 292; Jahuri Sah V. Dwarika Prasad Jhunjhunwala & Ors, AIR 1967 SC 109; M.L.Subbaraya Setty V. M.L.Nagappa Setty, (2002) 4 SCC 743; Rakesh Wadhawan & Ors. V. M/s Jagdamba Industrial Corporation & Ors., AIR 2002 SC 2004; Sushil Kumar V. Rakesh Kumar, (2003) 8 SCC 673; and Seth Ramdayal Jat V. Laxmi Prasad (2009) 11 SCC 545.***

In ***Manager, R.B.I., Bangalore V. S. Mani & Ors., AIR 2005 SC 2179***, the Apex Court held that pleadings cannot be a substitute for evidence. Non-denial of or non-response to a plea that is not supported by evidence cannot be enough. Evidence is required to be adduced by the plaintiff to prove the same. In the case of ***Food Corp. of India V. Pala Ram, (2008) 14 SCC 32***, it was held that there was non rebuttal of court decision affecting jurisdiction. It was held that the decision does not become applicable merely because the opposite party has not rebutted it. In ***Zolba V. Keshao & Ors., 2008 AIR SCW 2739***, the Court had taken a similar view observing that the provisions are not mandatory.

Counterclaim

Order VIII Rule 6-A deals with counterclaim. Counterclaim may be defined as 'a claim made by the Defendant in a suit against the Plaintiff'. It is a claim independent of, and separable from, the Plaintiff's claim which can be enforced by a cross-action. It is a cause of action in favour of the Defendant against the Plaintiff.

Order VIII Rule 9 provides for subsequent pleadings. In ***Shakoor & Ors. V. Jaipur Development Authority, Jaipur & Ors., AIR 1987 Raj 19***, the Court considered the application of the provisions of Order 8 Rule 9 even in a case of miscellaneous application under Order 39 rule 1, C.P.C. and held that undoubtedly the contingency of filing a rejoinder does not arise in every case because it would arise only in such cases where some new plea or fact is introduced by the defendant in his reply, only with the leave of the Court and the purpose of putting such an embargo is that the plaintiff may not be permitted to introduce a pleading subsequently by a rejoinder. The procedure provided for a trial of the Suit and miscellaneous proceedings is meant for determining the truth and to do justice. The procedure is always a hand-maid of justice and full opportunity should be given to the parties to bring forth their case before the Court, unless such procedure is specifically prohibited under the law and if the Court is satisfied that subsequent pleadings should not be permitted, the plaintiff cannot be denied his right to file a rejoinder.

In ***Veerasekhara Varamarayar V. Amirthavalliammal & Ors., AIR 1975 Mad. 51***, a Division Bench of the Madras High Court held that where the defendant brings in new facts in the written statement, the plaintiff must get a chance to file a rejoinder, challenging the truth and the binding nature of the allegations/averments made in the written statement. However, the law does not compel the plaintiff to file a replication/ rejoinder and the plaintiff cannot be deemed to have admitted the same simply because he had not filed the rejoinder.

In ***Rohan Lal Choudhary V. Prem Prakash Gupta, AIR 1980 Pat. 59***, the Patna High Court has taken the same view holding that the plaintiff is entitled to join issues with the defendant in respect to all those allegations which are made in the written statement and may lead evidence in rebuttal of those allegations notwithstanding the fact that he did not file any rejoinder.

In ***M/s Ajanta Enterprises V. Bimla Charan Chatterjee & Anr., 1987 RLR 991***, this Court held that it is not permissible to file a rejoinder to all allegations made in the written statement and the rejoinder or replica can be filed with the permission of the Court only if the defendant has raised a plea of new facts and, thus, permission must be granted after taking into consideration all the facts and circumstances of the case, especially the pleas which have been raised in the written statement. In the garb of submitting a rejoinder, a plaintiff cannot be allowed to introduce new pleas in his plaint so as to alter the basis of his plaint. In a rejoinder, plaintiff can explain certain additional facts which have been made in the written statement, but he cannot be allowed to come forward with an entirely new case in the rejoinder. The original pleas cannot be permitted to be altered under the garb of filing a rejoinder. Rejoinder/replication cannot be permitted for introducing pleas which are not consistent with the earlier pleas.

In ***State of Rajasthan V. Mohammed Ikbal, 1998 DNJ (Raj.) 275***, the Court considered its earlier judgments in ***M/s Ajanta Enterprises (supra) and M/s Gannon Dunkerley & Co. Ltd. V. Steel Authority of India Ltd., Rourkela, AIR 1993 Ori 141,*** and held that the plaintiff cannot be allowed to introduce new pleas under the garb of filing rejoinder, so as to alter the basis of his plaint. In rejoinder, plaintiff has a right to explain the additional facts incorporated by the

defendant in his written statement. In rejoinder, plaintiff cannot be permitted to come forward with an entirely new case or raise inconsistent pleas so as to alter his original cause of action.

In ***Ishwar Lal & Anr. V. Ashok & Anr., 1998 (2) RLW 730,*** the Court held that rejoinder affidavit can be filed only with leave of the Court and it is a matter of judicial discretion vested in the trial court which should be exercised only if there are cogent reasons to allow the plaintiff to file rejoinder to the written statement.

In ***Saiyed Sirajul Hasan V. Sh. Syed Murtaza Ali Khan Bahadur & Ors., AIR 1992 Del. 162***, the Delhi High Court had held that rejoinder cannot be filed as a matter of right and it is an absolute discretion of the Court to grant leave to present a fresh pleading. A party seeking permission under Order 8 Rule 9 has to provide "cogent reason for permission" to file additional plea.

In ***M/s Anant Construction (P) Ltd. V. Ram Niwas, 1995 (1) Current Civil Cases 154,*** the Delhi High Court held that a replication to written statement cannot be filed, nor can be permitted to be filed ordinarily, much less in routine. The Court has a discretion to permit replication after scrutinizing the plaint and the written statement, if it comes to the conclusion that the plaintiff can be permitted to join specific pleadings to a case, specifically and newly raised in the written statement, and if such a need arises for the plaintiff introducing a plea by way of "confession and avoidance." The Court further held that a mere denial of the defendant's case by the plaintiff does not need replication, for the reason that he can safely rely on rules of implied or assumed traverse and joinder of issue.

Thus, in sum and substance, the plaintiff cannot be permitted to raise a new plea under the garb of filing rejoinder-affidavit, or take a plea inconsistent to the pleas taken by him in the petition, nor the rejoinder can be filed as a matter of right, even the Court can grant leave only after applying its mind on the pleas taken in the plaint and the written statement.

Leave can be granted by the Court to file replication/rejoinder on an oral request of petitioner-plaintiff as held in a case reported in 1972 (2) Mys. L.J. 328, for the reason that the provisions of Order 8 Rule 9 C.P.C. do not require any written application. Order VIII Rule 10 prescribes the procedure adopted by the court when party fails to present written statement called for. In case of ***Balraj Taneja & Anr.v. Sunil Madan & Anr., AIR 1999 SC 3381***, held that the court should not act blindly on the averments made in the plaint merely because the written statement has not been filed by the Defendant traversing the facts set out by the Plaintiff therein. Where a written statement has not been filed by the Defendant, the court should be little cautious in proceeding under Order VIII Rule 10, Code of Civil Procedure. Before passing the judgment against the Defendant it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the Plaintiff without requiring him to prove any fact mentioned in the plaint.

Parties to Suit – Order 1, Rules 1 to 13

A person who is not a party in the proceeding is not bound by any judgment or decree as the order against him is in violation of the principles of natural justice. There may be a party necessary, proper and/or improper, therefore the concept of joinder, non-joinder and misjoinder of parties has always been very relevant. Nearly a Constitution Bench of the Supreme Court in ***Udit Narain Singh Malpaharia Vs Member, Board of Revenue Bihar, AIR 1963 SC 786***, has explained as to who are the necessary parties and without whom the suit shall not be

maintainable. A necessary party is one without whom no order can be made effectively. Proper party is one whose presence is necessary for a complete and final decision. Suit fails for non-joinder of necessary parties. A Constitution Bench in ***U.P. Awas Evam Vikas Parishad V. Gyan Devi, AIR 1995 SC 724*** reiterated the same view. In ***Iswar B.C. Patel V. Harihar Behera, AIR 1999 SC 1341***, the Apex Court observed that question of joinder of parties involves joinder of causes of action.

Objection should be taken before trial court in order to provide opportunity to plaintiff to rectify the defect and despite such objection if plaintiff persists in not impleading the party, consequences on non-joinder may follow - ***Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee (2012) 8 SCC 706***.

Under Rule 1 of Order 1 several persons may join as plaintiffs in one suit, though their causes of action are separate and distinct, provided that

(i) the right to relief, alleged to exist in them, arises out of the same act or transaction or series of acts or transactions - ***Hari Ram Fatan Das v. Kanhaiya Lal, 1975 A Raj 23***; and

(ii) the case is of such a character that, if such persons brought separate suits, any common question of law or fact would arise.

Both these conditions must be fulfilled to enable two or more persons to join as plaintiffs in one suit. The two conditions are not alternative - ***Stroud v. Lawson, (1898) 2 QB 44***.A suit by a number of shareholders of a company for avoiding the contracts of allotment of shares and for refund of money paid does not fall within the purview of this rule or r 8 as the facts relating to each contract must be different and there is no identity of interest among the several plaintiffs - ***Mansukhlal v. Jupiter Airways Ltd., (1953) AB 112***.But it is not necessary that all the questions arising in the case should be common to all the parties. It is sufficient even if one of them is common to them - ***Sitaram v. Rajendra Chandra, AIR 1956 Ass 7***.

ILLUSTRATIONS

(1) A publishes a series of books under the title of The Oxford and Cambridge Publications so as to induce the belief that the books are publications of the Oxford and Cambridge Universities or either of them. The two Universities may join as plaintiffs in one suit to restrain A from using the title, because the publication and the belief induced are common questions of fact arising out of the same series of transactions - ***The Universities of Oxford and Cambridge v. George Gill & Sons, (1899) 1 Ch 55***.

(2) A, a shareholder in a company, sues B, C and D, the directors, to recover damages on his own behalf for fraudulently inducing him to purchase shares by declaring an illegal dividend; and he joins in the same suit a claim on behalf of himself and all other shareholders (see r. 8 below) for repayment by the defendants to the company of the amount of the dividend paid out by them. A is not entitled to join both causes of action in one suit, because the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders do not arise out of the same transaction or series of transactions - ***Stroud v. Lawson, (1898) 2 QB 44***

(3) Four persons, each of whom separately took debentures on the faith of certain statements in a prospectus issued by the directors of a company, joined as co-plaintiffs in one suit against the directors, claiming damages for misrepresentations contained in the prospectus. Held that as the

several causes of action arose out of the same transaction, and the case would involve common questions of fact the suit was properly framed - ***Drinogbier v. Wood, (1899) 1 Ch. 393***

(4) In a suit instituted by A, B and C jointly for an injunction against D, E and F, it is alleged that all three defendants, as officers of several associations of workmen, conspired to prevent all persons, not belonging to the associations, from obtaining employment in place of the members of the associations. To constitute the overt acts alleged to have been committed in furtherance of the conspiracy, it is averred that D, E and F caused A, B and C to be molested, that E used threatening language to A, and that F assaulted C. It is proved that D was not a party to the conspiracy. As the claim arises out of the same series of the conspiracy, A, B and C may join in the suit, notwithstanding that an injunction is granted against E and F only, and involves the common question of fact and law whether the overt acts were committed in furtherance of the conspiracy A, B and C may join in the suit, notwithstanding that an injunction is granted against E and F only - ***Walters v. Green, (1899) 2 Ch 696***

Order I Rule 3 provides for the joining of parties as Defendants in a suit.

The plaintiff is dominus litis having domain in his suit. He has a right and the prerogative to choose and implead in a suit as the defendant, the person against whom he seeks relief. The plaintiff is not obliged to implead a person as a defendant in the suit, against whom no relief is sought - ***Furkan Ahmad v. Sayed Ahmad Raza, AIR 1995 All 337.*** That is, he cannot be compelled to implead unwanted and unnecessary parties who are neither necessary nor proper parties for deciding the dispute in the suit - ***Canara Bank v. Mettalica Industries Ltd., AIR 1997 Bom 296.*** The condition precedent is that the court must be satisfied that the presence of the party to be added, would be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. To bring a person as party-defendant is not a substantive right but one of procedure and the court has discretion in its proper exercise. The object of the rule is to bring on record all the persons who are parties to the disputes relating to the subject-matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and the multiplicity of the proceedings may be avoided - ***Anil Kumar Singh v. Shiv Nath Mishra, (1995) 3 SCC 147.*** In order that a party may be added as a defendant in the suit, the party should have a legal interest in the subject-matter of the litigation, i.e., legal interest not as distinguished from an equitable interest, but an interest which the law recognises.

A person who would be indirectly or commercially effected by the result of the litigation cannot be impleaded as a party - ***State Bank of India v. Krishna Pottery Udyog Assn, AIR 1994 HP 90***. A necessary party may still be declined the right to be impleaded in the suit if it appears to the court that the same shall result in the abuse of the process of the court. Thus, in a case where the municipality as well as the state machinery actively assisting a party to stall the reconstruction and ensuring that the order of the court granting the right to reconstruction is flouted, the court would be justified in not allowing the application of the state and the municipality to be included as a party - ***State of Kerela v. Thressia (1995) Supp 2 SCC 449.*** However, where the original defendants are not impleaded in the special leave petition, the petition is liable to be dismissed - ***Ram Kishan Ghosh v. Roop Chand Molla, (1997) 10 SCC 307***. It cannot be gainsaid that no decree in a suit can bind a person if he is not a party thereto or duly represented therein. However, if there is a technical error in the drafting of the petition by a lawyer, the litigant must not be made to suffer. An oral request to correct the description would satisfy the procedural requirement in this case. However, in a case, an objection about the petition being incompetent in

absence of Union of India as a party, could not be allowed to be raised after a lapse of six years, where inadvertently the case title describes the Union of India as the Government of India - ***Murari Mohan Dev v. Secretary to the Government of India, (1985) 3 SCC 120.***

Under this rule, all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist; where if separate suits were brought against such persons, any common question of law or fact could arise, though the causes of action against the defendants may be different - ***Shew Narayan v. Brahmanand, AIR 1950 Cal 479***. A Plaintiff is entitled under this rule to join several defendants in respect of several and distinct causes of action subject, however, to the discretion of the court to strike out one or more of the defendants on the analogy of O 1, r 2, if it thinks it right to do so - ***Payne v. British Time Recorder Co., (1921) 2 KB 1***. What was done on the analogy of O 1, r 2 is now legislatively confirmed by the insertion in this order of the new rule, r 3A. Thus, as a general rule, where claims against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter be disposed of at the same time, the court will allow the joinder of defendants, subject to its discretion as to how the act ion should be tried - ***Payne v. British Time Recorder Co., (1921) 2 KB 1*** It is not necessary that all the defendants should be interested in all the reliefs or that their liability should be the same - ***Kamala Prasad v. Chamanlal 66 Cal WN 391***. On the other hand, it is essential that there must be some link or nexus so that the condition as to the existence of the same act or transaction or some series of acts or transactions may be satisfied - ***Nagendra Bala v. Provash Chandra, AIR 1953 Cal 185***. Thus, where a corporation filed a suit to recover rates and taxes from owners of different houses, it was held that it was bad for multifariousness as the liability of the several defendants were distinct and separate and that the fact that all the houses belonged to one owner at one time did not bring the suit within this rule as that might involve similar but not common questions of fact or law - ***Corpn of Calcutta v. Radhakrishna Dev, AIR 1952 Cal 222***. Similarly, when a purchaser of a house, which was in the occupation of two tenants under two different demises, filed one suit against them claiming different reliefs, it was held that it was not maintainable under this Rule - ***Kanhaiyala v. Keshodas, AIR 1961 MP 46***. However, a suit to recover different parcels of land in the possession of different persons is within this rule where the claims are interconnected - ***Kamala Prasad v. Chamanlal 66 Cal WN 391***. The owner of land is entitled to file one suit against all persons who have trespassed on it as he has a right to recover the plot whole and entire and not in bits and fragments - ***Joseph v. Makkaru, AIR 1960 Ker 127.*** Where there is a single cause of action to recover properties, even if those properties are situated in the jurisdiction of different courts, a suit in respect of all of them can be filed in any of the courts within the jurisdiction of which any one of the suit properties is situate - ***Laxmibai v. Madhankar, AIR 1968 Mys 82.*** It is permissible to combine in one suit a claim against the railway administration on a contract of carriage of goods and one against the insurance company on a contract of insurance - ***Foolchand v. Union of India, AIR 1961 Mad 64***. It is permissible to implead in a pre-emption suit, a lessee as a co-defendant along with the vendor and the vendee, where the suit property is alleged to be in possession of a third party who claims to be the lessee and the genuineness of the lease is challenged by the plaintiff. It would be unfair to the plaintiff to drive him to another suit after he succeeds in the preemption suit - ***Amar Singh v. Jagdish, AIR 1976 P&H 276***.

Order I, Rule 8 provides that persons may be impleaded in representative capacity where they are in large number but having the same interest with the provision of the Court - ***Diwakar Shrivastava & Ors. V. State of Madhya Pradesh & Ors, AIR 1984 SC 468.***

Rule 8 is an exception to the general rule that all persons interested in a suit ought to be made parties thereto - ***Chudasama v. Partapsang, (1904) ILR 28 Bom 209***.The object for which this provision (r 8) is enacted is really to facilitate the decision of questions in which a large body of persons are interested, without recourse to the ordinary procedure. In cases where the common right or interest of a community or members of an association or large sections is involved, there will be insuperable practical difficulty in the institution of suits under the ordinary procedure, where each individual has to maintain an action by a separate suit. Thus, to avoid numerous suits being filed for decision of a common question O 1, r 8 has come to be enacted. The nature of the claim whether it is a suit for declaration of a right, or an injunction or an act ion for money on contract or in tort is not very material in considering whether a suit could be filed in a simplified procedure of this rule. But it is the existence of a sufficient community of interest among the persons on whose behalf or against whom the suit is instituted that should be the governing factor in deciding whether the procedure under this rule could properly be adopted or not. This, of course, is subject to the essential condition that the interest of a person concerned has really been represented by the others; in other words, his interest has been looked after in a bona fide manner. If there be any clash of interests between the persons concerned and his assumed representative or if the latter due to collusion or for any other reason neglects out of malignance to defend the case, he cannot be considered to be a representative - ***Surayya Begum v. Mohd Usman, (1991) 3 SCC 114***.Whatever be the law in England and the interpretation placed on the terms of O 16, r 9 of the Supreme Court Rules by the judges there, it is considered that in India, where right of communities to own property are recognised, it is necessary that this Rule should receive an interpretation to subserve the practical needs of the situation - ***Kudia Gounder v. Velandi Gounde, AIR 1955 Mad 281***.But it is not obligatory to have recourse to this rule and an institution may be sued in the name of its managers - ***Mohant Bhagwanji v. Secretary of State, AIR 1930 PC 232***.This rule is an enabling provision which entitles one party to represent many who have a common cause of action; but it does not force any one to represent many if his act ion is maintainable without the joinder of the other persons - ***Surendra Kumar v. District Board, Nadiad, AIR 1942 Cal 360***.It presupposes that each one of the numerous persons by himself has a right of suit. If a person has himself no such right to sue he cannot be permitted to sue on behalf of others who suffer from the same disability - ***Surendra Kumar v. District Board, Nadiad, AIR 1942 Cal 360***.Accordingly, a student having obtained a transfer certificate from a college cannot prosecute a suit under this rule on behalf of other students as he cannot henceforth be said to continue to have the same interest - ***Stewart Science College v. Braja Sun Sunder, AIR 1969 Ori 137***.The scope of this provision was thus stated in ***L Ramaseshiah v. M Ramayya, AIR 1957 AP 964***.

Order 1, r 8, Code of Civil Procedure, is an enabling provision and does not compel anyone to represent many, if, by himself, he has a right of suit. This rule does not vest a right of suit in a person and if he, by himself, has no right to sue, he cannot proceed to sue on behalf of others by invoking the aid of O 1, r 8, Code of Civil Procedure. At the same time, O 1, r 8, Code of Civil Procedure, does not debar a member of the village community from maintaining a suit in his own right in respect of a wrong done to him though the act complained of may also be injurious to some other villagers.

Unlike s 91, Code of Civil Procedure 1908 (the Code of Civil Procedure), which confers a new right to sue for the removal of a public nuisance, this rule gives no new right to sue. But if a person has a right to suit in respect of a public nuisance, it does not override the right to sue under this rule in a representative capacity - ***Chandrawati v. Rameshwar, AIR 1968 Pat 326***.

For grant of permission under this rule the court has to see that the provisions of this rule is not misused by unscrupulous persons and no harm is inflicted on others. Thus in a suit for declaration filed by the plaintiffs for themselves and as representatives of villagers claiming that the suit properties are religious places, the plaintiffs did not claim any right for themselves. It was also found that no one except the defendants would be affected if decree is passed against them, and the interests of the temples alone would be affected, if the suit is dismissed and villagers as a whole would not be affected by the decree. The plea of the defendants that procedural formalities under O 1, r 8 were not strictly followed was rejected - ***Chinnasamy Naidu v. K. S. Sengoda Gounder, AIR 2004 Mad 370***.

The scope and object of this rule was discussed and explained by the Supreme Court in the undernoted case - ***Chairman, Tamil Nadu Housing Board v. T. N. Ganapathy, AIR 1990 SC 642***.It was observed by the court as follows:

"The provisions of O 1 r 8 have been included in the Code of Civil Procedure in the public interest so as to avoid multiplicity of litigation. The condition necessary for application of the provision is that the persons on whose behalf the suit is being brought must have the same interest. In other words either the interest must be common or they must have a common grievance which they seek to get redressed. The object for which O 1 r 8 is enacted is really to facilitate the decision of questions in which large number of persons are interested, without recourse to the ordinary procedure. The provisions must, therefore, receive an interpretation which will subserve the object of the enactment. There are no words in the rule to limit its scope to any particular category of suits or to exclude a suit in regard to a claim for money or for injunction."

Misjoinder of Parties

Order I, Rules 9 and 10 provide that in view of mis-joinder and non-joinder of parties, court may proceed and decide the case. However, the judgment/decree shall not be binding upon a non-party. A person claiming an independent title and possession adversely to the vendor is not a necessary party as a proper decree can be passed in his absence - ***Kasturi V. Iyyamperumal & Ors., AIR 2005 SC 2813.***

There would be misjoinder of parties if person having a separate cause of act ion file a suit jointly - ***Premchand v. State of Madhya Pradesh, AIR 1978 MP 173***,but it would not be so in a case where a plaintiff files a suit against more than one person and a common question of law or fact would arise if separate suits were filed - ***Nagamalai Thevar v. Pandaram, AIR 1977 Mad 347***.There is also no question of misjoinder where the suit is in respect of the entire land, though the defendants are in possession of separate portions of such land - ***Suresh Chandra v. Durlav Chandra, AIR 1968 Nag 36***.

In a particular case, an application for the correction of misdescription of the defendant in the plaint was allowed, the correction could not be incorporated in the plaint. However, the misdescription did not mislead any party. Infact, the written statement and the documents in appeal carried the correct name. It was held that the decree was valid - ***Patasibai v. Ratanlal, (1990) 2 SCC 42***.

A misjoinder or non-joinder of parties is not fatal to the suit - ***Janokinath v. Ramrunjan, (1879) ILR 4 Cal 949***.Where there is a misjoinder of parties, the name of the plaintiff or the defendant

who has been improperly joined may be struck out under r 10, sub-r (2) below, and the case may be proceeded with.

However, misjoinder and non-joinder of parties can sometimes lead to fatal consequences. In a proceeding for removal of trustees appointed by the registrar under the Madhya Pradesh Public Trusts Act 1951, it was held that the proceedings and order passed therein ought to have been dismissed for non-impleadment of either trust or trustees whose removal was sought for - ***Ghanshyam Prasad Kurmi Patel v. Yashwant Singh, AIR 2001 MP 68***.Suppression of material facts is another aspect which is taken very seriously by the courts. In one case, the respondent was granted occupancy rights under the Karnataka Land Reforms Act 1962 and the order became final and writ petition filed against it was dismissed. Subsequently, the appellant claiming occupancy right under Karnataka Certain Imams Abolition Act 1978 in respect of the same land filed a writ petition without impleading the respondent and without disclosing about the earlier order. It was held by the Supreme Court that the appellant cannot claim any bona fide's in not impleading the respondents or about nondisclosure of earlier order - ***Dattatreya v. Mahaveer, AIR 2004 SC 3362***.In an application for temporary injunction, the plea of injunction was based upon agreement between applicant and respondent which in its turn was based on representation made by a third. It was held that joining of the third respondent, who was a necessary party, would not make the suit bad for mis-joinder and the application cannot be dismissed on that account rendering the claim of other parties invalid - ***Manoharamma Hotels and Investments Pvt. Ltd. v. Aruna Hotels Ltd., AIR 2004 Mad 344***.

In a suit for recovery of loan, the defendant Insurance Company was impleaded as pro-forma defendant as thefactory of the loanee was insured with the said Company against loss by fire. The insurance claim had been repudiated by it and a complaint had been filed against it which was pending. It was held that the Defendant insurance company was just a proper party and not a necessary party and as such the suit cannot be said to be bad for mis-joinder - ***H.P. State Industrial Development Corporation Ltd. Shimla v. M/s Gobind Pharm Chem Pvt. Ltd., AIR 2007 HP 3.***

In ***Ranjeet Mal Vs General Manager, Northern Railway, New Delhi & Anr, AIR 1977 SC 1701***, the Apex Court considered a case where the writ petition had been filed challenging the order of termination from service against the General Manager of the Northern Railways without impleading the Union of India. The Apex Court held as under: “The Union of India represents the Railway Administration. The Union carries administration through different servants. These servants All represent the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petition was rightly rejected by the High Court.”

While considering the similar view in ***Chief Conservator of Forests, Government of A. P. V. Collector & Ors; (2003) 3 SCC 472***, the Supreme Court accepted the submission that writ cannot be entertained without impleading the State if relief is sought against the State. The Apex Court had drawn the analogy from Section 79 of the Code of Civil Procedure, 1908, which directs that the State shall be the authority to be named as plaintiff or defendant in a suit by or against the Government and Section 80 thereof directs notice to the Secretary of that State or the Collector of the district before the institution of the suit and Rule 1 of Order 27 lays down as to who should

sign the pleadings. No individual officer of the Government under the scheme of the constitution nor under the Code of Civil Procedure, can file a suit nor initiate any proceeding in the name and the post he is holding, who is not a juristic person.

The Court also considered the provisions of Article 300 of the Constitution which provide for legal proceedings by or against the Union of India or State and held that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be; in the case of the Central Government, the Union of India and in the case of State Government, the State, which is suing or is being sued. ***Refer to Tridip Kumar Dingal & Ors. V. State of West Bengal & Ors., (2009) 1 SCC 768).***

Rule 1 of Order 27 only deals with suits by or against the Government or by officers in their official capacity. It provides that in any suit by or against the Government the plaint or the written statement shall be signed by such person as the Government may, by general or special order, authorize in that behalf and shall be verified by any person whom the Government may so appoint. The Court further held as under: "It needs to be noted here that a legal entity – a natural person or an artificial person- can sue or be sued in his/its own name in a court of law or a tribunal. It is not merely a procedural formality but is essentially a matter of substance and considerable significance. That is why there are special provisions in the Constitution and the Code of Civil Procedure as to how the Central Government or the Government of a State may sue or be sued. So also there are special provisions in regard to other juristic persons specifying as to how they can sue or be sued. In giving description of a party it will be useful to remember the distinction between misdescription or misnomer of a party and misjoinder or non-joinder of a party suing or being sued. In the case of misdescription of a party, the court may at any stage of the suit/proceedings permit correction of the cause-title so that the party before the court is correctly described; however, a misdescription of a party will not be fatal to the maintainability of the suit/proceedings. Though, Rule 9 of Order 1 C.P.C. mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise, the suit or the proceedings will have to fail. Rule 10 of order 1 C.P.C. provides remedy when a suit is filed in the name of the wrong plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings."

The Court thus held that writ is not maintainable unless the Union of India or the State, as the case may be, impleaded as a party. Refer to ***Tridip Ku. Dingal & Ors. V. State of West Bengal & Ors., (2009) 1 SCC 768.***

In ***Bal Niketan Nursery School V. Kesari Prasad, AIR 1987 SC 1970; and Amit Kumar Shaw & Anr. V. Farida Khatoon & Anr., (2005) 11 SCC 403***, the Supreme Court held that a party can be impleaded at any stage of the proceedings including at the appellate forum.

A Full Bench of Kerala High Court in Kerala State represented by ***Chief Secretary to Government, Trivandrum V. General Manager, Southern Railway, Madras, AIR 1965 Ker 277*** held that suit is not maintainable if instituted against Railway Administration. The condition precedent for its maintainability is that it must be instituted against the Union of India.

In ***Smt.Saila Bala Dassi V. Smt Nirmala Sundari Dassi & Anr., AIR 1958 SC 394*** the Constitution Bench of the Supreme Court held that in exercise of the powers under Order 1 Rule

10 CPC or in exercise of its inherent jurisdiction the Court on an application or suo motu, if considered necessary, may implead a party at any stage. While deciding the said case, reliance was placed upon ***Vanjiappa Goundan V. N.P.V.L.R. Annamalai Chettiar & Ors., AIR 1940 Mad 69***.

A similar view has been reiterated by Apex Court in ***State of Kerala V. General Manager, Southern Railway, Madras, AIR 1976 SC 2538***. A Constitution Bench of Supreme Court in ***State of Punjab V. O.G.B., Syndicate Ltd, AIR 1964SC 669*** held that if relief is sought against the State, suit lies only against the State, but, it may be filed against the Government if the Government acts under colour of the legal title and not as a Sovereign Authority, e.g., in a case where the property comes to it under a decree of the court. The ***Rajasthan High Court in Pusha Ram V. Modern Construction Co. (P) Ltd, Kota AIR 1981 Raj 47***, held that to institute a suit for seeking relief against the State, the State has to be impleaded as a party. But mis-description showing the State as Government of the State may not be fatal and the name of party may be permitted to be amended, if such an application is filed. In ***Bhupendra Narayan Sinha Bahadur V. Rajeshwar Prasad Bhakat & Ors., AIR 1931 PC 162*** the Privy Council held that the Court has ample power to remove technical objections to remedy the defects under Order 1 Rule 10 CPC by adding the pro forma defendant as co-plaintiff. It can be done at the appellate stage also. Such a course should be adopted where it is necessary for a complete adjudication upon the question involved in the suit and to avoid multiplicity of proceedings.

A similar view has been reiterated in ***R.S. Maddanappa V. Chandramma & Anr., AIR 1965 SC 1812; Kiran Tandon V. Allahabad Development Authority & Anr., AIR 2004 SC 2006; Dalbir Singh & Ors. V. Lakhi Ram & Ors., AIR 1979 P & H 10; and Nishabar Singh V. Local Gurudwara Committee Manji Sahib, Karnal & Anr., AIR 1986 Pun 402***.

In ***Udit Narain Singh Malpaharia V. Additional Member Board of Revenue, Bihar AIR 1963 SC 786***, a Constitution Bench of the Supreme Court considered the issue as to who is a necessary party and held that a person who is directly affected or against whom relief is sought is a necessary party and in case the matter is decided without impleading him the judgment and order shall not be binding on him having been passed in violation of the principles of natural justice. Such a judgment or order cannot be effective one.

While considering the application for impleadment under Order 1, Rule 10, CPC, the Court must keep in mind that plaintiff is the sole architect of his plaint and he has a right to choose his own adversary against whom he seeks relief. Mere apprehension of any party that the plaintiff and defendant of the suit may collusively get their suit decided remains unfounded as whatever may be the judgment and order in a suit it cannot be binding on him as he was not a party in the suit. Such judgment or order shall have no legal effect so far as the person who is not a party in the case is concerned. Impleadment may be necessary to avoid multiplicity of the suit, but it cannot be the sole ground. Facts and circumstances of the case must show that unless a person is impleaded in the suit there is likelihood of further litigation in the same matter on the same issues. The plaintiff being the master of the suit cannot be compelled to file the same against whom he does not wish to fight and against whom he does not claim any relief. It is only in exceptional circumstances where the Court finds that the addition of a new party is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties it will added him as a party - ***Banarsi Dass Durga Prashad V. Panna Lal Ram Richhpal Oswal & Ors., AIR 1969 P & H 57; Arjan Singh & Ors., V. Kartar Singh & Ors,***

AIR 1975 P & H 184; Harbans Singh & Ors. V. E.R. Srinivasan & Anr., AIR 1979 Delhi 171; and Mohd. Farooq V. District Judge, Allahabad & Ors., AIR 1993 All. 8.

In ***Jaikaran Singh V. Sita Ram Agarwalla & Ors., AIR 1974 Pat. 364***, the Patna High Court examined a case where the landlord filed a suit for eviction of a tenant, the tenant pleaded that the title of the property has subsequently vested with a third party.

Therefore, the third party was a necessary party to the suit. The Court rejected the contention observing that the said person who claims title can file a separate suit for declaration of his title, but he cannot be arrayed as a party in a eviction suit. In ***M/s. Jayashree Chemicals Ltd. V. K. Venkataratnam & Ors, AIR 1975 Ori. 86,*** the Court held that it is not permissible that by moving an application under Order 1, Rule 10, CPC the nature of the suit can be changed. Therefore, in case of a plain and simple eviction suit if another person files an application claiming to have title over the suit property, it would amount to converting the simple suit for eviction into a suit for declaration of title. The said course would amount to substitute a new suit in place of old one.

In ***Chamiar Kunchelan V. Kandan Damodaran, AIR 1960 Ker. 284***, the suit was filed for recovery of arrears of rent. Another person filed an application for impleadment on the ground that he was in possession of half of the suit property as owner. The question arose as to whether the applicant was the owner or trespasser. The Court held that the suit had been filed for arrears of rent and it cannot be converted into a complicated title suit by addition of parties and to adjudicate upon title of the parties.

In ***Pravat Kumar Misra V. Prafulla Chandra Misra & Anr. , AIR 1977 Ori. 183***, a suit for eviction of tenant was filed and a person made an application claiming title over the suit property and thus applied for impleadment. The Court rejected the application on the ground that in the suit no relief has been claimed against the applicant nor his rights were to be determined therein and the judgment and order passed in the suit cannot adversely affect him as he was not the party to the suit. Therefore, he was not a necessary party. Refer to ***Vidhur Impex & Traders (P) Ltd. V. Tosh Investments (P) Ltd., (2012) 8 SCC 384.***

In ***Firm of Mahadeva Rice and Oil Mills & Ors. V. Chennimalai Goundar, AIR 1968 Mad. 287***, the Court held that unless the Court comes to the conclusion that the applicant is one for whose presence the question in the suit cannot be completely and effectively adjudicated upon, the question of his addition does not arise. Merely because impleadment would avoid multiplicity of suits and it would be convenient for purpose of trial application cannot be allowed as there are not relevant considerations. The Court has to restrict the case only for determining the real controversy between the parties and when it is found that the third party is necessary only then he may be impleaded.

In ***Motiram Roshanlal Coal Co.(P) Ltd. V. District Committee, Dhanbad & Ors, AIR 1962 Pat. 357***, the Court held that a plaintiff cannot be compelled to add a party against his wishes, and in spite of his protest to litigate against such a person against his choice. Merely because a person is indirectly interested in the suit property, he cannot become a necessary party. The Court must keep two principles in mind while considering such a question, i.e., (1) when the applicant ought to have joined as Plaintiff or defendant, and is not so joined, or (2) when without his presence the questions in the suit cannot be completely decided. The plaintiff is a dominus litus of his case. He cannot be forced to add a party against his wishes or a person against whom he had not claim for relief. Therefore, the Court must invariably take into account the wishes of the plaintiff

before adding a third person as a defendant to his suit claiming no relief against such third person. A person may be having interest in the property, but the plaintiff does not claim any relief. So he cannot be permitted to add it and the Court must keep in mind the issue as to whether there is anything in the suit which cannot be determined on account of his absence in the party array or whether there will be prejudice by his not being added. Person seeking impleadment should have a direct interest in the suit property. A third party cannot be allowed to enforce himself on the plaintiff to get his title decided when no such question arises between the parties to the litigation.

However, there cannot be any absolute bar to implead a person against the plaintiff's consent in a fit and proper case where the applicant is found to be a necessary party - ***Naba Kumar Hazra & Anr. V. Radhashyam Mahish & Ors., AIR 1931 PC 229; and Banarsi Dass Durga Prashad V. Panna Lal Ram Richhpal Oswal & Ors., AIR 1969 Punj. 57***.

In ***J.J. Lal Pvt. Ltd. & Ors. V. M.R. Murali & Anr., AIR 2002 SC 1061***, the Supreme Court held as under: "Both the sets of applications raise such controversies as are beyond the scope of these proceedings. This is a simple land-lord-tenant suit. The relationship of Municipal Corporation, with the Respondents and their mutual rights and obligations are not germane to the present proceedings. Similarly, the question of title between Hemlata Mohan and the respondents cannot be decided in these proceedings. The impleadment of any of the applicants would change the complexion of litigation and raise such controversies as are beyond the scope of this litigation. The presence of either of the applicants is neither necessary for the decision of the question involved in these proceedings nor their presence is necessary to enable the Court effectually and completely to adjudicate upon and settle the questions involved in these proceedings. They are neither necessary nor proper parties. Any decision in these proceedings would govern and bind the parties herein. Each of the two applicants is free to establish its own claims and title whatever it maybe in any independent proceedings before a competent forum…"

In ***Vijay Lata Sharma V. Rajpal & Anr., (2004) 6 SCC 762***, the Supreme Court considered the case where the proceeding for release of the premises under the provisions of Section 21 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 were pending and a person filed an application for impleadment on the ground of acquiring title on the basis of a will left by the owner before his death. The Court held that as the release of building had nothing to do with ownership of the suit premises, such a person was neither necessary nor a proper party and application for release would be decided without his presence. More so, the issue of title cannot be decided by the Prescribed Authority in those proceedings.

In ***Kasturi V. Iyyamperumal & Ors., AIR 2005 SC 2813***, during the pendency of the suit for specific performance of contract for sale, a third party claimed independent title and possession over the contracted property, and filed an application for impleadment. The Court held that such an application would enlarge the scope of the suit for specific performance of contract to the suit for title and possession. As the nature of the suit itself would change, the impleadment was not required. To decide the right, title and interest in the suit property of the third party to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be converted into a regular title suit. In case the nature and character of the suit is converted by impleadment, the application has to be rejected. The Court further held as under:- "… This addition, if allowed would lead to a complicated litigation by which trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all,

affect the right, title and interest of (applicants) in respect of the contracted property…… ((Plaintiff) is dominus litus and cannot be forced to add parties against whom he does not want to fight unless it is a compulsion of the rule of law. It is well settled that in a suit for specific performance of contract for sale, the lis between the appellant and respondent Nos. 2 and 3 shall only be gone into and it is also not open to the Court to decide whether the respondent nos. 1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against respondent Nos. 2 and 3 can only be adjudicated upon, and in such a list the Court cannot decide the question of title and possession of the respondent Nos. 1 and 4 to 11 relating to the contracted property."

While deciding the said case, a heavy reliance has been placed by the Court upon its earlier judgment in ***Vijay Pratap V. Sambhu Saran Sinha, AIR 1996 SC 2755*** wherein it was held that the scope of the suit cannot be enlarged by addition of a party and suit for specific performance cannot be converted into a suit for title and possession. In ***Sumtibai & Ors. V. Paras Finance Co. Regd. Partnership Firm, AIR 2007 SC 3166,*** the Apex Court held that if a party can show fair semblance of title and interest, he is entitled to make an application for impleadment.

In ***Sunil Gupta V. Kiran Girhotra & Ors., (2007) 8 SCC 506***, the Apex Court held that a probate can be granted only to an executor appointed by a Will. A transferee of a property during the pendency of such a proceeding is not a necessary party. Similar view has been reiterated by the Apex Court in ***Krishna Kumar Birla V. Rajendra Singh Lodha & Ors., (2008) 4 SCC 300; and Babulal Khandelwal & Ors. V. Balkishan D. Sanghvi & Ors., AIR 2009 SC 67***.

Order II, Rule 2 provides that Suit must include the whole claim. If a relief which could have been claimed is not claimed, party cannot claim it in a subsequent Suit - ***Mohd Khalil Khan V. Mahbub Ali Mian, AIR 1949 PC 78; and Alka Gupta V. Narendra Kumar Gupta (2010) 10 SCC 141***.

The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. One great criterion, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit, is whether the same evidence will maintain both actions. A Constitution Bench of Supreme Court in ***Gurubux Singh V. Bhooralal, AIR 1964 SC 1810***, held that even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata enshrined in Explanation IV to Section 11 and Order 2 rule 2 of the Code of Civil Procedure. In Order 2 rule 2 C.P.C., as has been explained, in unambiguous and crystal clear language by the Supreme Court in ***M/S D. Cawasji & Co. V. State of Mysore, AIR 1975 SC 813; Commissioner of Income Tax V. T.P. Kumaran, (1996) 10 SCC 561; Union of India & Ors. V. Punnilal & Ors., (1996) 11 SCC 112; Kunjan Nair Sivaraman Nair V. Narayanan Nair AIR 2004 SC 1761; and Sapan Sukhdeo Sable V. Assistant Charity Commissioner, AIR 2004 SC 1801***.

In ***Dalip Singh V. Maher Singh Rathee, (2004) 7 SCC 650***, the sine qua non for applicability of Order 2 Rule 2 C.P.C. is that a person entitled to more than one relief in respect of the same cause of action has omitted to sue for some relief without the leave of the Court. When an

objection regarding bar to filing of suit under Order 2 Rule 2 CPC is taken, it is essential for the court to know what exactly the cause of action is that had been alleged in the previous suit in order that it might be in a position to appreciate whether the cause of action alleged in the previous suit is identical to the present one.

Similar view has been reiterated in ***Swami Atmananda & Ors. V. Sri Ramkrishna Tapovanam, AIR 2005 SC 2392; N.V. Srinivasa Murthy & Ors. V. Mariyamma (Dead) by proposed L.Rs. & Ors., AIR 2005 SC 2897***; and ***Union of India V. H.K. Dhruv, (2005) 10 SCC 218***. In ***Sandeep Polymers (P) Limited V. Bajaj Auto Limited & Ors., (2007) 7 SCC 148***, the Apex Court held that this provision is directed to secure the exhaustion of the relief in respect of a cause of action and not to inclusion in one and the same action of different causes of action, even though they arise from the same transaction. The fresh suit is permissible to be filed in a court of competent jurisdiction in respect of a cause of action for which the original court did not have jurisdiction.

In ***Dadu Dayalu Mahasabha, Jaipur (Trust) V. Mahant Ram Niwas & Anr., 2008 AIR SCW 3324***, the Apex Court observed that even if the second suit has been filed in view of the observation made by the Supreme Court while dealing with an appeal against the order passed in first appeal, the trial Court has full power to reject the said plaint being barred by Order II Rule 2 or the provisions of Section 11 C.P.C.

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UNIT – 3

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Appearance & Non-appearance of Parties

Order 9 of CPC deals with the appearance of parties to the suit and the consequences of their non-appearance. It also provides a remedy for setting aside an order of dismissal of the suit as also the setting aside of an ex parte decree passed against the Defendant.

Order IX R.13 CPC

The aforesaid provisions read as under:

> "Setting aside decree ex-parte against Defendant - In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;
>
> Provided further that no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

It is evident from the above that an ex-parte decree against a defendant has to be set aside only if the party satisfies the Court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date and sufficient time to appear in the court.

The legislature in its wisdom, made the second proviso, mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein. "Sufficient Cause" is an expression which has been used in large number of Statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part, in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive".

However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously - ***Ramlal & Ors. V. Rewa Coalfields Ltd., AIR 1962 SC 361; Sarpanch, Lonand Grampanchayat V. Ramgiri Gosavi & Anr., AIR 1968 SC 222; Surinder Singh Sibia V. Vijay Kumar Sood, AIR 1992 SC 1540; Oriental Aroma Chemical Industries Limited V. Gujarat Industrial Development Corporation & Another, (2010) 5 SCC 459; and Parimal V. Veena@Bharti,(2011) 3 SCC 545.***

In ***Arjun Singh V. Mohindra Kumar & Ors., AIR 1964 SC 993***, the apex Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause". Also refer to ***Brij Indar Singh V. Lala Kanshi Ram & Ors., AIR 1917 P.C. 156; Manindra Land and Building Corporation Ltd. V. Bhutnath Banerjee & Ors., AIR 1964 SC 1336; and Mata Din V. A. Narayanan, AIR 1970 SC 1953***.

While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it - ***State of Bihar & Ors. V. Kameshwar Prasad Singh & Anr., AIR 2000 SC 2306; Madanlal V. Shyamlal, AIR 2002 SC 100; Davinder Pal Sehgal & Anr. V. M/s. Partap Steel Rolling Mills (P) Ltd. & Ors., AIR 2002 SC 451; Ram Nath Sao @ Ram Nath Sao& Ors. V. Gobardhan Sao & Ors., AIR 2002 SC 1201; Kaushalya Devi V. Prem Chand & Anr. (2005) 10 SCC 127; Srei International Finance Ltd., V. Fair growth Financial Services Ltd. & Anr., (2005) 13 SCC 95; and Reena Sadh V. Anjana Enterprises, AIR 2008 SC 2054***.

In order to determine the application under Order IX, Rule 13 CPC, the test which has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application - ***Parimal V. Veena @ Bharti, AIR 2011 SC 1150***.

Ex parte decree obtained fraudulently is not sustainable and is liable to be set aside - ***Kaushalya Devi V. Prem Chand & Anr., (2005) 10 SCC 127***. An application under Order 9 Rule 13 C.P.C. itself has all the ingredients of an application for condonation of delay, in making application. Therefore, a separate application under Section 5 of Limitation Act is not necessary - ***Bhagmal & Ors. V. Kunwar Lal & Ors. (2010) 12 SCC 159.***

Discovery & Inspection

Discovery means to compel the opposite party to disclose what he has in his possession or power. It is thus a compulsory disclosure by a party to an action of facts or documents on which the other side wishes to rely – Concise Oxford English Dictionary.

Discovery by interrogatories – Rules 1-11

Interrogatory means to ask questions or to make inquiry closely or thoroughly. The object and purpose of serving interrogatories is to enable a party to require information from his opponent for the purpose of maintaining his own case and for destroying the case of the adversary. Answering the interrogatory might often shorten the trial proceedings and save the time of the court and parties, besides saving expenses for summoning witnesses, documents and the like. This power must not be confined within narrow limits. It should be used liberally whenever it can shorten the litigation and serve the interests of justice. Nevertheless, the power is to be exercised with great care and caution so that it is not abused by any party. Interrogatories have to

be confined to the facts, which are relevant to the matters in question in the suit - ***P. Balan v. Central Bank of India, Calicut, AIR 2000 Ker 24***. Every party to a suit is entitled to know the nature of his opponents case, - ***Saunders v. Jones, (1877) Ch D 435***, so that he may know beforehand the case he has to meet at the hearing - ***Marriott v. Chamberlain, (1886) 17 QBD 154***. But he is not entitled to know the facts which constitute, exclusively, the evidence of his opponents case, the reason being that it would enable an unscrupulous party to tamper with his opponents witnesses, and to manufacture evidence in contradiction, and so shape his case as to defeat justice - ***Benbow v. Low, (1880) 16 CD 93.***

The nature of a Plaintiff's case is disclosed in his plaint. The nature of a Defendant's case is disclosed in his written statement. But a plaint or a written statement may not sufficiently disclose the nature of a party's case, and to make good the deficiency, either party may administer interrogatories in writing to the other through the court. Interrogatories may also be administered by a party to his opponent to obtain admissions from him to facilitate the proof of his own case. The party to whom interrogatories are administered must answer them in writing and on oath (r 8). This is called discovery by interrogatories. The party to whom the interrogatories are administered discovers or discloses by his affidavit, in answer to the interrogatories, the nature of his case.

These, administering of interrogatories must be encouraged as it is a means of getting admissions and tends to shorten litigation - ***Sutherland (Duke) v. British Dominions Land Settlement Corpn. Ltd., (1926) 1 Ch 746***. It is a valuable right of which a party should not lightly be deprived of - ***Ramlal Sao v. Tan Singh, AIR 1952 Nag 135.*** The fact that the party has other means of proving the fact in question is not a ground for refusing interrogatories - ***Jamaitrai Bishan Sarup v. Motilal Chamaria, AIR 1960 Cal 536.***

Where interrogatories were filed by the plaintiff and the order was passed by the Joint Registrar disallowing the interrogatories on the ground that defendant had filed some documents which were answer to interrogatories, it was held that the order was liable to be set aside. When the Joint Registrar was of the view that the interrogatories were relevant he should have asked the defendant to answer them on affidavit and thereafter he should have considered which of these the defendant should be compelled to answer. If an object is raised about irrelevancy or otherwise of the interrogatories the some may also be decided at that stage - ***Sharda Dhir v. Ashok Kumar Makhija, AIR 2003 Del 288.***

Discovery of Documents – Rules 12 – 14

Discovery is of two kinds, namely: (1) discovery of interrogatories; and (2) discovery of documents. Generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party? In other words, unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific documents? Rule 12 therefore enables a party without filing an affidavit to apply to the Court for the purpose of compelling his opponent to disclose the documents in the possession or power, relating to any matter in question in the suit – ***M. L. Sethi Vs. R. P. Kapur AIR 1972 SC 2379***.

Object

The object of this procedure is twofold – i. Firstly, to secure, as far as possible, the disclosure on oath of all material documents in possession or power of the opposite party under the sanction of penalties attached to a false oath; and ii. Secondly, to put an end to what might otherwise lead to a protracted enquiry as to the material documents actually in possession or power of the opposite party – **Rameshwar Narayan V. Rikhanath Koeri, AIR 1920 Pat 131.** Thus, this procedure **i)** elicits admissions, **ii)** Obviates necessity of leading lengthy evidence; and **iii)** Expedites trial of suits and thereby assists Courts in administration of justice.

Inspection of documents – Rules 15-19

Rules 15 to 19 deal with inspection of documents. For the purpose of inspection, documents may be divided into two classes: i) documents referred to in the pleadings or affidavits of parties; and ii) other documents in the possession or power of the party but not referred to in the pleadings of the parties.

As regards the first class of documents, a party to a suit is entitled to inspection. And without intervention of the Court every party may give notice in the prescribed form to the other party in whose pleadings they are referred to, to produce such documents for his inspection – ***Ram Sewak Vs. Hussain Kamil Kidwai, AIR 1964 SC 1249***. The party to whom such notice is given should, within ten days from the receipt of such notice, give notice to the party claiming such inspection, stating the time and place at which the documents may be inspected and stating his objections, if any, to the production of any of the documents. If he fails to do so, the Court may make an order of inspection.

As regards the second class of documents, the party desiring the inspection can only proceed by way of an application to the Court along with an affidavit satisfying the Court that the document is relevant to the case.

The primary object of Rules 15 to 19 of Order 11 is to place the opposite party in the same position as if the documents had been fully set out in his pleading or in the affidavit – Halsbury's Laws of England.

First Hearing

The expression 'first hearing' has not been defined in the Code. However, according to Section 3(3) of Karnataka Civil Rules of Practice, 1967 - 'first hearing' in relation to a suit means the date on which the Defendant is summoned to appear for settlement of issues or for final hearing and includes any other adjourned date for the above purposes.

The first hearing of a suit means the day on which the Court goes into the pleadings of the parties in order to understand their contentions. As stated above, the machinery of a Court is set in motion by the presentation of a plaint, which is at the first stage in the suit. The second stage is the filing of the Written Statement by the Defendant. The third important stage in suit is the framing and settlement of issued and the day on which such issues are framed is the hearing of the suit – ***Sangram Singh v. Election Tribunal, AIR 1955 SC 425***. In cases in which no issues need be framed, eg, a small cause suit, the first hearing would be the day on which the trial starts - ***Sangram Singh v. Election Tribunal, AIR 1955 SC 425***.

The hearing presupposes the existence of an occasion which enables the parties to be heard by the Court in respect of the cause. Hearing, therefore, should be first in point of time after the issues have been framed. The date of "first hearing of a suit" under CPC is ordinarily understood to be the date on which the Court proposes to apply its mind to the contentions raised by the

parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the "first hearing of the suit" prior to determining the points in controversy between the parties i.e. framing of issues does not arise. The words the "first day of hearing" does not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken - ***Ved Prakash Wadhwa V. Vishwa Mohan, AIR 1982 SC 816; Sham Lal (dead) by Lrs. V.Atma Nand Jain Sabha (Regd.) Dal Bazar, AIR 1987 SC 197; Siraj Ahmad Siddiqui V. Shri Prem Nath Kapoor, AIR 1993 SC 2525; M/s Mangat Singh Trilochan Singh thr. Mangat Singh (dead) by Lrs. & Ors. V. Satpal, AIR 2003 SC 4300; and Kanwar Singh Saini V. High Court of Delhi, JT 2011 (11) SC 544***.

Object

Order 10**,** Rule 1 provides that the Court shall, at the first hearing of the suit, ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or in the written statement, if any, of the opposite party. If the Court makes proper use of this provision, waste of time and money can be saved and the judge can proceed to decide the case more intelligently – ***Ram Kishan v. Ramjanki Shiva Parbati Maharaj, AIR 1952 All 355***.

Framing of Issues

Meaning of Issue

Issue means appoint in question; an important subject of debate, disagreement, discussion, argument or litigation – **Concise Oxford Dictionary.** An issue is a single, certain, and material point arising out of the allegations and contentions of the parties; it is a *matteraffirmed on one side and denied on the other*, and when a fact is alleged in the complaint and denied in the answer, the matter is then put in issue between the parties. - ***Federal Civil Procedure***. In other words, an issue is that which, if decided in favour of the Plaintiff, will in itself give a right to relief; and if decided in favour of the Defendant, will in itself be a defence – ***Howell v. Dering, (1915) I KB 54.***

Object of framing issues

The primary object of framing issues in a suit is to ascertain the controversy in the suit and the rival contentions between the parties. In ***J.K. Iron & Steel Co. Ltd. Vs. Mazdoor Union, AIR 1956 SC 231***, their Lordships of the Supreme Court said – "the only point of requiring pleadings and issues is to ascertain the real dispute between the parties, to narrow the area of conflict and to see just where the two sides differ."

Important Principles of Framing Issues

1. The Court should not frame an issue which doesn't arise out of the pleadings – ***AIR 1969 SC 1291***

2. Issues must be confined to the material questions of fact or law and not on subordinate facts or evidence by which material fact or law are proved or disproved – ***AIR 1971 MP 172***

3. One issue should cover only one fact or law in dispute between the parties – ***AIR 1964 Cal 209***

4. Courts can't refuse to decide the point on which, an issue has been framed and evidence led by the parties – ***(1969) 74 CWN 328***

5. Court can give judgment where parties are not at issue

Kinds of Issues

Rule 1 (4) enacts that issues are of two kinds: a) issues of fact; and b) issues of law. Issues however may be mixed issues of fact and law – ***Sree Meenakshi Mills Ltd. v. CIT, AIR 1957 SC 49.*** Rule 2(1) of Order 14 provides that where issues both of law and fact arise in the same suit, notwithstanding that a case may be disposed of on a preliminary issue, the Court should pronounce judgment on all issues. But if the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first, if that issue relates to i) the jurisdiction of the Court; or ii) a bar to the suit created by any law for the time being in force. For that purpose, the Court may, if it thinks fit, postpone the settlement of the other issues until the issues of law have been decided – Order 14, Rule 2 (2)

Order XIV Rule 1 of the Code of Civil Procedure reads:

"Issues arise when a material proposition of fact or law is affirmed by the party and denied by the other."

Therefore, it is neither desirable nor required for the court to frame an issue not arising on the pleadings. The Court should not decide a suit on a matter/point on which no issue has been framed - ***Raja Bommadevara Venkata Narasimha Naidu & Anr. V. Raja Bommadevara Bhashya Karlu Naidu & Ors., (1902) 29 Ind. App. 76 (PC); Sita Ram V. Radha Bai & Ors., AIR 1968 SC 535; Gappulal V. Thakurji Shriji Dwarkadheeshji & Anr., AIR 1969 SC 1291; and Biswanath Agarwalla V. Sabitri Bera, (2009) 15 SCC 693***.

Preliminary Issue

Order XIV Rule 2 requires the court to dispose of a case on a preliminary issue.

An issue relating to i) jurisdiction of the Court, or ii) bar to the suit created by law may be treated as preliminary issue.

In ***Smt. Tara Devi V. Sri Thakur Radha Krishna Maharaj, AIR 1987 SC 2085***, the Supreme Court considered a case as to whether the valuation made by the Plaintiff himself is taken to be correct on its face value and proceed with the trial. The Apex Court held that the court fee has to be paid in view of the provisions of the Court Fees Act, 1870 and the valuation by the plaintiff is ordinarily to be accepted; however, plaintiff does not have any absolute right or option to place any valuation whatsoever on such relief and where the plaintiff manifestly and deliberately under-estimates the relief, the Court is entitled to examine the correctness of the valuation given by the plaintiff and to revise the same if it is patently arbitrary or unreasonable. While deciding the said case, the Supreme Court placed reliance upon its earlier judgments in ***Sathappa Chettiar V. Ramanathan Chettiar, AIR 1958 SC 245***; and ***Meenakshisundaram Chettiar V. Venkatachalam Chettiar, AIR 1979 SC 989.***

In ***M/s Commercial Aviation & Travel Company & Ors. V. Mrs. Vimla Pannalal, AIR 1988 SC 1636,*** reiterating the same view, the Supreme Court held that the Court must accept plaintiff's valuation tentatively unless it is found demonstratively arbitrary. The Court observed as under:-

"But there may be cases under Section 7 (iv) (of the Court Fees Act, 1870 and the Suit Valuation Act, 1887) where certain positive objective standard may be available for the purpose of determination of the valuation of the relief. If there be materials or objective standards for the valuation of the relief, and yet the plaintiff ignores the same and puts an arbitrary valuation, the Court, in our opinion, is entitled to interfere under O. VII, Rule 11 (b) of the Code of Civil Procedure, for the Court will be in a position to determine the correct valuation with reference to the objective standards or materials available to it. .....in such a case, the Court would be competent to direct the plaintiff to value the relief accordingly..... The plaintiff will not be permitted to put an arbitrary valuation de hors such objective standards or materials..... The Plaintiff cannot choose a ridiculous figure for filing the Suit most arbitrarily where there are positive materials and/or objective standards of valuation of the relief appearing on the face of the plaint."

In ***Abdul Hamid Shamsi V. Abdul Majid, AIR 1988 SC 1150***, the Supreme Court considered a case under the provisions of the Court Fee Act and the Suit Valuation Act and held as under:-

"If a plaintiff chooses whimsically a ridiculous figure, it is tantamount to not exercising his right in this regard. In such a case it is not only open to the Court but it is its duty to reject such a valuation. The cases of some of the High Courts, which have taken a different view, must be held to be incorrectly decided."

Same view has been taken by the Calcutta High Court in ***Nalini Nath Mallik Thakur V. Radhashyam Marwari & Ors., AIR 1940 Cal. 482;*** and Patna High Court in ***Kishori Lal Marwari V. Kumar Chandra Narain Deo, AIR 1939 Pat. 572***.

In ***Smt. Cheina & Ors. V. Nirbhay Singh, 1997 (1) RLW 688***, the Court examined the scope of the provisions of O. 7 R. 11 of the Code and observed that if an objection is raised and the application under O. 7 R. 11 is filed, the Court is bound to decide such an application and if it appears to the Court that the valuation of the Suit is ex facie arbitrary or absurd and if the Court, after determination, comes to the conclusion that the Suit had been under-valued, it must direct the valuation to be amended or court fees to be paid in accordance with such valuation. Only in exceptional circumstances where it is not possible to determine the correctness of the valuation without taking evidence, the Court may not reject the plaint but keep the question open to be tried in the Suit. The Court further held that even if the application under O. 7 R. 11 of the Code has not been filed but valuation of the Suit has been objected in the written statement, as it is a pure question of law, the Court must treat it as a preliminary issue and decide it as such at the initial stage. Similar view has been taken in ***Jagdish Rai & Ors. V. Smt. Sant Kaur, AIR 1976 Del. 147***; and ***Resham Lal & Ors. V. Anand Sarup & Anr., AIR 1974 P&H 97***.

In ***Gauri Shanker V. Pukh Raj & Ors., 1989 (1) RLW 195***, this Court has held that an issue as to the jurisdiction of the court depending upon the valuation of the subject matter of the Suit, has to be tried as a preliminary issue.

In ***Panna Lal V. Mohan Lal & Ors., AIR 1985 Raj. 178***, the Court examined a similar issue under the Rajasthan Court Fee & Suit Valuation Act, 1961 and held that if the defendant pleads in his written statement that the subject matter of the Suit has not been properly valued, or that the court fees paid is not sufficient, questions arising on such plea shall be taken and decided before hearing of the Suit as contemplated by O. 14 of the Code. The Court further held that in Section 11 (2) of the Code, the Legislature has employed the word "plead" and it has further

been provided therein that all question arising out of such "pleas" shall be heard and decided before the hearing of the Suit as contemplated by O. 6 R. 1 of the Code.

In ***Ratan Lal V. Roshan Lal & Ors., 1986 RLR 248***, the Court, in a case similar to the case in hand, held that for the purpose of Rajasthan Court Fee & Suit Valuation Act, 1961, in a Suit for pre-emption, valuation should be on consideration for sale which preemptor seeks to avoid. The Court held that if the pre-emptor wants to avoid 'sale' and not 'consideration', the Suit should be valued on amount of consideration of sale mentioned in sale-deed or on market value of the property, whichever is less.

In ***Maj. S.S. Khanna V. Brig. F.J. Dillon, AIR 1964 SC 497***, the Supreme Court considered the issue regarding the maintainability of a Suit and held as under:-

"Under O. 14 R. 2 of the Code, where issues, both of law and of facts, arise in the same Suit and the court is of the opinion that the case or any part thereof may be disposed of on the issue of law only, it shall try those issues first, and for that purpose, may, if it thinks fit, postpone the settlement of issues of facts until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of facts may be exercised only where in the opinion of the court, the whole Suit may be disposed of on the issues of law alone. But the Code confers no jurisdiction upon the court to try the Suit on mix issues of law and facts as preliminary issues. Normally, all the issues in a Suit should be tried by the court, not to do so, especially when the decision on issues even of law depends upon the decision of issues of facts will result in a lope-sided trial of the Suit."

It may be pertinent to mention here that preliminary issue, which was sought to be tried first, was as to whether the Suit was not maintainable and the plaintiff was not entitled to institute as alleged in paragraphs Nos. 15, 16, 17 and 18 of the written statement ? Thus, it was not one of the issues for the decision of which the plaint had to be rejected. It was an issue of maintainability of Suit on the objections raised by the defendants.

In ***Amir Chand V. Harji Ram & Ors., 1986 RLR 985,*** the Court held that any issue of law, determination of which would dispose of the Suit itself, must be decided as the preliminary issue and in case the trial court has refused to do so, it would amount to committing material irregularity in exercise of its jurisdiction and the revisional Court must exercise its power and direct the trial court to decide the same as a preliminary issue.

Issue of deficit court-fee is to be decided as a preliminary issue - ***N.R. Govindarajan V. V.K. Rajagopalan & Ors., (2005) 12 SCC 362***.

In ***Ramesh B. Desai V. Bipin Vadi Lal Mehta, (2006) 5 SCC 638;*** and ***Balasaria Construction (P) Ltd. V. Hanuman Seva Trust, (2006) 5 SCC 658***, the Supreme Court held that the mixed question of fact and law cannot be adjudicated upon under Order 14 Rule 2. In case a plea of limitation is taken, it cannot be decided under the said provision de hors the facts involved therein as in each and every case, the starting point of limitation has to be ascertained unless it is clearly made out that the petition was barred merely by bare perusal of the pleadings.

Amendment of issues

After the amendment of 2002 in the Code of Civil Procedure, Order 14 Rule 5 which was deleted by earlier amendment, and brought back, the Courts again have wide powers to amend or strike out any issues framed at any stage before passing the decree. Further, the Court has been given

powers to amend or frame additional issues as may be necessary for determining the matters in controversy between the parties.

In ***Bhagwan and Ors. vs. Sachi Chandra Jain and Ors*** the MP High Court has laid down that ssues can be framed at any stage, and it is in fact the duty of the Court to frame issues at any stage if it comes to the conclusion that the correct issues have not been framed in the matter.

Rule 33 of Karnataka Civil Rules of Practice, 1967 gives the guidelines for the framing of issues:

1. Every material proposition of fact and every proposition of law which is affirmed by the one side and denied by the other, shall be made the subject of a separate issue.

2. Every issue of fact shall be framed as to indicate on whom the burden of proof lies.

3. Every issue of law shall be so framed as to indicate, either by a statement of admitted or alleged facts, or by reference to the pleadings or some document mentioned therein, the precise question of law to be decided.

4. No proposition of fact which is not itself a material proposition but relevant only as tending to prove a material proposition shall be made subject of an issue.

5. No question regarding admissibility of evidence shall be made subject of an issue.

Admissions

Meaning – "an admission is a statement oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned - ***Sec.27, Evidence Act, 1872***

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

Any statement or assertion made by a party to a case and offered against that party; an acknowledgment that facts are true. – ***Black's Law Dictionary***

Importance of Admissions

The importance of admission consists in the fact that either party may, at any stage of the suit, move for judgment on the admissions made by the other side (R.6). Once a fact is admitted, it becomes concluded and hence it is no longer open to the court to reopen it and reappraise the evidence - ***Bhawani Prasad v. Ram Deo, AIR 1975 All 37.*** If due execution of a hand-note is admitted by the defendant, the burden then is on him to show either satisfaction or want of consideration - ***Ram Pragas v. Gajendra Prasad, AIR 1976 Pat 92***.

As per the case of ***Bharat Singh & Anr vs Bhagirathi,***the Supreme Court held that:

Admissions are substantive evidence by themselves. But as per section 17 and section 21 of the Indian Evidence Act, they are not conclusive in nature. However, if admission is proved beyond doubt and duly proved, then irrespective of the fact if the witness appeared in the witness box or not, the admission can be considered admissible.

In the case of ***Biswanath v Dwarka Prasad***, the Apex Court observed that:

i. The admissions are made by the maker against himself unless otherwise proved or explained.

ii. The admissions are considered as *proprio vigore* that means a phrase which by its own force.

In another case of Supreme Court, ***Bhogilal Chunilal Pandya vs The State Of Bombay,*** it has been stated that even if admissions made are not communicated to the other person, then also that can be used against him. For example: if the person has written in the accounts book regarding debt, then if such evidence is available then that will be considered as an admission even if the debt was not communicated to other people.

Elements of admissions

The admissions are not conclusive. They can be gratuitous or erroneous. The admissions can be withdrawn or explained away. The inference regarding admission could be concluded after considering the pleadings in entirety. Admissions could be proved to be wrong. Oral admissions prevail over the record of rights, or documentary evidence. Admissions of the co-defendant cannot be allowed to be used as against the other defendants. The admissions made at any time can be proved to be collusive or fraudulent.

Different kinds of admissions

The object of obtaining admissions is to do away with the necessity of proving facts that are admitted.1 Admissions are of three kinds, namely,

(1) Admissions in pleading:

(i) actual, that is, those contained in the pleadings (O 7, R 5) or in answer to interrogatories (O 11, R 22).

(ii) constructive, that is, those which are merely the consequence of the form of pleading adopted (O 8, Rules 3, 4, 5).

(2) Admissions by agreement.

(3) Admissions by notice.

In a suit for the eviction of a tenant, the defendant proposed to examine certain witness, for proving that the lease was for manufacturing purpose. In order to avoid delay, the plaintiff landlord filed a memo, admitting the Defendant's plea, subject to the condition that arguments in the case should be heard on a particular day. The condition as to hearing the arguments was not fulfilled. It was held that the admission of the plaintiff was not binding on the Plaintiff at all.

An admission must either be accepted subject to the condition, or not at all - ***Kishan Chand v. Sayeeda Khatoon, AIR 1983 AP 253.***

But a statement relied on as an admission made in a pleading must be taken as a whole and not in parts - ***Ramsurat Devi v. Salraji Kaur, AIR 1975 Pat 168***. Thus, if a written statement incorporates an admission as to certain facts and also contains a denial of certain other facts the cumulative effect of the entire statement must be considered - ***Indermal v. Ramprasad, AIR 1970 MP 40.***

Affidavits

Meaning

Though the expression 'affidavit' has not been defined in the Code, it has been commonly understood to mean 'a sworn statement in writing made especially under oath or on affirmation

before an authorised officer or Magistrate' – ***M. Veerabhadra Rao v. Tek Chand, AIR 1985 SC 28***.

Stated simply, an affidavit is a declaration of facts, made in writing and sworn before a person having authority to administer oath. Every affidavit should be drawn up in the first person and should contain only facts and not inferences.

Essentials of an Affidavit

The essential attributes of an affidavit are:

i. It must be a declaration made by a person;
ii. It must relate to facts;
iii. It must be in writing;
iv. It must be in the first person; and
v. It must have been sworn or affirmed before a Magistrate or any other authorised officer.

Death, Marriage & Insolvency of Parties

Death of Parties

Order XXII deals with substitution of legal representatives and abatement of proceedings.

Order XXII Rule 3 provides that in case the application for substitution of the legal representatives of the deceased plaintiff/petitioner is not filed within the limitation prescribed by law, the suit/proceedings shall abate as against the said party.

Order XXII Rule 4 deals with the procedure in case of death of one or several defendants or sole defendant and fixes the period of limitation to bring an application for substitution of legal representatives of the deceased defendant, failing which proceedings would stand abated. In case there are several defendants and only one dies, the proceedings would not abate qua the other defendants.

Generally, a case abates against the person who is dead and substitution of his legal representative is not made. Setting aside abatement requires a specific order under Order 22 Rule 11 - ***Madan Nayak V. Mst. Handubal Devi, AIR 1983 SC 676***. But in a case where the decree appealed against is joint and inseverable, the entire appeal stands abated - ***N. Khosla V. Rajlakshmi, AIR 2006 SC 1249)***. While deciding the said case, the Apex Court considered and followed its earlier judgment in ***Sardar Amarjeet Singh Kalra V. Pramod Gupta, (2003) 3 SCC 272*** and distinguished its earlier judgment in ***Badni V. Sri Chand, AIR 1999 SC 1077***; ***Pandit Srichand V. Jagdish Prasad Kishan Chand, AIR 1966 SC 1427; and Ram Swarup V. Munshi, AIR 1963 SC 553***.

Sub-rule (4) thereof provides for exemption for substitution of the legal representatives where the defendants/respondents have not filed the written statement or failed to appear and contest the suit and in such eventuality, the judgment can be pronounced against the said defendant notwithstanding the death of such a Defendant and the judgment shall be enforceable, and have effect as if it had been pronounced before the death took place - ***Zahirul Islam V. Mohd. Usman & Ors. (2003) 1 SCC 476; and T. Gnanavel V. T.S. Kanagaraj & Anr. AIR 2009 SC 2367; and Budh Ram & Ors. V. Bansi & Ors., 2010(11) SCC 476***.

Sub–rule (5) of Rule 4 of Order 22 provides for condoning the delay in filing the substitution application of legal representatives of the deceased defendants in case the petitioner proves before the Court that he was ignorant about his death. Thus, the purpose is seeking extension of time limit for substitution of legal representatives in such a circumstance.

In ***Union of India V. Ram Charan, AIR 1964 SC 215***, the Apex Court observed as under:-

"The provisions of the Code are with a view to advance the cause of justice. Of course, the Court in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within the time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merit of the dispute between the parties and because if the abatement is set aside the merits of the dispute can be determined while if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement."

In ***State of Punjab V. Nathu Ram AIR 1963 SC 89***, while interpreting the provisions of Order XXII Rule 4(3) CPC read with Rule 11 thereof, the Apex Court observed that an appeal abates as against the deceased respondents where within the time limited by law no application is made to bring his heirs or legal representatives on record. However, whether the appeal stands abated against the other respondents also, would depend upon the facts of a case.

In ***Sri Chand V. M/s Jagdish Pershad Kishan Chand AIR 1966 SC 1427***, the Apex Court held that in case one of the respondents dies and the application for substitution of his heirs or legal representatives is not filed within the limitation prescribed by law, the appeal may abate as a whole in certain circumstances and one of them could be that when the success of the appeal may lead to the courts coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it will lead to the court passing a decree which may be contradictory and inconsistent to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent in the same case.

In ***Ramagya Prasad Gupta & Ors. V. Brahmadeo Prasad Gupta & Anr. AIR 1972 SC 1181***, the Supreme Court examined the same issue in a case of dissolution of a partnership firm and accounts and placed reliance upon two judgments referred to immediately hereinabove and held as under:

"16. …The courts will not proceed with an appeal when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests…….are not cumulative tests. Even if one of them is satisfied, the court may dismiss the appeal".

In ***Sardar Amarjit Singh Kalra & Ors. V. Pramod Gupta & Ors. AIR 2003 SC 2588***, a Constitution Bench of the Apex Court, while dealing with the similar issue, has after considering its large number of judgments reached the following conclusion :-

"(a) In case of "Joint and indivisible decree", "Joint and inseverable or inseparable decree", the abatement of proceedings in relation to one or more of the appellant(s) or respondent(s) on account of omission or lapse and failure to bring on record his or their legal representatives in time would prove fatal to the entire appeal, and require to be dismissed *in toto* as otherwise inconsistent or contradictory decrees would result and proper reliefs could not be granted, conflicting with the one which had already become final with respect to the same subject matter vis-a-vis the others;

(b) the question as to whether the Court can deal with an appeal after it abates against one or the other would depend upon the facts of each case and no exhaustive statement or analysis could be made about all such circumstances wherein it would or would not be possible to proceed with the appeal, despite abatement, partially;

(c) existence of a joint right as distinguished from tenancy in common alone is not the criteria but the joint character of the decree, de hors the relationship of the parties inter se and the frame of the appeal, will take colour from the nature of the decree challenged;

(d) where the dispute between two groups of parties centered around claims or based on grounds common relating to the respective groups litigating as distinct groups or bodies -- the issue involved for consideration in such class of cases would be one and indivisible; and

(e) when the issues involved in more than one appeals dealt with as group or batch of appeals, which are common and identical in all such cases, abatement of one or the other of the connected appeals due to the death of one or more of the parties and failure to bring on record the legal representatives of the deceased parties, would result in the abatement of all appeals."

The Court further observed that any relief granted and the decree ultimately passed, would become totally unenforceable and mutually self-destructive and unworkable vis-à-vis the other part, which had become final. The appeal has to be declared abated in toto. It is the duty of the court to preserve and protect the rights of the parties.

In ***Shahazada Bi & Ors. V. Halimabi AIR 2004 SC 3942***, the Supreme Court considered the same issue and held as under :-

"……That, so far as the statute is concerned, the appeal abates only qua the deceased respondent, but the question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject matter. The Court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties."

Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the defendants/respondents would abate the appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-à-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test - ***Budh Ram & Ors. V. Bansi & Ors., 2010 (9) SCR 674***.

Order XXII Rule 6 is an exception as it provides that there shall be no abatement of the proceedings in case the death occurs of either of the parties where the cause of action survives or not after the hearing of the case stands concluded. However, the judgment has not been pronounced, and in such a case, it cannot be held that the judgment is in favour of a dead person.

It is settled law that once after hearing the arguments in a case judgment is reserved, no application can be entertained - ***Arjun Singh V. Mohindra Kumar, AIR 1964 SC 993***; ***N.P. Thirugnanam (D) by L.Rs. V. Dr. R. Jagan Mohan Rao & Ors., AIR 1996 SC 116; Neki V. Satnarain, AIR 1997 SC 1334.***

In ***N.P. Thirugnanam (D) by L.Rs. V. Dr. R. Jagan Mohan Rao & Ors., AIR 1996 SC 116***, the Supreme Court explained the scope of the provisions of Order 22, Rule 6 holding that if the defendant dies after the conclusion of the arguments and the judgment had been reserved, the proceedings shall not abate and the decree against the dead person shall be executed.

Order XXII Rule 10 A This provision was inserted by amendment in 1976 and provided for obligation on the part of the lawyer appearing for a party to inform the Court about the death of his client, and the Court shall thereupon give a notice of such death to the other party. In such a case there may be delay in bringing the application for substitution of L.Rs. and the Court may take lenient view taking into consideration the date of knowledge of the death by the party filing an application for condonation of delay.

In ***Gangadhar V. Raj Kumar, AIR 1983 SC 1202***, the Apex Court held that refusal to set aside abatement without considering Order 22 Rule 10A of the Code is not justified.

A similar view has been reiterated by the Apex Court in ***Minati Sen @ Smt. D.P. Sen V. Kalipada Ganguly & Ors., AIR 1997 Cal.386***.

In ***P. Jesaya (Dead) by L.Rs. V. Sub Collector & Anr., (2004) 13 SCC 431*** the Apex Court considered a case where the pleader of the deceased respondent did not inform the Court about the death of the respondent and conclude the final arguments. The Court rejected the contention that matter stood abated for the reason that there was a serious recklessness on the part of pleader to inform the Court about the death of his client which he failed to discharge. Therefore, his L.Rs. were bound by the judgment and the matter could not stand abated. In ***Chaukas Ram V. Duni Chand (Dead) by proposed L.Rs., (2004) 13 SCC 567,*** the Supreme Court held that application for substitution of L.Rs. can be filed within reasonable time from the date of reporting of the death of the other side to the Court.

Marriage of Party

The marriage of a female Plaintiff or Defendant shall not cause the suit to abate. Where the decree is passed against a female Defendant, it may be executed against her alone – ***Madan Naik v. Hansubala, AIR 1983 SC 676***. A decree in favour of or against a wife, where the husband is legally entitled to the subject-matter of the decree or is liable for the debt of his wife may, with the permission of the Court, be executed by or against him – Rule 7 (2)

Insolvency of Party

Insolvency of Plaintiff – the insolvency of a Plaintiff shall not cause the suit to abate and can be continued by his Assignee or Receiver for the benefit of his creditors. But if the Assignee or Receiver declines to continue the suit, or to give security for costs, as ordered by the Court, the Court may, on the application of the Defendant, dismiss the suit on the ground of the Plaintiff's insolvency. The Court may also award the Defendant costs for defending the suit, to be paid as a debt against the Plaintiff's estate – Rule 8.

Insolvency of Defendant – Rule 8 does not apply where the Defendant becomes an insolvent. In such cases, the Court may stay the sui or proceeding pending against the Defendant who has been adjudged an insolvent – ***Kala Chand Banerjee v. Jagannath Marwari, AIR 1927 PC 108***. Rule 10 will also apply in those cases and a receiver will become a representative of the Defendant-debtor.

Withdrawal & Compromise of Suits

Order XXIII Rule 1 deals with withdrawal and adjustment of Suits. It permits a person to withdraw the Suit, but he shall not be entitled to maintain another suit unless he has taken the leave of the Court while withdrawing the earlier suit.

The Supreme Court time and again held that even if the earlier writ petition has been dismissed as withdrawn, Public Policy, which is reflected in the principle enshrined in order XXIII Rule 1 C.P.C., mandates that successive writ petition be not entertained for the same relief.

In ***Hulas Rai Baij Nath V. Firm K.B. Bass & Co., AIR 1968 SC 111***, the Apex Court considering the provision of Order XXIII, Rule 1 of C.P.C., and particularly, sub-rule (3) thereof in crystal clear words held that where plaintiff withdraws from a suit without the permission of the Court to file a fresh, he is precluded from instituting a fresh suit in same subject matter against the same parties.

In ***Sarguja Transport Service V. State Transport, AIR 1987 SC 88***, the Apex Court held as under:-

".....The principle underlying R.1 of O. XXIII of the Code, is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. beneficium non datur. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of R. 1 O. XXIII. The principle underlying the above rule is founded on public policy, it is not the same as the rule of res judicata contained in S. 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in

a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of R. 1 of O. XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the Court.....

.....It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition....."

In ***M/s. Upadhyay & Co. V. State of U.P. & ors., AIR 1999 SC 509***, the Apex Court has emphasized to apply the principle enshrined under Order XXIII Rule 1 C.P.C., being based on public policy, in all the Courts' proceedings. The Apex Court held that the principle was applicable also in case of filing the special leave petition before the Apex Court under Article 136 of the Constitution. It was further clarified by the Court that liberty to file a fresh suit can be granted only in certain contingencies as provided under the said provision.

A Division Bench of the Allahabad High Court in ***Khacher Singh V. State of U.P. & Ors., AIR 1995 All 338***, considered the issue at length and interpreted the provisions of Rule 7 of Chapter XXII of the Allahabad High Court Rules, 1952 which bar the filing of the second writ petition on the same cause of action and held that the second petition for the same cause of action not to be maintainable. Other Division Benches in ***L.S. Tripathi V. Banaras Hindu University & Ors., (1993) 1 UPLBEC 448; and Saheb Lal V. Assistant Registrar (Administration), Banaras Hindu University, Varanasi & Ors., (1995) 1 UPLBEC 31***, held that filing successive writ petitions for the same cause of action is not only against the public policy, but also amounts to abuse of the process of the Court.

A Division Bench of Rajasthan High Court in ***Radhakrishna & Anr. V. State of Rajasthan & ors., AIR 1977 Raj 131*** has observed that undoubtedly, the Code of Civil Procedure does not apply to the writ jurisdiction, but the principles enshrined in its provision can be made applicable so far as they are in consonance with the rules framed by the High Court or where the rules are silent and applying the provisions of Order XXIII, Rule 1 in writ jurisdiction as similar provisions existed in the Rajasthan High Court Rules, putting an embargo to file a successive writ petition for the same cause of action, observed that the Court can permit a party to withdraw the petition with liberty to file a fresh one, but that power is subject to the conditions prescribed in the provisions of Order XXIII, Rule 1 of the Code and not beyond it.

In ***Baniram & Ors. V. Gaind & ors., AIR 1982 SC 789***, the Apex Court held that permission to withdraw a case with liberty to file afresh on the same cause of action can be granted, provided it is in the interest of justice or advances the cause of justice. The right to withdraw a suit or abandonment of the whole or a part of claim is not absolute. Such right cannot be exercised to abuse the process of the Court or play fraud upon the party as well as upon the Court. Therefore,

it is necessary that if a person wants to approach the Court again, he must seek liberty of the Court to file a fresh petition. Even the Court cannot grant a permission to withdraw a petition straightaway, as it has to consider and examine as to whether any right has been accrued in favour of any other person.

While considering the oral prayer or application for withdrawal of a petition the Court has to bear in mind that the act of the party should not be to defeat a right accrued in favour of any other person or the prayer was to over reach the Court. However, the prayer may be granted in order to remove the public inconvenience or when the petitioner does not want to press the petition - ***Shaik Hussain & Sons V. M.G. Kanniah & anr., AIR 1981 SC 1725; and Smt Madhu Jajoo V. State of Rajasthan & ors., AIR 1999 Raj 1).***

Order XXIII, Rule 1 of the Code does not confer an unbridled power upon the Court to grant permission to withdraw the petition, with liberty to file afresh, on the same cause of action; it can do so only on the limited grounds mentioned in the provision of Order XXIII, Rule 1 of the Code, and they are, when the Court is satisfied that the sui must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject matter, and that too, on such term as the Court thinks fit. The grounds for granting a party permission to file a fresh suit, including a formal defect, i.e., in the form or procedure not affecting the merit of the case, such as also of statutory notice, under Section 80 of the Code, mis-joinder of the parties or cause of action, non-payment of proper Court -fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject matter of the suit, absence of territorial jurisdiction of the Code or defect in prayer clause etc. Non-joinder of a necessary party, omission to substitute heirs etc. may also be considered in this respect, or where the suit was found to be premature, or it had become infructuous, or where relief could not be, and where the relief even if granted, could not be executed, may fall within the ambit of sufficient ground mentioned in that provision - ***Ms. Kankan Trading Co. V. Suresh Govind Kamath Tarkas & Ors., AIR 1986 SC 1009; Muktanath Tewari & Anr. V. Vidyashanker Dube & Ors., AIR 1943 All 67; and Ramrao Bhagwantrao Inamdar & Anr. V. Babu Appanna Samage & Ors., AIR 1940 Bom. 121 (F.B.).***

In ***Dankha Devi Agarwal V. Tara Properties (P) Ltd. AIR 2006 SC 3068***, the order of withdrawal was obtained by fraud as the plaintiff never authorised the counsel to sign the application/affidavit and it was obtained by forging her signature, the Court held that the order of withdrawal was illegal.

In ***Kandapazha Nadar V. Chitraganiammal, (2007) 7 SCC 65***, the Apex Court held that when Court allows the suit to be withdrawn without liberty to file a fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree, and it cannot debar the petitioner from taking the defence in 2nd round of litigation.

Such order does not constitute a decree under Section 2 (2) of the Code. It is the provision to sub-rule (3) of Rule 1 of Order 23 (like that in Rule 9 of Order 9) and not in principles of res judicata that precludes the plaintiff in such a case from bringing a fresh suit in respect of the same matter. Also refer to ***Sneh Gupta V. Devi Sarup & Ors., (2009) 6 SCC 194***.

The Court can grant such permission even suo motu without any application. The granting of permission to withdraw a suit with liberty to file a fresh suit removes the bar of res judicata; it restores the plaintiff to the position, which he would have occupied had he brought no suit at all.

Order 23 Rule 1 CPC does not apply where a second suit has been filed during the pendency of the first suit. In such a case permission / liberty to file a fresh suit is not required - ***P.A. Muhammed V. The Canara Bank & Anr., AIR 1992 Ker. 85; Hari Basudev V. State of Orissa & Ors., AIR 2000 Ori. 125; and Vimlesh Kumari Kulshrestha V. Sambhajirao & Anr., (2008) 5 SCC 58.***

Order XXIII Rule 1(5) - The courts have consistently held, that a suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the court may pass such an order. If the court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction - ***Mt. Ram Dei v. Mt. Bahu Rani, AIR 1922 Pat. 489; Mt. Jaimala Kunwar & Anr. v. Collector of Saharanpur & Ors., AIR 1934 All. 4; The Asian Assurance Co. Ltd. v. Madholal Sindhu & Ors., AIR 1950 Bom; and Bhagwati Developers Private Ltd. v. The Peerless General Finance Investment Co. Ltd. & Ors. AIR 2013 SC 1690***.

Order XXIII Rule 3 provides for compromise of a Suit.

After the institution of the suit, it is open to the parties to compromise, adjust or settle it by an agreement or compromise – ***Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan, AIR 1968 SC 1087.*** The general principle is that all matters which can be decided in a suit can also be settled by means of a compromise – ***K.K. Chari v. R.M. Seshadri, AIR 1973 SC 1311.***

Rule 3 of Order 23 lays down that i) where the Court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement in writing and signed by the parties; or ii) where the Defendant satisfies the Plaintiff i.r.o. the whole or any part of the subject-matter of the suit, the Court shall record such agreement, compromise or satisfaction and pass a compromise decree accordingly.

However, consent decree cannot be passed in contravention of the law - ***Nagindas Ramdas V. Dalpatram Iccharam @ Brijram & Ors., AIR 1974 SC 471; C.F. Angadi V. Y.S. Hirannayya, AIR 1972 SC 239; State of Punjab & Ors. V. Amar Singh & Anr., AIR 1974 SC 994; and Smt Nai Bahu V. Lala Ramnarayan, AIR 1978 SC 22.***

However, in the proceedings under Order 23, Rule 1, third party's right cannot be set at naught by a consent order - ***Ram Chandra Singh V. Savitri Devi, (2003) 8 SCC 319***.

Where a decree is passed on compromise of the parties, it can still be said to be a judgment and decree on facts and the Court has a power to make changes in the compromise agreement. It is binding on the parties - ***Jineshwardas V. Jagrani, AIR 2003 SC 4596; Rajasthan Financial Corporation V. Man Industrial Corporation Ltd., (2003) 7 SCC 552; Dr. Renuka Datla V. Solboy Pharmaceutical Y.B., (2004) 1 SCC 149; and Jamshed Hormusji Wadia V. Board of Trustees, Port of Mumbai, AIR 2004 SC 1815***.

Where the case is decided after considering the rival submissions on issues, the case cannot be of a consent decree - ***Manager, RBI V. S. Mani, AIR 2005 SC 2179***.

In ***Dhanakha Devi Agarwal V. Tara Properties Pvt. Ltd., AIR 2006 SC 3068,*** the Apex Court held that if the proceedings have been withdrawn playing fraud upon the Court, it should be recalled and matter should be reheard and decided on merit. Also refer to ***Vimlesh Kumari Kulshrestha V. Sambhajirao & Anr., (2008) 5 SCC 58; and Ghulam Nabi Dar v. State of J & K, AIR 2013 SC 2950.***

Judgment & Decree

Meaning

Judgment means the statement given by a Judge of the grounds of a decree or order – Sec.2(9)

Essentials

The essential elements of a judgment is that there should be a statement for the grounds of the decision – ***Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099.*** Every Judgment other than that of a Court of small causes should contain i) a concise statement of the case ii) the points for determination; iii) the decision there; and iv) the reasons for such decision. A judgment of a Court of small causes may contain only points ii) and iii). Sketchy orders which are not self-contained and cannot be appreciated by an appellate or revisional Court without examining All the records are, therefore, unsatisfactory and cannot be said to be judgments in that sense.

As the Supreme Court in ***Balraj Taneja Vs. Sunil Madan, AIR 1999 SC 3381,*** a Judge cannot merely say 'suit decreed' or 'suit dismissed'. The whole process of reasoning has to be set out for deciding the case one way or the other Even the Small Causes Court's judgments must be intelligible and must show that the Judge has applied his mind. The judgment need not, however, be a decision on All the issues in a case. Thus, an order deciding a preliminary issue in a case eg. Constitutional validity of a State is a judgment.

Conversely, an order passed by the Central Administrative Tribunal cannot be said to be a judgment, even if it has been described as such – ***State of TN v. S. Thangavel, AIR 1997 SC 2283.*** Similarly, the meaning of the term 'judgment' under the Letters Patent is wider than the definition of 'judgment' under the CPC – ***Shah Babulal v. Jayaben D. Kania, AIR 1981 SC 1786.***

Decree

Meaning - "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

Essential elements of a Decree

In order that a decision of a Court may be a 'decree', the following elements must be present – ***Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099.***

i. There must be an adjudication;
ii. Such adjudication must have been done in a suit;
iii. It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
iv. Such determination must be of a conclusive nature; and
v. There must be a formal expression of such adjudication.

Illustration decisions which are decrees:

i. Order of abatement of suit;
ii. Dismissal of appeal as time barred;
iii. Dismissal of suit or appeal for want of evidence or proof;
iv. Rejection of plaint for non-payment of Court fees;
v. Granting or refusing to grant costs or instalment;
vi. Modification of scheme under Sec.92 of the Code;
vii. Order holding appeal is not maintainable;
viii. Order holding that the right to sue does not survive;
ix. Order holding that there is no cause of action;
x. Order refusing one of several reliefs.

Illustrative decisions which are not decrees:

i. Dismissal of appeal for default;
ii. Appointment of Commissioner to take accounts;
iii. Order of remand;
iv. Order granting or refusing interim relief;
v. Return of plaint for presentation to proper Court;
vi. Dismissal of suit under Order 23 Rule 1;
vii. Rejection of application for condonation of delay;
viii. Order holding an application to be maintainable;
ix. Order refusing to set aside sale;
x. Order directing assessment of mesne profits.

Types of Decrees

The Code of Civil Procedure recognises the following classes of decrees:

i. Preliminary Decree
ii. Final Decree
iii. Partly preliminary and partly final decree.

i. Preliminary Decree – Where an adjudication decides the rights of the parties with regard to All or any of the matters in controversy in the suit, but does not completely dispose of the suit, it is a preliminary decree. A preliminary decree is passed in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hands for the time being, until it is in a position to pass a final decree in the suit. In other words, a preliminary decree is only a stage in working out the rights of the parties which are to be finally adjudicated by a final decree – ***Mool Chand v. Director, Consolidation, AIR 1995 SC 2493***.

The Code provides for passing of preliminary decrees in the following suits:

i. Suits for possession and mesne profits
ii. Administration suits
iii. Suits for pre-emption
iv. Suits for dissolution of partnership
v. Suits for accounts between principal and agent
vi. Suits for partition and separate possession
vii. Suits for foreclosure of a mortgage
viii. Suits for sale of mortgaged property
ix. Suits for redemption of a mortgage

ii. Final Decree – A decree may be said to be final in two ways:

i. When within the prescribed period no appeal is filed against the decree or the matter has been decided by the decree of the highest Court; and
ii. When the decree, so far as regards the Court passing it, completely disposes of the suit – ***Shankar v. Chandrakant, AIR 1995 SC 1211***;

A final decree is one which completely disposes of a suit and finally settles All questions in controversy between parties and nothing further remains to be decided thereafter.

Thus in a suit for recovery of money, if the amount found due to the Decree-Holder is declared and the manner in which the amount is to be paid has also been laid down, the decree is a final decree. Similarly, a decree passed for a sum representing past mesne profits and future mesne profits at a particular rate, without directing any further enquiry is a final decree. Thus, where a decree passed by a special Court did not contemplate any further proceedings, the decree, even though described as a preliminary decree, in substance was a final decree.

Ordinarily, there will be one preliminary decree and one final decree in one suit – ***Babburu Basavayya V. Babburu Guruvayya, AIR 1951 Mad 938 (FB).***

iii. Partly preliminary and partly final decree

A decree may be partly preliminary and partly final, e.g., in a suit for possession of immovable property with mesne profits, where the Court: a) decrees possession of the property; and b) directs an enquiry into the mesne profits.

The former part of the decree is final, while the latter part is only preliminary because the final decree for mesne profits can be drawn only after enquiry, and the amount due is ascertained. In such a case, even though the decree is only one, it is partly preliminary and partly final – ***Lucy Kochuvareed v. P. Mariappa Gounder, AIR 1979 SC 1214***.

Execution

Execution is the last stage of any civil litigation. There are three stages in litigation -

a. Institution of litigation,
b. Adjudication of litigation,
c. Implementation of litigation.

This implementation of litigation is also known as execution. Decree means operation or conclusiveness of judgment. A decree will be executed by the court which has passed the

judgment. In exceptional circumstances, the judgment will be implemented by other court which is having competency in that regard. Execution enables the decree-holder to recover the fruits of the judgment.

Meaning

The term "execution" has not been defined in the code. The expression "execution" simply means the process for enforcing or giving effect to the judgment of the court. The principles governing execution of decree and orders are dealt with in Sections 36 to 74 and Order 21 of the Civil Procedure Code. Hon'ble Apex Court in ***Ghanshyam Das v. Anant Kumar Sinha AIR 1991 SC 2251*** dealing with provision of the code relating to execution of decree and orders, observed in following words - "so far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all aspects. The numerous rules of Order 21 of the code take care of different situations providing effective remedies not only to Judgment-Debtors and Decree-Holders but also to claimant objectors, as the case may be."

Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realize the fruits of the decree and judgment passed by the competent Court in his favour. The execution is complete when the decree-holder gets money or other thing awarded to him by the judgment, decree or order of the Court.

Order XXI of the CPC is the lengthiest order provides detailed provisions for making an application for execution and the manner that, how they are to be entertained, dealt with and decided. Execution is the enforcement of a decree by a judicial process which enables the Decree-Holder to realize the fruits of the decree passed by the competent Court in his favour. All proceedings in execution commence with the filing of an application for execution. Such application should be made to the Court who passed the decree or where the decree has been transferred to another Court, to that Court. Once an application for Execution of decree is received by the Court, it will examine whether the application complies with the requirements of Rules (11 to 14). If they are complied with, the Court must admit and register the application.

Application for Execution of Decree: All proceedings in execution commence with the filing of an application for Execution.

The following persons may file an application for execution:

i. Decree-holder.
ii. Legal Representatives of the decree-holder, if the decree-holder is dead.
iii. Representative of the decree-holder.
iv. Any person claiming under the decree-holder.
v. Transferee of the decree-holder, if the following conditions are satisfied namely,
   (a) The decree must have been transferred by an assignment in writing or by operation of law;
   (b) The application for execution must have been made to the court which passed the decree; and
   (c) Notice and opportunity of hearing must have been given to the transferor and the judgment-debtor in case of assignment by transfer.
vi. One or more of the joint decree-holders, provided the following conditions are satisfied namely,

(a) The decree should not have imposed any condition to the contrary;
(b) The application must have been made for the execution of the whole decree; and
(c) The application must have been made for the benefit of all the joint decree-holders.

vii. Any person having special interest.

Procedure on Receiving Application

a) Admission – Rule 17

Rule 17 prescribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the Court to ascertain whether the execution application complies with the requirements of rules 11 to 14. If they are not complied with, the Court shall allow the defect to be remedied then and there or within a time fixed by it. If the defect is not remedied within that period, the Court shall reject the application. The provisions of this Rule are procedural and they should be interpreted liberally – ***Jiwani v. Rajmata Basantika Devi AIR 1994 SC 1286***.

b) Hearing of application – rules 105-106

Rules 105 provides that the Court before which an application is pending may fix a date for hearing of such application. When the application is called out for hearing and the applicant is not present, the Court may dismiss the application. On the other hand, if the applicant is present and the opposite party is not present, the Court may hear the application ex parte and pass such order as it thinks fit.

Rule 106 lays down that if the application is dismissed for default or an ex parte order is passed under Rule 105, then the aggrieved party may apply to the Court to set aside such order. The Court shall set aside such order if sufficient cause if shown. An order rejecting an application under Rule 106 (1) is appealable – Order 43 Rule 1(ja)

c) Notice of execution – Rule 22

Rule 22 provides for the issue of show-cause notices to persons against whom execution is applied for in certain cases. As a general rule, the law does not require any notice to be issued for execution.

In the following cases, however, such notices must be issued:

i. Where an application is made two years after the date of the decree; (or more than two years after the date of the last order made on any previous application for execution) or
ii. Where an application is made against the legal representative of the Judgment-Debtor; or
iii. Where an application is made for the execution of a decree passed by a Court of reciprocating territory – Sec.44-A;
iv. Where an application is made against the assignee or receiver of insolvent judgment-debtor; or
v. Where the decree is for payment of money and the execution is sought for arrest and detention of judgment-debtor – Or.21, R.37;
vi. Where an application is made against a surety - Sec.145; or

vii. Where an application is made by the transferee or assignee of the Decree-Holder – Or.24 R.16.

The underlying object of giving notice to Judgment-Debtor is not only to afford him an opportunity to put forward objections, if any, against the maintainability of the execution application but also to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him – ***Erava v. Sidramappa Pasare (1897) 21 Bom 424***.

Stay of Execution

Provisions for stay of execution of a decree are made in Rule 26 of Order 21.

Rule 26 applies to the court to which a decree has been transferred for execution and not to the court which passed the decree and sent it for execution. It empowers the transferee court, upon a sufficient cause shown, to stay the execution of the decree so transferred to it, for execution for a reasonable time and for the purposes set out in sub-r (1). Rule 26(1) only relates to granting of limited stay of execution by executing court for only a specific purpose as to enable the judgment-debtor to apply for a stay order from the Appellate Court or from the trial court which passed the decree for suitable orders – ***R.Komala v. Mohd. Iqbal, AIR 1999 Kant 337***. But in ***Saradakripa v. Comilla Union Bank Ltd.,- AIR 1934 Cal 4.*** the Calcutta High Court relied on Secs.37 and 42 and held that the expression the court which passed the decree in Sec.37 would include the court to which the decree is sent for execution as once the decree is transferred for execution the transferor court ceases to have jurisdiction and that, therefore, the transferee court can pass an absolute order for stay of execution under r 29 of this Order. It is submitted that this view is not sustainable since apart from the express terms of sub-r (1) neither s 37 nor s 42 can apply. The Calcutta view has been dissented from the High Courts of Rangoon - ***MPL Chottyar v. V Chottyar, AIR 1936 Rang 184, Mysore - Raghvender Rao v. Laxminarasayya, AIR 1962 Mys 89, Madhya Pradesh - Khemchand v. Rambhau, AIR 1958 MP 131 and Rajasthan - Sohanlal v. Rajmal, AIR 1963 Raj 4***. The Patna High Court also dissenting from the Calcutta view has held that the power of the transferee court is not co-equal to that of the court which has passed the decree and that in view of the express terms of sub-r (1) of this rule, if the judgment-debtor wants the execution case to be stayed, he has to move the court which has passed the decree since the transferee court can grant stay for a short period only and for the purposes mentioned in the sub-rule. This is also the view of the Orissa High Court - ***Surrendranath Mohanty v. Harihar Das, AIR 1971 Ori 77***.

In execution of a decree the order of attachment of bank account of judgement-debtor at Delhi, was passed by the executing Court of Jammu and Kashmir. The judgment-debtor approached the High Court of Delhi to stay the attachment. The prayer of the judgement-debtor was refused with direction to approach the High Court of Jammu and Kashmir for appropriate relief - ***Hotel Corporation of India v. State Bank of India, AIR 2003 Del 87***.

But in cases of execution of eviction of decree, when stay is granted, payment of mesne profits or compensation for use of the premises during the period of stay by the tenant has to be taken into consideration. Thus, in a case, where the suit premises was situated in prime locality of the city, the High Court, on the basis of evidence, granted mesne profits/compensation for use and occupation at the rate of Rs 15 per sq ft from the date of decree, subject to final determination by competent forum - ***Anderson Wright and Co. v. Amar Nath Roy, AIR 2005 SC 2457.***

Where an application is filed by the judgment debtor before the insolvency court, the executing court need not stay its proceedings is absence of any adjudication by the said Court - ***Sudhandiran v. S Krishnan, AIR 2006 Mad 10.***

The execution of decree in a case, passed by the High Court was stayed until disposal of second appeal pending in the High Court. As a condition of the stay, the appellants were directed to furnish security to the registrar of the High Court - ***Gurinder Singh v. Harmala Kaur, (1982) 2 SCC 54***.

In execution of a money decree, the Supreme Court granted stay of execution on the condition of the judgment-debtor depositing a certain sum in Court. When the deposit as directed was made, the decree-holder took the stand that the entire decretal amount shall stand satisfied if the amount deposited is allowed to be withdrawn by the decree-holder. In the circumstances, the Supreme Court allowed the appeal in part and modified the decree of the trial Court to the extent that the decree would stand satisfied on withdrawal of the deposited amount - ***Karnataka Patrika (P.) Ltd. v. Syndicate Bank, AIR 2009 SC (Supp) 1258***

Court which may execute the decree

Section 38 of the Code specifies that, a decree may be executed either by the Court who passed it or by the Court to which it is sent for execution. Section 37 defines the expression 'Court which passed a decree' while sections 39 to 45 provide for the transfer for execution of a decree by the Court which passed the decree to another Court, lay down conditions for such transfer and also deal with powers of executing Court. U/s. 37 the expression 'Court which passed the decree' is explained. Primarily the Court which passed the decree or order is the executing Court. If order or decree is appealed against and the appellate Court passes a decree or order, even then the original Court which passed the decree or order continues to be treated as Court which passed decree. The Court which has passed the decree or order ceased to exist or ceased to have jurisdiction to execute the decree already passed, then the Court which will be having a jurisdiction upon that subject matter, when application of execution is made will be the competent Court to execute the decree.

Merely because the jurisdiction of the Court which has passed the decree is transfer to another Court due to transfer of territorial area, the jurisdiction to execute the decree passed by such a Court is not ceased. However, the Court to whom the transfer of territorial area is made, will also have a jurisdiction to conduct the execution of decree or order - Sec.37. Sec. 38 contemplates that a decree may be executed either by the Court which passed it, or by the Court which it is sent for execution. However the execution on judgment debtor is criteria of executing Court of territorial jurisdiction.

Modes of Executing a Decree

The Code lays down the following modes for execution of different types of decrees:

The different modes of execution of a decree are provided in section 51 as under:

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without

(c) by arrest and detention in prison;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require.

1. Delivery of property

a) Movable property – Sec.51 (a), Rule 31

Where the decree is for any specific movable property, it may be executed i) by seizure and delivery of the property; or ii) by detention of the Judgment-Debtor; or iii) by the attachment and sale of his property; or iv) by attachment and detention both – Rule 31. The words specific movable (property) do not include money and therefore, a decree for money cannot be executed under Rule 31 – ***Netumprakkot Kumath v. Nelumprokkotti Kumath, AIR 1914 Mad 572***. Again, for the application of this Rule the property must be in the possession of the Judgment-Debtor. Where the property is in the possession of a third-party, the provisions of this Rule do not apply and the property cannot be attached – ***Pudmanund Singh v. Chundi Dat, (1896) I CWN 170.***

b) Immovable property – Rules 35-36

Rules 35 and 36 provide the mode of executing decrees for possession of immovable property to the Decree-Holder. These rules correspond to rules 95 and 96 which lay down the procedure for delivery of possession to the auction-purchaser who has purchased the property in an auction-sale. Where the decree is for immovable property in the possession of the Judgment-Debtor or in the possession of the person bound by the decree, it can be executed by removing the Judgment-Debtor or any person bound by the decree and by delivering possession thereof to the Decree-Holder.

The ambit and scope of rules 35 and 36 (khaas or actual and symbolic or formal possession) has been appropriately explained by Srivastava, J. in the case of ***Shamsuddin v. Abbas Ali, AIR 1971 All 117*** "It appears to me that the possession referred to in Sub-rules (1) and (3) of Order 21, Rule 35 is Khas or actual possession, while that referred to in Sub-rule (2) and Rule 36 is formal or symbolical possession. Formal or symbolical possession is delivered by fixing a copy of the warrant in some conspicuous place of the property and proclaiming by the beat of drum or other customary mode at some convenient place the substance of the decree. Rules 35 and 36 refer to cases where a suit is brought for possession of immoveable property and a decree is passed in the suit for the delivery of the property to the decree-holder. If the immoveable property of which possession is directed by the decree to be delivered to the decree-holder is in the possession of the judgment-debtor, actual possession must be delivered to the decree-holder under Sub-rule (1) of Rule 35. Where it is in the possession of a tenant or other person entitled to occupy the same only symbolical possession can be delivered, and that is to be done under Rule 36. Symbolical possession can in such cases operate as actual possession against the judgment-debtor."

2) Attachment and Sale of property – Sec.51 (b)

Sec.51(b) empowers the Court to order execution of a decree by attachment and sale or by sale without attachment of any property. The Court is competent to attach the property if it is situated within the local limits of the jurisdiction of the Court – ***M.A.A. Raoof v. K.G. Lakshmipathi, AIR 1969 Mad 268.*** It is immaterial that the place of business of the Judgment-Debtor is outside the jurisdiction of the Court – ***ibid***. The words attachment and sale in clause (b) of Sec.51 are to be read disjunctively – ***Amulya Chandra v. Pashupati***

Nath, AIR 1951 Cal 48 (FB). Hence, the attachment of the property is not a condition precedent – ***Krishnamukhlal v. Bhagwan Kashidas, AIR 1974 Guj 1***. Sale of the property without an attachment is not void or without jurisdiction and does not vitiate such sale. It is merely an irregularity – ***Rahim Bux Haji & Sons v. Firm Samiullah & Sons, AIR 1963 All 320.*** An order of attachment takes effect from the moment it is brought to the notice of the Court – ***Vishwanathan v. Muthuswamy Gounder, AIR 1978 Mad 221***. Rule 54 provides for the attachment of immovable property and the procedure for the proclamation of such attachment. The object of Rule 54 is to inform the Judgment-Debtor about the attachment so that he may not transfer or create encumbrance over the property thereafter – ***Desh Bandhu Gupta v. N.L.Anand, (1994) I SCC 131.***

3) Arrest and detention – Sec.51(c)

It is for the Decree-Holder to decide in which of the several modes he will execute his decree. One of such modes of executing a decree is arrest and detention in civil prison of the Judgment-Debtor. However, clause (c) should be read subject to the proviso to Sec.51.

The proviso lays down that where the decree is for payment of money, execution by detention in civil prison should not be ordered unless, after giving the Judgment-Debtor an opportunity of showing cause why he should not be so detained, the Court for reasons to be recorded in writing is satisfied:

i) that the Judgment-Debtor with the object of obstructing or delaying the execution of the decree a) is likely to abscond or leave the local limits of the jurisdiction of the Court; or b) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

ii) that the Judgment-Debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same; or

iii) that the decree is for a sum which the Judgment-Debtor was bound in a fiduciary capacity to account for – ***Proviso to Sec.51.***

These provisions are mandatory in nature and must be strictly complied with. They are not punitive in character. The object of detention of a Judgment-Debtor in a civil prison is twofold. On the one hand, it enables the Decree-Holder to realise the fruits of the decree passed in his favour; while on the other hand, it protects the Judgment-Debtor who is not in a position to pay the dues for reasons beyond his control or is unable to pay. Therefore, mere failure to pay the amount does not justify arrest and detention of the Judgment-Debtor inasmuch as he cannot be held to have neglected to pay the amount to the Decree-Holder.

4) Appointment of Receiver – Sec.51(d)

One of the modes of execution of a decree is the appointment of a receiver. Execution by appointment of a receiver is known as equitable execution and is entirely at the discretion of the Court – Kerr on Receivers (1972). It cannot be claimed as a matter of right. It is thus an exception to the general Rule stated above that it is for the Decree-Holder to choose the mode of execution and that the Court has no power to refuse the mode chosen by him.

The appointment of a receiver in execution proceedings is considered to be an exceptional remedy and a very strong case must be made out in support of it – ***Bhagwati Bai v. Padma Bai, AIR 1955 Ajm 58***. The Decree-Holder before resorting to this mode must show that there is no effective remedy for obtaining relief by the usual statutory modes of execution – ***Nawab Bahadu v. Karnani Industrial Bank Ltd., AIR 1931 PC 160***. The Court also must also be satisfied that the appointment of a receiver is likely to benefit both the Decree-Holder and the Judgment-Debtor rather than a sale of the attached property – ***Toolsa Golal v. John Antone, ILR (1887) II Bom 448***. It has also to be satisfied that the decree is likely to be realised within a reasonable time from the attached properties so that the Judgment-Debtor may not be burdened with property while he is deprived of the enjoyment of it – ***Hemendra Nath Roy V. Prokash Chandra, AIR 1932 Cal 189***. Again this mode of execution cannot be resorted to in order to circumvent the statutory provisions.

Thus the Decree-Holder cannot be permitted to pray for the appointment of a receiver in respect of property which has been expressly excluded from attachment by the statute - ***Toolsa Golal v. John Antone, ILR (1887) II Bom 448.***

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UNIT – 4

Synopsis

1. Suits by Indigent Persons (Order Xxxiii)
2. Incidental Proceedings
3. Supplemental Proceedings
4. Temporary Injunction (Order Xxxix Rules 1 To 5)
5. Interlocutory Orders (Order Xxxix Rules 6 To 10)
6. Receiver (Order Xl)
7. Appeals (Section 96 To 112, Order 41-45)
8. Reference (Section - 113 And Order Xiii)
9. Review (Section 114 And Order Xlvii)
10. Revision (Section 115)
11. Restitution
12. Caveat (Section 148-A)
13. Inherent Powers of Courts (Sections 148, 149 And 151 To 153-A)

SUITS BY INDIGENT PERSONS (ORDER XXXIII)

Introduction: The provision relating to suits by an indigent person is contained in Order XXXIII, having rules which provide various provisions regarding the purpose, procedure, examination of applicant, rejectionofapplicationetc.Thegeneralrulefortheinstitutionofasuitisthataplaintiffsuingina Courtofla w isboundtopayCourt-feesprescribedundertheCourtFeesActatthetimeofpresentationofplaint.Order XXXIIIisanexceptiontotheaboveruleandexemptssome(poor)personsfrompayingtheCourtfeeatthe timeofinstitutionofthesuiti.e.atthetimeofpresentationofplaintandallowsprosecutinghissuitinforma pauperis,subjecttothefulfillmentoftheconditionslaiddowninthisOrder.

MeaningofIndigentPerson: Anindigentpersonisonewhoisnotpossessedofsufficientmeansduebad personaleconomiccondition.Theword'person'includesjuristicperson.AccordingtoExplanationfRu le1, OrderXXXIII,

An indigent person is a person, who

a. ifheisnotpossessedofsufficientmeans(otherthanpropertyexemptfromattachmentinexecution ofa decreeandthesubjectmatterofthesuit)toenablehimtopaythefeeprescribedbylawfortheplaintin such suit,or
b. wherenosuchfeeisprescribed,ifheisnotentitledtopropertyworthonethousandrupeesotherthan thepropertyexemptfromattachmentinexecutionofadecree,andtheSubjectmatterofthesuit.

Explanations II and III read as under -

Explanation-II: Any property, which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation III: Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity.

ProceduretosueasIndigentPerson: Beforeanindigentpersoncaninstituteasuit,permissionof theCourt tosueasanindigentpersonisrequired.Asperrule3,theapplicationforpermissiontosueasaindigent person,shallbepresentedtotheCourtbytheapplicantinperson,unlessheisexemptedfromappearingin court,inwhichcasetheapplicationmaybepresentedbyanauthorizedagentwhocananswerallmaterial questions relating to the application, and who may be examined in the same manner as the party representedbyhimmighthavebeenexaminedhadsuchpartyattendedinperson:

PROVIDEDthat,wheretherearemoreplaintiffsthanone,itshallbesufficientiftheapplicationispresente d byoneoftheplaintiffs.

Contents of Application: Every such application shall contain the following particulars:-

a. theparticularsrequiredinregardtoplaintsinsuits;
b. a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof;and
c. itshallbesignedandverifiedasprovidedinOrderVIrules14and15.

The suit commences from the moment an application to sue in forma pauperis is presented. AccordingtoRule1-A,aninquirytoascertainwhetherornotapersonisanindigentpersonshallbemade.

Rule1-A: Everyinquiryintothequestionwhetherornotapersonisanindigentpersonshallbemade,in thefirstinstance,bythechiefministerialofficerofthecourt,unlessthecourtotherwisedirects,andtheco urt mayadoptthereportofsuchofficerasitsownfindingormayitselfmakeaninquiryintothequestion.

Examination of Applicant and Rejection of Application:

Examination: (Rule 4)

1. Where the application is in proper form and duly presented, the court may if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claimandthepropertyoftheapplicant.
2. Ifpresentedbyagent,courtmayorderapplicanttobeexaminedbycommission- Wheretheapplication is presented by an agent, the court may, if it thinks fit, order that the applicant be examined by a commissioninthemannerinwhichtheexaminationofanabsentwitnessmaybetaken.

RejectionofApplication:Rule5: Thecourtshallrejectanapplicationforpermissiontosueasanindigent person–

1. Whereitisnotframedandpresentedinthemannerprescribedbyrules2and3,or
2. Wheretheapplicantisnotanindigentperson,or
3. Wherehehas,withintwomonthsnextbeforethepresentationoftheapplication,disposedofan y propertyfraudulentlyorinordertobeabletoapplyforpermissiontosueasanindigentperson: PROVIDEDthatnoapplicationshallberejectedif,evenafterthevalueofthepropertydisposedofby theapplicantistakenintoaccount,theapplicantwouldbeentitledtosueasanindigentperson,or
4. Wherehisallegationsdonotshowacauseofaction,or

5. Wherehehasenteredintoanyagreementwithreferencetothesubjectmatteroftheproposedsuit underwhichanyotherpersonhasobtainedaninterestinsuchsubjectmatter,or

6. Wheretheallegationsmadebytheapplicantintheapplicationshowthatthesuitwouldbebarred by any law for the time being in force, or

7. Whereanyotherpersonhasenteredintoanagreementwithhimtofinancethelitigation.

FixingofDateandNoticetotheoppositePartyandtheGovernmentPleader: Wherethereis groundasstatedinrule5,torejecttheapplicationtheCourtshallfixaday(ofwhichatleasttendays'ear noticeshallbegiventotheoppositepartyandthegovernmentpleader)forreceivingsuchevidenceasthe applicant may adduce in proof of his indigency, and for hearing any evidence which may be adduced in disprooftheref.

ProcedureatHearing: Onthedatefixed,theCourtshallexaminethewitness(ifany)producedbyeither party to the matters specified in clause (b), clause (c) and clause (e) of rule 5, and may examine the applicant or his agent to any of the matters specified in Rule 5 the Court after hearing the argument hall eitheralloworrefusetoallowtheapplicanttosueasanindigentperson.

ProcedureifApplicationAdmitted: Wheretheapplicationisgranted,itshallbedeemedtheplaintinthe suitandthesuitshallproceedinallotherrespectsasasuitinstitutedintheordinarymanner,exceptatthe plaintiff shall not be liable to pay any court fee or fees payable for service of process in respect of any petition,appointmentofapleaderorotherproceedingsconnectedwiththesuit.

Withdrawal of Permission: The Court may, on the application of the defendant, or of the government pleaderandaftergivingsevendaysnoticeinwritingtotheplaintiff,withdrawthepermissiongrantedto the plaintifftosueasanindigentpersononthefollowingconditions:

1. ifheisguiltyofvexatiousorimproperconductinthecourseofthesuit;
2. ifitappearsthathismeansaresuchthatheoughtnottocontinuetosueasanindigentperson;or
3. ifhehasenteredintoanyagreementwithreferencetothesubjectmatterofthesuitunderwhicha ny otherpersonhasobtainedaninterestinsuchsubjectmatter.

Realization of Court fees: (Rule 14)

a. **Where Indigent person succeeds:** (Rule 10) Where the plaintiff succeeds in the suit, the court shall calculate the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person; such amount shall be recoverable by the State Governmentfromanypartyorderedbythedecreetopaythesame,andshallbeafirstchargeon thesubjectmatterofthesuit.

b. **WhereIndigentpersonfails**:(Rule11)Wheretheplaintifffailsinthesuitorthepermissiongr anted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-

I. because the summons for the defendant to appear and answer has not been served

upon himin consequenceofthefailureoftheplaintifftopaythecourtfeeorpostalcharges(ifany)chargeable forsuchserviceortopresentcopiesoftheplaintorconcisestatement,or

II. becausetheplaintiffdoesnotappearwhenthesuitiscalledonforhearing,thecourtshallorderthe

plaintiff, or any person added as a co-plaintiff to the suit, to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person.

c. **Where an indigent person's suit abates :(Rule 11.A)** Where the suit abates by reason of the deathoftheplaintifforofanypersonaddedasaco-plaintiff,thecourtshallorderthattheamountof court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person shall be recoverable by the State government from the estate of the deceased plaintiff.

Accordingtorule15,whetheapplicationtosueasanindigentpersonisrefused,itshallbeabartoany subsequentapplicationofthelikenaturebyhiminrespectofthesamerighttosue;buttheapplicantshall be at liberty to institute a suit in the ordinary manner in respect of such right, provided he pays the costs incurredbytheGovernmentPleaderandtheoppositepartyinopposinginapplication.

Whenanapplicationiseitherrejectedunderrule5orrefusedunderrule7,theCourtwillgranttimetothe applicanttopaytherequisiteCourtfeewithinthespecifiedtimeorwithintimeextendedbytheCourtfrom timetotime,anduponpaymentofsuchCourtfeeandonpaymentofthecostsreferredtoinrule15within that time, the suit shall be deemed to have been instituted on the date on which the application for permissiontosueasanindigentpersonwaspresented.

Thecostsofanapplicationforpermissiontosueasanindigentpersonandofaninquiryintoindigenceshall becostsinthesuit.

Defencebyanindigentperson:Rule17: Anydefendant,whodesirestopleadasetofforcounterclaim, maybeallowedtosetupsuchclaimasanindigentperson,andtherulescontainedinthisOrdershall,sofar asmaybe,applytohimasifhewereaplaintiffandhiswrittenstatementwereaplaint.

Subject to the provisions of this order, the Central or State Government may make such supplementary provisions for free legal services to those Who have been permitted to sue as indigent persons,60 andwhereanindigentpersonisnotrepresentedbyapleader,theCourtmay,ifthecircumstancesofthecas eso require,assignapleadertohim.

IndigentPerson: ApersonunabletopayCourtfeesonmemorandumofappealmayapplytoallowhimto appeal as an indigent person. The necessary inquiry as prescribed in Ord.er XXXIII will be made before grantingorrefusingtheprayer.ButwheretheapplicantwasallowedtosueasanindigentpersoninthetrialCourt,nofreshinquirywillbenecessaryifhefilesanaffidavitthathecontinuestobeanindigentperson.

SUITS IN PARTICULAR CASES

SuitsbyorAgainsttheGovernmentorthePublicOfficersintheirOfficialCapacity(Section79to82 and OrderXXVII)

TitletoSuit: Theauthoritytobenamedasaplaintiffordefendant,inanysuitbyoragainstGovernment shallbe.

1. **theUnionofIndia:**WherethesuitisbyoragainsttheCentralGovernment,or
2. **theState:**WherethesuitisbyoragainsttheStateGovernment.

Requirement of Notice: No suit shall be instituted, except as provided in sub-section (2) of section 80

againsttheGovernmentoragainstapublicofficerinrespectofanyactpurportingtobedonebysuchpubli c officer in his official capacity unless a Notice in writing has been issued and until the expiration of two monthsnextafternotice.

Notice to whom:

a.AgainstGovernment:TheNoticeissuedundersection80(1)shallbedeliveredto,orleftattheofficeof–

1) InthecaseofasuitagainstCentralGovernment-
   i) aSecretarytothatGovernment:whenitdoesnotrelatetoarailway,and
   ii) theGeneralManagerofRailway:whenitrelatestoarailway.
2) InthecaseofasuitagainsttheStateGovernmentofJammuandKashmir-
   i) aChiefSecretarytothatGovernment;or
   ii) anyotherpersonauthorizedinthisbehalfbytheStateGovernment.
3) InthecaseofasuitagainstanyotherStateGovernment-
   i) aSecretarytothatGovernment;or
   ii) thecollectorofthedistrict.

b) **AgainstPublicOfficer:**InthecaseofasuitagainstPublicOfficernoticeshallbedeliveredtohi m orleftathisoffice.

Contents of Notice: The notice shall contain the following particulars -

i) thename,descriptionandplaceofresidenceoftheplaintiff;
ii) thecauseofaction;and
iii) therelief,whichtheplaintiffclaims.

Exemption from Notice: A suit may, with the leave of the Court, be instituted to obtain an urgent or immediate relief without serving any notice as required under section 80(1).

But,insuchsuit,theCourtshallnotgrantanyrelief,whetherinterimorotherwise;exceptaftergivingtothe GovernmentorPublicOfficer,asthecasemaybe,areasonableopportunityofshowingcauseinrespectof thereliefprayedinthesuit.

It is also provided that the Court shall return the plaint for presentation to it after complying with the requirementsofsection80(1),ifafterhearingtheparties,theCourtissatisfiedthatnourgentorimmediate reliefneedtobegranted.

No Dismissal of suit: Any suit instituted against the Government or such public officer shall not be dismissed, by reason of any error or defect in the notice, if such notice contains-

I. Thename,descriptionandresidenceoftheplaintiff,soastoenabletheGovernmentorsuchpubli cofficer to identify the person serving the notice;
II. Notice has been delivered or left at the offices of the appropriate authority specified U/s 80(1);and
III. Thecauseofactionandthereliefclaimedhavebeensubstantiallyindicated.

Procedure in Suit:

Signature and Verification of Plaint Or Written Statement

AgentandAuthorizedAgent: TheCourtshallallowareasonabletimeinfixingadayfortheGovernment to answer the plaint, for the purpose of necessary communication with the Government through

proper channelandfortheissueofinstructionstotheGovernmentpleadertoappearandansweronbehalfofthe Government.Thetimesoallowedmay,atthediscretionoftheCourt,beextendedbutthetimesoextended shallnotexceedtwomonthsintheaggregate.

Where in any case the Government Pleader is not accompanied by any person on the part of the Government,whomaybeabletoansweranymaterial.questionsrelatingtothesuit,theCourtmay,direct theattendanceofsuchaperson.

DutyofCourt: ItshallbethedutyoftheCourttomakeeveryendeavour,ifpossibletodosoconsistently withthenatureandcircumstancesofthecase,toassiststhepartiesinarrivingatasettlementinrespectof thesubject-matterofthesuitandineverysuchsuitorproceeding,atanystage,ifitappearstotheCourt that there is a reasonable opportunity of settlement between the parties, the Court may adjourn the proceedingforsuchperiod,asitthinksfit,toenableattemptstobemadetoeffectsuchasettlementThe power to adjourn proceeding under sub-rule (2) shall be in addition to any other power of the Court to adjournproceedings.

ProcedureinSuitagainstPublicOfficer: Thedefendant(publicofficer)onreceivingthesummonsmay applytotheCourttogranttheextensionoftimefixedinthesummons,toenabletohimtomakereferenceto theGovernment,andtoreceiveordersthereonthroughtheproperchannelandtheCourtshall,onsuch applicationextendthetimeforsolongasitappearstoittobenecessary.

TheGovernmentshallbejoinedasapartytothesuit,wherethesuitisinstitutedagainstthepublicofficerfor damages or for any other relief in respect of any act alleged to have been done by him in his official capacity.

Wherethegovernmentundertakesthedefenceofasuitagainstapublicofficer,thegovernmentpleader, uponbeingfurnishedwithauthoritytoappearandanswertheplaint,shallapplytotheCourt,anduponsuch applicationtheCourtshallcauseanoteofhisauthoritytobeenteredintheregisterofcivilsuits.

Wherenoapplicationundersub-rule(1)ismadebythegovernmentpleaderonorbeforethedayfixedinthe noticeforthedefendanttoappearandanswer,thecaseshallproceedasinasuitbetweenprivateparties.

No need of security from government or a public officer in certain cases: No such security as is mentionedinrules5and6oforderXLIshallberequiredfromthegovernmentor,wherethegovernment hasundertakenthedefenceofthesuit,fromanypublicofficersuedinrespectofanactallegedtobedone by him in his official capacity.

ExemptionfromArrest,PersonalAppearanceandAttachmentofProperly: Accordingtosection8 1 of the Code, if the suit is against a public officer in respect of any act purporting to be done by him in his official capacity–

a. thedefendantshallnotbeliabletoarrestnorhispropertytoattachmentotherwisethaninexecuti on ofadecree,and

b. wherethecourtissatisfiedthatthedefendantcannotabsenthimselffromhisdutywithoutdetri ment tothepublicservice,itshallexempthimfromappearinginperson.

Executionofdecree: Where,inasuitbyoragainsttheGovernmentorbyoragainstapublicofficerin respectofanyactpurportingtobedonebyhiminhisofficialcapacity,anydecreepassedagainsttheUni on ofIndiaoraStateor,asthecasemaybe,thepublicofficer,shallnotbeexecutedexceptinaccordancewith theprovisionsofsub-section(2)ofS.82.i.e.

Anexecutionshallnotbeissuedonanysuchdecreeunlessitremainsunsatisfiedfortheperiodofthree monthscomputedfromthedateofsuchdecree.

The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award –

a. ispassedormadeagainsttheUnionofIndiaoraStateorapublicofficerinrespectofanysuchact asaforesaid,whetherbyaCourtorbyanyotherauthority;and

b. iscapableofbeingexecutedundertheprovisionsofthisCodeorofanyotherlawforthetimebein g inforceasifitwereadecree.

Definition of 'Government' and 'Government Pleader': Rule 8-8 of Order XXVII provides that in Order XXVII 'Government' and 'Government Pleader' mean respectively"

i. inrelationtoanysuitbyoragainsttheCentralGovernmentoragainstapublicofficerintheservi ce ofthatGovernment-theCentralGovernmentandsuchpleaderasthatGovernmentmayappoint86.

ii. inrelationtoanysuitbyoragainstaStateGovernmentoragainstapublicofficerintheserviceof a State- the State Government and such Government pleader as defined in Section 2(7), or such otherpleaderastheStateGovernmentmay,appoint.

Inter Pleader Suit (Section 88 and Order XXXV)

Meaning: An interpleader suit is a suit in which the real dispute is not between the plaintiff and the defendantbutbetweenthedefendantsonlyandtheplaintiffisnotreallyinterestedin.thesubjectmatterof thesuit.

Object: Theprimaryobjectofinstitutinganinterpleadersuitistogetclaimofrivaldefendantsadjudicated .

Principle: According to Section-"Where two or more persons claim adversely to one another the same debts, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges and costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to theperson to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Providedthatwhereanysuitispendinginwhichthe-rightsofthepartiescanproperlybedecided,nosuch suitofinterpleadershallbeinstituted.

ConditionsforApplication: Beforetheinstitutionofan interpleadersuit,thefollowingconditionsmustbe satisfied:

a.

ExistenceofsomeDebt,MoneyorMoveableorImmoveableProperty:theremustbesomedebt,sumof moneyorothermoveableorimmoveablepropertyindispute;

b.

AdverseClaimbytwoormorepersons:twoormorepersonsmustbeclaimingtheabovedebt,moneyor property,adverselytooneanother;

c. Thepersonfromwhomthedebt,moneyorpropertyisbeingclaimedshouldnotbeinterestedinit:the personfromwhomsuchdebt,moneyorpropertyisclaimed,mustnotbeclaminganyinteresttherein otherthanthechargesandcosts:
d. Theabovepersonmustbereadytodeliverit:Theabovepersonmustbereadytopayordeliverittothe rightful claimant;and
e. No Pendency of Suit: there must be no suit pending in which the rights of the rival claimants can be properlydecided.

Who may not institute an interpleader suit?

An Agent or Tenant:

Anagentcannotsuehisprincipaloratenanthislandlordforthepurposeofcompellingthemtointerplead with persons claiming through such principals or landlords,because ordinarily, an agent cannotdispute the title of his principal and a tenant cannot dispute the title of his landlord during the subsistence of tenancy.

Illustrations: A deposited a box of jewels with B as his agent:

a. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. Bcannot instituteaninterpleadersuitagainstAandC.(CclaimsadverselytoA,andtherefore,nointerpleader suit canfile.)
b. HethenwritestoCforthepurposeofmakingthejewelsasecurityforadebtduefromhimselftoC.A afterwardsallegesthatC'sdebtissatisfied,andCallegesthecontrary.B mayinstituteaninterpleadersuitagainstAandC.(CclaimsthroughAand,therefore,itcanfile.)

ProcedureinInterpleaderSuit: OrderXXXVprovidestheprocedurefortheinstitutionofaninterpleader suit.

PlaintinInterpleaderSuit: Ineveryinterpleadersuittheplaintinadditiontootherstatementsnecessary forplaint,state–

a. thattheplaintiffclaimsnointerestinthesubjectmatterindisputeotherthanthechargesorcosts;
b. theclaimsmadebythedefendantsseverally;and
c. thereisnocollusionbetweentheplaintiffandanyofthedefendants.

PaymentofthingclaimedintoCourt: TheCourtmayordertheplaintifftoplacethethingclaimedinthe custodyoftheCourtwhenthethingiscapableofbeingpaidintoCourtorplacedinthecustodyofCourtand providehiscostsbygivinghimachargeonthethingclaimed.

Procedurewheredefendantissuingplaintiff(StayofProceedings): Whereanyofthedefendantsin an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit, the Courtin whichthesuitagainsttheplaintiffispendingshall,onbeinginformedbytheCourtinwhichtheinterplead

er suit has been instituted, stay the proceeding as against him; and his cost in the suit so stayed may be providedforinsuchsuit;butif,andinsofaras,theyarenotprovidedforinthatsuit,theymaybeaddedto hiscostsincurredintheinterpleadersuit.

Procedure of First Hearing:

1. Atthefirsthearing,theCourtmay-
   a. Declare that the plaintiff is discharged from all liabilities to the defendants in respect of the thing claimed,awardhimhiscostsanddismisshimfromthesuit;or
   b. ifitthinksthatjusticeorconveniencesorequire,retainsallpartiesuntilthefinaldisposalofthesuit.
2. WheretheCourtfindsthattheadmissionofthepartiesorotherevidenceenabletheCourttodos o, itmayadjudicatethetitletothethingclaimed.
3. WheretheadmissionsofthepartiesdonotenabletheCourtsotoadjudicatetheCourtmaydirect-
   a) thatanissueorissuesbetweenthepartiesbeframedandtried,and
   b) thatanyclaimantbemadeaplaintiffinlieuoforinadditiontotheoriginalplaintiff,andshallpro ceed totrythesuitintheordinarymanner.

INCIDENTAL PROCEEDINGS

Commission (Sections - 75 to 78 and Order 26)

Meaning:'Commission'isaprocessthroughwhichthewitnesses,whoaresickorinfirmandareunableto attendtheCourt,areexaminedbyissuingacommissionbytheCourt.Sections75to78andOrderXXVIof theCodedealwiththevariousprovisionsrelatingtotheissueofCommissiontoexaminewitnesseswho areunabletoattendtheCourtforoneortheotherreasons.

PowerofCourttoissueCommissions: Asageneralrule,theevidenceofawitnessinanaction,whether heisapartytothesuitornot,shouldbetakeninopen'Courtandtestedbycross-examination.Thecourt hasadiscretiontorelaxtheruleofattendanceinCourt,undersomecircumstancesandmayjustifyissueof acommission.Section75oftheCode-specifiesthepowersofaCourttoissueCommission.

Section 75: Subject to the conditions and limitations as may be prescribed, the Court may issue a commission:-

a. to examineanyperson; orderXXVI,Rule1to8
b. tomakealocalinvestigation;orderXXVI,Rule9to10
c. toexamineoradjustaccounts; orderXXVI,Rule11to12
d. tomakeapartition; orderXXVI,Rule13to14
e. toholdascientific,technicalorexpertinvestigation;orderXXVI,Rule10-A
f. toconductsaleofpropertywhichissubjecttospeedyandnaturaldecayandwhichisinthecusto dy oftheCourtpendingthedeterminationofthesuit;orderXXVI,Rule10-C
g. toperformanyministerialact;Rules15to18-Bdealwithgeneralprovisions.orderXXVI,Rule10-B

CasesinwhichCourtmayissueCommissiontoexamineaperson(Witness): Acommissionmaybe issuedinthefollowingcases:

a.

AnyCourtmayinanysuitissueacommissionfortheexaminationoninterrogatoriesorotherwiseo fany
person,ifthepersontobeexaminedasawitnessresideswithinthelocallimitsofjurisdiction,and

i. IsexemptedundertheCodefromattendingtheCourt,or
ii.

intheinterestofjustice,orforexpeditiousdisposalofacase,orforanyotherreasonhisexaminati on on commission will be proper;or

b. ifheresidesbeyondthelocallimitsofjurisdictionoftheCourt,or
c. heisabouttoleavethejurisdictionoftheCourt,or
d.

IfheisaGovernmentservantandcannotintheopinionoftheCourt,attendwithoutdetrimenttot he public service,or

e. heisresidingoutofIndiaandtheCourtissatisfiedthathisevidenceisnecessary.

Persons for whose examinations commission may be issued: Rule 4(1):
Any Court may in any suit issue a commission for the examination on interrogatories or otherwise ofany person,

a. Ifheresidesbeyondthelocallimitsofthejurisdictionofthecourtor[(OrderXXVI,Rule4(1)(a)]
b. ifheisabouttoleavethejurisdictionoftheCourt,or[(OrderXXVI,Rule4(1)(b)]
c.

ifheisaGovt.servantandcannot,intheopinionofthecourt,attendwithoutdetrimenttothepubl ic service,or[(OrderXXVI,Rule4(1)(c)]

d. ifheisresidingoutofIndiaandtheCourtissatisfiedthathisevidenceisnecessary.Rule5

To whom Commission may be issued: [Rule 4 (2) and (3)]

Rule4(2): SuchcommissionmaybeissuedtoanyCourt,notbeingahighCourt,withinthelocallimitsof whose jurisdiction such person resides; or to any pleaded or other person whom the Court issuing the commission mayappoint.

Rule4(3): TheCourtonissuinganycommissionunderthisruleshalldirectwhetherthecommissionhallb e returnedtoitselfortoanysubordinateCourt.

Order for Issue of Commission: (Rule-2)

The Court may issue such a commission –

a. eithersuemotu(ofitsownmotion)or
b. ontheapplicationofanypartytothesuit,or
c. ofthewitnesstobeexamined.

Evidence to be a part of Record: (Rule-7): The evidence taken on commission shall, subject to the provisions of rule 8, form part of the record.

Whendepositionmaybereadinevidence:(Rule-S): Evidencetakenunderacommissionshallnotread asevidenceinthesuitwithouttheconsentofthepartyagainstwhomthesameisoffered,unless.

a. The person, who gave the evidence, is beyond the jurisdiction of the Court or dead or unable for sicknessorinfirmitytoattendtobepersonallyexamined,orexemptedfrompersonalappearancein Court, or is a person in the Service of the Government who cannot, in the opinion of the Court, attendwithoutdetrimenttothepublicservice;or

b. TheCourtinhisdiscretiondispenseswiththeproofofanyofthecircumstancesmentionedinclause (a),andauthorizestheevidenceofanypersonbeingreadasevidencein'thesuit,notwithstanding proofthatthecausefortakingsuchevidencebycommissionhasceasedatthetimeofreadingthesame.

LettersofRequest:(Section77): InlieuofissuingacommissiontheCourtmayissueaLetterofRequesttoexamineawitnessresidingatanyplacenotwithinIndia.

SUPPLEMENTAL PROCEEDINGS

Arrest Before Judgment (Order 38, Rule 1 to 4)

Introduction: The general rule is that a creditor having a claim against the debtor has first to obtain a decree against him and then execute the said decree according to the provisions of Order XXI and may adopt the mode of his arrest or attachment of his property in such execution, but under special circumstances, the creditor, however can move for the arrest of the debtor or for the attachment of his propertyevenbeforethejudgmentinordertopreventanyattemptonthepartofthedefendanttodefeattheexecutionofdecreethatmaybepassedagainsthim.

Principle:

Whencansuchorderbepassed: Anapplicationforarrestmaybemadebytheplaintiffatanytimeafter theplaintispresented,evenbeforetheserviceofsummonsiseffected-onthedefendantandtheCourtmay passtheorderof-arrestuponthesatisfactionofthefollowingtwoconditions:

a. ThePlaintiffssuitmustbebonafideandhiscauseofactionmustactionbeprimafacieunimpeachable subjecttohisprovingtheallegationsintheplaint,and

b. TheCourtmusthavereasonto-believeonadequatematerialsthatunlessthisextraordinarypoweris exercisedthereisarealdangerthatthedefendantwillremovehimselforhispropertyfromtheambit of thepowerstotheCourt.

Groundsofarrestbeforejudgment:(Order38,Rule1)Wherealanystageofthesuit,otherthanasuitofthenaturereferredtoinSection16,clauses(a)to(d),theCourtissatisfied,eitherbyaffidavitorotherwise –

a. thatthedefendant,withintenttodelaytheplaintiff,ortoavoidanyprocessoftheCourt,ortoobstructor delaytheexecutionofanydecreethatmaybepassedagainsthim:
   a. hasabscondedorleftthelocallimitsofthejurisdictionoftheCourt,or
   b. isabouttoabscondorleavethelocallimitsofthejurisdictionoftheCourt,or

c. hasdisposedoforremoved,fromthelocallimitsofthejurisdictionoftheCourthispropertyora ny part thereof,or

b. thatthedefendantisabouttoleaveIndiaundercircumstancesaffordingreasonableprobabilitythat the plaintiffwillormaytherebybeobstructedordelayedintheexecutionofanydecreethatmaybepass ed againstthedefendantinthesuit.

TheCourtmayissueawarranttoarrestthedefendantandbringhimbeforetheCourttoshowcausewhyhe shouldnotfurnishsecurityforhisappearance.

Providedthatthedefendantshallnotbearrestedifhepaystotheofficerentrustedwiththeexecutionofthe warrantanysumspecifiedinthewarrantassufficienttosatisfytheplaintiff'sclaims;andsuchsumshallb e heldindepositbytheCourtuntilthesuitisdisposedoforuntilthefurtherorderoftheCourt.

Security : (Rule 2)

i. WherethedefendantfailstoshowsuchcausetheCourtshallorderhimeithertodepositintheCo urt money -or other property sufficient to answer the claims against him to furnish security for his appearance at the time when called upon while the suit is pending and until satisfaction of any decreethatmaybepassedagainsthiminthesuit,ormakesuchorderasitthinksfitinregardtothe sumwhichmayhavebeenpaidbythedefendantundertheprovisotothelastprecedingrule.

ii. Everysuretyfortheappearanceofadefendantshallbindhimselfindefaultofsuchappearance,t o payanysumofmoney,whichthedefendantmaybeorderedtopayinthesuit.

Procedure on application by surety to be discharged (Discharge of Security): (Rule 3)

I. AsuretyfortheappearanceofadefendantmayatanytimeapplytotheCourtinwhichhebecamesuch suretytobedischargedfromhisobligation.

ii. Onsuchapplicationbeingmade,thatCourtshallsummonthedefendanttoappearor,ifitthinksfit, may issueawarrantforhisarrestinthefirstinstance.

iii. On the appearance of the defendant in pursuance of the summons of warrant or on his voluntary surrender,theCourtshalldirectthesuretytobedischargedfromhisobligationandshallcalluponth e defendanttofindfreshsecurity.–

Procedure where defendant fails to furnish security or find fresh security: (Rule 3): Where the defendantfailstocomplywithanyorderunderrule2orrule3,theCourtmaycommithimtothecivilpris on untilthedecisionofthesuitorwhereadecreeispassedagainstthedefendantuntilthedecreehasbeen satisfied:

Providedthatnopersonshallbedetainedinprisonunderthisruleinanycaseforalongerperiodthansix months,norforalongerperiodthansixweekswhentheamountorvalueofthesubjectmatterofsuitdoes notexceedfiftyrupees:

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Arrest on Insufficient Grounds:6 According to section 95, where, in any suit in which an arrest or attachment has been effected and-

a. itappears, totheCourtthatsucharrestorattachmentwasappliedforoninsufficientground,or
b. the suit of the plaintiff fails and it appears to- the Court that there was no reasonable orprobable

ground for instituting the same,

ontheapplicationofthedefendanttheCourtmay,awardagainsttheplaintiffbyitsordersuchamount,not exceedingfiftythousandrupees,asitdeemsreasonablecompensationtothedefendantfortheexpenseor injury(includinginjurytoreputation)causedtohim.

Provided that a Court shall not award under this section, an amount exceeding the limits of itspecuniary jurisdiction.

AttachmentBeforeJudgment(Order38Rules5-12)

Object: In Sardar Govind Rao Vs Devi Sahai AIR 1982 S.C. 989, the Court held that "the sole object behindtheorderlevyingattachmentbeforejudgmentistogiveanassurancetotheplaintiffthathisdecree if madewouldbesatisfied.Itisasortofguaranteeagainstdecreebecominginfructuousforwantofproperty availablefromwhichtheplaintiffcansatisfythedecree."

Grounds:Rule5(1): Where,atanystageofasuit,theCourtissatisfied,byaffidavitorotherwisethatthe defendant,withintenttoobstructordelaytheexecutionofanydecreethatmaybepassedagainsthim-

a. isabouttodisposeofthewholeoranypartofhisproperty,or
b. isabouttoremovethewholeoranypartofhispropertyfromthelocallimitsofthejurisdictionoft he Court;

theCourtmaydirectthedefendant,withinatimetobefixedbyit,eithertofurnishsecurityinsuchsumas may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree, or to appearandshowcausewhyheshouldnotfurnishsecurity.

Rule 5(2): The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and estimated value thereof.

Rule5(3): TheCourtmayalsointheorderdirecttheconditionalattachmentofthewholeoranyportionof thepropertysospecified.

Rule5(4): Ifanorderofattachmentismadewithoutcomplyingwiththeprovisionsof Sub-rule1ofRule5, suchattachmentshallbevoid.

Principles: The remedy of an attachment before judgment is an extraordinary remedy and must be exercisedsparinglyandstrictlyinaccordancewiththelawandwiththeutmostcareandcaution,"andth e Courtmustbesatisfiedaboutthefollowingtwoconditionsbeforemakingsuchorderofattachment-

a. thatthedefendantisabouttodisposeofthewholeoranypartofhisproperty;and
b. thatthedisposaliswiththeintentionofobstructingordelayingtheexecutionofanydecreethat may bepassedagainsthim.

ChandrikaPrasadVsHiralal,AIR1924,PatHC,DawsonMillarC.J.,-statedthat"suchapowerisonly givenwhentheCourtissatisfiednotonlythatthedefendantisabouttodisposeofhispropertiesorto remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the executionofanydecreethatmaybepassedagainsthim,andsodeprivetheplaintiff,ifsuccessful,ofthe fruitsofthevictory."

AsperRule12,theplaintiffcannotapplyandtheCourtcannotordertheattachmentorproductionofany agriculturalproduceinpossessionofanagriculturist.

Right of Third Party

Rule10: Attachmentbeforejudgmentnottoaffectrightsofstrangers,norbardecreeholderfromapplying forsale:

Attachmentbeforejudgmentshallnotaffecttherights,existingpriortotheattachment,ofpersonsnotartie s to the suit, nor bar any person holding a decree against the defendant from applying for the sale f the propertyunderattachmentinexecutionofsuchdecree.

Re-attachment In Execution: (Rule 11 and 11-A)

Rule 11: Property attached before judgment not to be re-attached in execution of decree:

Where property is under attachment by virtue of the provisions of the Order 38, and a decree is subsequentlypassedinfavouroftheplaintiff,itshallnotbenecessaryuponanapplicationforexecutionf suchdecreetoapplyforare-attachmentoftheproperty.

Rule 11-A : Provisions applicable to attachment:

a. TheprovisionofthisCode(Order21)applicabletoanattachmentmadeinexecutionofadecree so farasmaybe,applytoanattachmentmadebeforejudgmentwhichcontinuesafterthejudgment by virtueoftheprovisionsofrule11.
b. An attachment made before judgment in a suit which is dismissed for default shall not become revivedmerelybyreasonofthefactthattheorderforthedismissalofthesuitfordefaulthasbeen setasideandthesuithasbeenrestored.

Withdrawal of Attachment:

Rule 9: Removal of attachment when security furnished or suit dismissed:

Where an order is made for attachment before judgment; the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for costs of the attachment or when the suit is dismissed.

TEMPORARY INJUNCTION (ORDER XXXIX RULES 1 TO 5)

MeaningofInjunction:AninjunctionisanorderbytheCourttoapartytotheeffectthatheshalldoorrefrain fromdoingaparticularact.

“Ajudicialprocess,bywhichone,whohasinvadedoristhreateningtoinvadetherights(legalorsuitable)o f another, is restrained from continuing or commencing such wrongful act."

AccordingtoLordHalsbury:"Aninjunctionisajudicialprocesswherebyapartyisorderedtorefrain.a m doingortodoaparticularactorthing."IntheformercaseitiscalledaRestrictiveInjunctionandthelater caseaMandatoryInjunction.

Characteristic of Injunction:

An injunction has three characteristics -

1. Itisajudicialprocess,
2. Theobjecttherebyisrestraintorprevention,and
3. Thethingrestrainedorpreventedisawrongfulact.

ClassificationofInjunction: The lawrelating toinjunction islaid downin theSpecific ReliefAct, 1963(Section36to42)

Aninjunctionmaybeclassifiedaccordingtothereliefgrantedoraccordingtoitsnatureoraccordingtothe operationofTime

As regards the "time" of their operation the injunction may be divided into two categories-

i) Perpetualor(Permanent),and
ii) Interlocutory Or(Temporary)

i.

Perpetualor(Permanent): Aperpetualinjunctionrestrainsapartyforeverfromdoingthespecifi c actandcanbegrantedonlyonmeritsattheconclusionofthetrialafterhearingboththepartiestothe suits.Section37(2)oftheSpecific-ReliefAct,1963

ii. Interlocutoryor(Temporary):

Definition: A temporary injunction or interim injunction, restrains a party temporarily from doing the specifiedactandcanbegrantedonlyuntilthedisposalofthesuitoruntilthe_furtherordersoftheCourts.It isregulatedbyOrder39rule1to5oftheC.P.C.andmaybegrantedatanystageofthesuit.

Section 37(1) of the Specific Relief Act, 1963

Object: Theprimaryobjectofgrantingtemporaryinjunctionistomaintainandpreservestatusquoatthe timeofinstitutionoftheproceedingsandtopreventanychangeinituntilthefinaldeterminationofthesuit .

Grounds:[Order39Rule1,2andalsoSec.94(c)]AtemporaryinjunctionmaybegrantedbytheCourt underthefollowingcases:

1. Whereinanysuititisprovedbyaffidavitorotherwise:
    a. thatanypropertyindisputeinasuit, isindangerofbeingwasted,damagedoralienatedby anypartytothesuit,orwrongfullysoldinexecutionofadecree;orRule1(a)

b. the defendant threatens, or intends to remove or dispose of his property with a view to defraudinghiscreditors,orRule1(b)

c. thedefendantthreatenstodisposestheplaintiffinrelationtoanypropertyindisputeint he suit,orRule1(c)

TheCourtmaybyordergrantatemporaryinjunctiontorestrainsuchact,ormakesuchotherorderforthe purposesofstayingandpreventingthewasting,damaging,alienation,sale,removalordispossessionof the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any propertyindisputeinthesuitastheCourtthinksfit,untilthedisposalofthesuitoruntilfurtherorders.

2. Wherethedefendantisabouttocommitabreachofcontract,orotherinjuryofanykind,orRule2(1)
3. WheretheCourtisoftheopinionthattheinterestofjusticesorequires:Section94(c)

Principles: Thepowertograntatemporaryinjunctionisinthediscretionofthecourt,butthisdiscretion, shouldbeexercisedreasonably,judiciouslyandonsoundlegalprinciples.Generally,beforegrantingth e injunction,theCourtmustbesatisfiedaboutthefollowingconditions:

i) Prima faciecase;
ii) Irreparable Injury;and
iii) Balance ofconvenience

i)

Primafaciecase: Theapplicantmustmakeoutaprimafaciecaseinsupportoftherightclaimed by him.TheCourtmustbesatisfiedthatthereisabonafidedisputeraisedbytheapplicantandonthe facts before the Court there is a probability of the applicant being entitled to the relief claimed by him.

Indecidingprimafaciecase;theCourtistobeguidedbythePlaintiffscaseasrevealedintheplaint, affidavitsorothermaterialsproducedbyhim...and"whiledeterminingwhetheraprimafaciec ase hadbeenmadeout,therelevantconsiderationis,whether'ontheevidenceled,itwaspossibleto arrive at the conclusion in question and not whether that was the only conclusion which could be arrivedatthatevidence."?

ii)

IrreparableInjury: TheapplicantmustfurthersatisfytheCourtthathewillsufferirreparable injuryif theinjunctionasprayedisnotgranted,andthereisnootherremedyopentohimbywhichhecan protecthimselffromtheconsequencesofapprehendedinjury.
Theexpression"irreparableinjury"meansthattheinjurymustbematerialone,Le.whichcannotbe adequatelycompensatedbydamages.

iii)

BalanceofConvenience: Thebalanceofconveniencemustbeinfavouroftheapplicant.Inoth er wordstheCourtmustbesatisfiedthatthecompensation,mischieforinconveniencewhichisli kely tobecausedtotheapplicantbywithholdingtheinjunctionwillbegreaterthanthatwhichislikel

yto becausedtotheoppositepartybygrantingit.

Discretionary Remedy: Since grant of injunction is discretionary and an equitable relief, even if all the conditionsaresatisfied,theCourtmayrefusetograntitforsomeotherreasonse.g.,onthegroundofdelay, latchesoracquiescenceorwheretheapplicanthasnotcomewithcleanhandsorhassuppressedmaterialf acts, or where monetary compensation is adequate relief.

Notice: The Court shall before granting an injunction, give notice to the opposite party, except where it appears that the object of granting the injunction would be defeated by the delay.

AccordingtoprovisotoRule3,whenanexparteinjunctionisproposedtobegiventheCourthastorecord thereasonsforcomingtotheconclusionthattheobjectofgrantingtheinjunctionwouldbedefeatedbythe delayandtheCourtshallordertheapplicant-

a. todeliverortosendbyregisteredpostacopyoftheapplicationforinjunctiontogetherwith-
   i) acopyofaffidavitfiledinsupportofapplication,
   ii) acopyofthePlaint,and
   iii) copiesofdocumentsonwhichtheapplicantrelies,and
b) to file, on the day on which injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent immediately to the oppositeparty.

Incaseofex-parteinjunction,theCourtshallmakeanendeavourtofinallydisposeoftheapplicationwithin 30 days from the date on which the ex-parte injunction was granted. Where the Court finds it difficult to disposeoftheapplicationwithintheperiodof30days,thereasonsarerequiredtoberecorded.(Rule3-A)

Anorderofinjunctionmaybedischarged,variedorsetasidebytheCourtonapplicationbeingmadebyany partydissatisfiedwithsuchorder;9orwheresuchdischarged,variationorsetasidehasbeennecessitated by the change in the circumstances, or where the Court is satisfied that such order has caused undue hardshiptotheotherside.

Provided that if an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without "giving" nonce to the opposite party, the Court shall vacate the injunction unless,forreasonstoberecorded,itconsidersthatitisnotnecessarytodointheinterestofjustice."

First ProvisotoRule4
Providedfurtherthatwhereanorderforinjunctionhasbeenpassedaftergivingapartyanopportunityof beingheard,theordershallnotbedischarged,variedorset-asideontheapplicationofthatpartyexcept wheresuchdischarged,variationorsetasidehasbeennecessitatedbythechangeinthecircumstances, orunlesstheCourtissatisfiedthat"theorderhascausedhardshiptothatparty.

SecondProvisotoRule4
Providedalsothatifatanystageofthesuititappears'totheCourtthattheParty"inwhosefavourtheorder ofinjunctionexistsisdilatingtheproceedingsorisotherwiseabusingtheprocessoftheCourt,itshallset asidetheorderforinjunction.

Consequences Of Disobedience Or Breach Of Injunction: Section 94(c) and Rule 2-A of Order 39

provideforthe consequencesofdisobedienceorbreachofanorderofaninjunctionissuedbytheCourt. Thepenaltyfordisobedienceorbreachofinjunctionmaybeeitherarrestorattachmentofhispropertyor both of the opposite party who has committed breach. However, the detention in civil prison shall not exceedthreemonthsandtheattachmentofpropertyshallnotremaininforceformorethanoneyear.[Rule 2-A (1)]

Ifthedisobedienceorbreachstillcontinues,thepropertyattachedmaybesoldandoutoftheproceeds,the Courtmayawardsuchcompensationasitthinksfittotheinjuredparty.[Rule2-A(2)]

The transferee Court can also exercise his power and can punish for breach of injunction granted bythe transferorCourt.[Rule2-A(1)]

Injunctiononinsufficientgrounds: Wheninanysuitinwhichanorderoftemporaryinjunctionhasbeen obtainedbytheplaintiffoninsufficientgrounds,orwherethesuitoftheplaintifffailsanditappearsto the Courtthattherewasnoreasonableorprobablegroundforinstitutingit,onapplicationbeingmadebythe defendant,theCourtmayordertheplaintifftopaysuchamountnotexceedingonethousandrupees,asit deemsareasonablecompensationtothedefendantfortheexpenseorinjurytoreputationcausedtohim.1 0

An order declining to grant injunction and issuing notice to defendants V/s Rule 3 of Order 39 is not appealable under Order 43 Rule 1 (2) of the Code but when the ex-parte interim injunction is refused illegally,theCourtcaninexerciseofitspowerofSuperintendenceunderSection115oftheCode,grantad - interiminjunction.

Interlocutory Orders (Order XXXIX Rules 6 to 10)

Meaning: Interimordersorinterlocutoryordersarethoseorderspassedbyacourtduringthependencyof a suit or proceeding which do not determine finally the substantive rights and liabilities of the parties in respectofthesubject-matterofthesuitorproceeding.

Afterthesuitisinstitutedbytheplaintiffandbeforeitisfinallydisposedof,theCourtmaymakeinterlocuto ry ordersasmayappeartotheCourttobejustandconvenient.**[Section94(e)]**

Interimordersorinterlocutoryordersaremadeinordertoassistthepartiestothesuitintheprosecutionof theircaseorforthepurposeofprotectionofthesubjectmatterofthesuit.

Interlocutory Orders Under Order XXXIX:

1. **Power of Court to Order Interim Sale:** On the application of any party (an application by the plaintiffunder Rules 6 or 7 may be made at any time after the institution of the suit while by the defendant,itmaybemadeatanytimeafterappearance)tothesuit,theCourtmay,orderthesale ofanymoveableproperty,beingthesubject-matterofsuchsuit,orattachbeforejudgmentinsuch suit,whichissubjecttospeedyandnaturaldelay,orwhichforanyjustandsufficientcauseitmay be desirabletohavebeensoldatonce.
2. **Detention, Preservation, Inspection, etc, of Subject-matter of Suit :** The Court may make an orderfordetention,preservationandinspectionofanypropertywhichisthesubject-matterof the

suit,orastowhichanyquestionmayarisetherein;andauthorizeanypersontoenteruponorinto anylandorbuildinginthepossessionofanyotherpartytosuchsuit;andauthorizeanysampleto betaken,oranyobservationtobemadeorexperimenttobetried,whichmayseemnecessaryor expedientforthepurposeofobtainingfullinformationorevidence.

Notice to Opposite Party: No order under rule 6 or 7 shall be made without giving notice tothe

oppositeparty,exceptwhereitappearstotheCourtthattheobjectofmakingsuchorderwouldbe defeated bydelay.

3. Whenpartymaybeputinimmediatepossessionofland,thesubjectmatterofsuit: Wherelandpayingrevenuetogovernment,oratenureliabletosale,isthesubjectmatterofasuit, or the party in possession of such land or tenure neglects to pay the government revenue, or the rentdueto.theproprietorofthetenure,asthecasemaybe,andsuchlandortenureisconsequentl y orderedtobesold,anyotherpartytothesuitclaimingtohaveaninterestinsuchlandortenurema y, uponpaymentoftherevenueorrentduepreviouslytothesale(andwithorwithoutsecurityatthe discretion of the court), be put in immediate possession of the land or tenure; and the court in its decreemayawardagainstthedefaultertheamountsopaid,withinterestthereonatsuchrateasth e court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the court orders,inanyadjustmentofaccountswhichmaybedirectedinthedecreepassedinthesuit.

4. **Depositofmoney,etc.,incourt:**Wherethesubjectmatterofasuitismoneyorsomeotherthing capableofdeliveryandanypartytheretoadmitsthatheholdssuchmoneyorotherthingsasatrue for another party, or that it belongs or is due to another party, the court may order the same tobe deposited in court or delivered to such last named party, with or without security, subject to the furtherdirectionofthecourt.

RECEIVER (ORDER XL)

Meaning: The word has not been defined in the Code. The same may be defined as under:-

"The receiver is an important person appointed by the Court to collect and receive, pending the proceedings,therents,issuesandprofitsofland,orpersonalestate,whichitdoesnotseemreasonableto theCourtthateitherpartyshouldcollectorreceive,orforenablingthesametobedistributedamongthe personsentitled."

Thereceiverisappointedforthebenefitofallconcerned;heistherepresentativeoftheCourt,andforall partiesinterestedinthelitigation,whereinheisappointed.HeisanofficerorrepresentativeoftheCourt andhefunctionsunderitsdirections.

Appointment: In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,appointareceiverofanypropertyandenforcetheperformanceofhisdutiesbyattachingand sellinghisproperty.Theremunerationfortheservicesofthereceivershallbepaidbytheorderof Court.

Order XL: Rule 1 (1) provides that:-
Where it appears to the court to be just and convenient, the court may by order-

a. appointareceiverofanyproperty,whetherbeforeorafterdecree;
b. remove25anypersonfromthepossessionorcustodyoftheproperty;
c. committhesametothepossession,custodyormanagementofthereceiver;and
d. conferupontherecеiverallsuchpowers,astobringinganddefendingsuitsandfortherealizatio n, management,protection,preservationandimprovementofthe: property,thecollectionofthe rentsandprofitsthereof,theapplicationanddisposalofsuchrentsandprofits,andtheexecutionof documentsastheownerhimselfhas,orsuchofthosepowersasthecourtthinksfit.

Duties and Enforcement thereof:

Rule 3: Duties : Every receiver so appointed shall-

a. furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respectoftheproperty;
b. submithisaccountsatsuchperiodsandinsuchformasthecourtdirects;
c. paytheamountduefromhimasthecourtdirects;and
d. beresponsibleforanylossoccasionedtothepropertybyhiswillfuldefaultorgrossnegligence.
e. failstopaytheamountduefromhimasthecourtdirects,oroccasionslosstothepropertybyhis willfuldefaultorgrossnegligence,

Rule 4: Enforcement of Receiver's Duties: Where a receiver-

a) Failstosubmithisaccountsatsuchperiodsandinsuchformasthecourtdirects,o r
b) Failstopaytheamountduefromasthecourtsdirects,or
c) Occasionslosstothepropertybyhiswillfuldefaultorgrossnegligence,

thecourtmaydirecthispropertytobeattachedandmaysellsuchproperty,andmayapplytheproceedsto makegoodanyamountfoundtobeduefromhimoranylossoccasionedbyhim,andshallpaythebalance (ifany)tothereceiver.

Accordingto**rule5**,acollectormaybeappointedasareceiverwherethepropertyislandpayingrevenueto the Government, or land of which the revenue has been assigned or redeemed, and the courtconsiders thattheinterestsofthoseconcernedwillbepromotedbythemanagementoftheCollector,thecourtmay, withtheconsentoftheCollector,appointhimtobereceiverofsuchproperty.

Appeals (Section 96 to 112, Order 41-45)

Introduction: TheprovisionsrelatingtoappealsarecontainedinSections96to112andOrdersXLItoXL V oftheCodeofCivilProcedureandcanbesummarizedasunder:

a. FirstAppeal, Sections96to99-A,107andOrderXLI
b. SecondAppeal, Sections100to103,108andOrderXUI
c. AppealsfromOrders Sections104,108andOrderXLIII

d. Appeals byIndigentpersons OrderXLIV
e. Appeals toSupremeCourt Section109andOrder45

Meaning: Theappealmeans"theJudicialexaminationofthedecisionsbyahigherCourtofthedecisions ofaninferiorCourt"

Right to Appeal: The right to appeal is a vested right. The right to appeal is a substantive right and an appealisacreatureofstatuteandthereisnorightofappealunlessitisgivenclearlyinexpresstermsbya statute. Appeal is a vested right and accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced. The rightofappealistobegovernedbythelawprevailingatthedateoftheinstitutionofthesuitorproceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.27 This vestedrightcanbetakenawayonlybyasubsequentenactmentifitsoprovidesexpresslyorbynecessary implication,andnototherwise.

FirstAppeal:(Sections96–99-A,107andOrderXLI) AppealfromOriginalDecree:
S. 96 of the Code provides as:

1. Savewhereotherwiseexpresslyprovidedinthebodyofthis Codeorbyanyotherlawforthetimebeing inforce,anappealshallliefromeverydecreepassedbyanyCourtexercisingoriginaljurisdictionto the Courtauthorized.tohearappealsfromthedecisionofsuchCourt.
2. Anappealmaylefromanoriginaldecreepassedexparte.
3. NoappealshallliefromadecreepassedbytheCourtwiththeconsentofparties.
4. Noappealshalllie,exceptonaquestionoflaw,fromadecreeinanysuitofthenaturecognizableby Courts of small causes, when the amount or value of the subject- matter of the original suit does not exceedtenthousandrupees.

Who may Appeal: The following persons are entitled to prefer an appeal :

1. A party to the suit who is adversely affected by the decree {Section 96(1)}, or his legal representative. (Section146)
2. Apersonclaimingunderatitlepartytothesuitoratransfereeofinterestsofsuchparty,who,sofar asinterestisconcerned,isboundbythedecree,providedhisnameisenteredontherecordofthe suit. (Section146)
3. AguardianadlitemappointedbytheCourtinasuitbyoragainstaminor.(Section147,Order32, Rule5)
4. Anyotherperson,withtheleaveoftheCourt,ifheisadverselyaffectedbythedecree.

Anappealmaylieagainstanex-partedecree{S-96(2)}andnoappealshallliefromadecreepassedwith consent of parties {S- 96(3)}. The provision of S-96(3) is based upon principle of Estoppels. Once the decree is shown to have been passed with the consent of parties, Section 96(3) becomes operative and bindsthem.ItcreatesandEstoppelsbetweenthepartiesasajudgmentonconsent.

Thereshallbenoappealinpettycasesasprovidedin Section 96(4) andanappealliesagainstpreliminary decreeasinthecaseofalldecrees,unlessafinaldecreehasbeenpassedbeforethedateoffilinganappeal, but there shall be no appeal against final decree when there was no appeal against preliminary decree. In fact, final decree owes its existence to the preliminary decree.

Conditions before filing an appeal: An appeal can be filed against every decree passed by any Court in exercise of original jurisdiction upon the satisfaction of the following two conditions:

i) Thesubjectmatteroftheappealmustbea"decree",and
ii) Thepartyappealingmust.havebeenadverselyaffectedbysuchdetermination.

OrderXLI-AppealfromOriginalDecrees. FormofAppeal:Rule1to4:
MemorandumofAppeal: Containsthegroundsonwhichthejudicialexaminationisinvited.Inordertha t anappealmaybevalidlypresented,thefollowingrequirementsmustbecompiledwith:

a. Itmustbeintheformofmemorandumsettingforththegroundsofobjectionstothedecreeappealed from.
b. ItmustbesignedbytheappellantCourtorhispleader.
c. ItmustbepresentedtotheCourt.
d. Thememorandummustbeaccompaniedbyacertifiedcopyofthedecree.
e. Thememorandummustbeaccompaniedbyacertifiedcopyofthejudgmentunlessthecourt dispenses with it;and
f. Whetheappealisagainstamoneydecree,theappellantmustdeposit-thedecretalamountorfurnish thesecurityinrespectthereofasperthedirectionoftheCourt.

Appeals From Appellate Decrees (Second Appeal Sections 100 to 103 and Order 42)

Section-100 Second Appeal:

1. Saveasotherwiseprovidedinthebodyofthis Codeorbyanyotherlawforthetimebeinginforce,an appealshalllietotheHighCourtfromeverydecreepassedinappealbyanyCourtsubordinatetothe HighCourt,iftheHighCourtis,satisfiedthatthecaseinvolvesasubstantialquestionoflaw.
2. Anappealmaylieunderthissectionfromanappellatedecreepassedex-parte.
3. In an appeal under this section, the memorandum of appeal shall precisely state the substantial questionoflawinvolvedintheappeal.
4. Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate suchquestion.
5. Theappealshallbeheardonthequestionsoformulatedandtherespondentshall,afterhearingofthe appeal,beallowedtoarguethatthecasedoesnotinvolvesuchquestion:

Providedthatnothinginthissub-sectionshallbedeemedtotakeawayorabridgethepoweroftheCourtto hear,forreasonstoberecorded,theappealonanyothersubstantialquestionoflaw,notformulatedbyit,if itissatisfiedthatthecaseinvolvessuchquestion.

Substantial Question of Law: Means a substantial question of law as between the parties in the case involved.Aquestionoflawisasubstantialasbetweenthepartiesifthedecisionturnsonewayortheother ontheparticularviewoflaw.Ifitdoesnotaffectthedecision,itcannotbesaidtobeasubstantialquestionof law.

Form of Second Appeal; A memorandum of second appeal precisely states the substantial questionof
lawinvolved,but,unlikethememorandumof1stappeal,itneednotsetoutthegroundofobjectionstothe decreeappealedfrom.Order41Rule1.

Appeal From Orders (Section 104 and Order 43)

Section 104: Orders from which appeal lies-

1.

Anappealshallliefromthefollowingorders,andsaveasotherwiseexpresslyprovidedinthebodyo f thisCodeorbyanylawforthetimebeinginforce,fromnootherorders:

I. AnorderunderSection35A;[Sec.104(1)(ff)]
II. anorderunderSection91orSection92refusingleavetoinstituteasuitofthenaturereferredtoin Section91orSection92,asthecasemaybe;[Sec.104(1)(ffa)]
III. anorderunderSection95;[Sec.104(1)(g)]
IV.

anorderunderanyoftheprovisionsoftheCodeimposingafineordirectingthearrestordetention in the Civil prison of any person except where such arrest or detention is in execution of a decree; [Sec.104 (1)(h)]

V. anordermadeunderrulesfromwhichanappealisexpresslyallowedbyrules;[Sec.104(1)(i)]

Providedthatnoappealshalllieagainstanyorderspecifiedinclause(ff)saveonthegroundthatnoorder, oranorderforthepaymentofalessamount,oughttohavebeenmade.{Provisoto,Section104(1)}

2. Noappealshallliefromanyorderpassedinappealunderthis Section.

Section 105:

a. Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exerciseofitsoriginalorappellatejurisdictionbut,whereadecreeisappealedfrom,anyerrordefec tor irregularityinanyorder,affectingthedecisionofthecasemaybesetforthasagroundofobjectionint he memorandum ofappeal.
b. Notwithstandinganythingcontainedinsub-section(1)whereanypartyaggrievedbyanorderofremand fromwhichanappealliesdoesnotappealtherefrom,heshallthereafterbeprecludedfromdisputin gits correctness.

Section 106 : What Courts to hear appeals: Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction then to the High court.

Appeals from Orders (Order XLIII)

Rule-1:AppealsfromOrders: Anappealshalllietothefollowingordersundertheprovisions ofSection 104,namely:

1. **Rule-**

1(a): Anorderunderrule10ofOrderVIIreturningaplainttobepresentedtotheproperCourt exceptwheretheprocedurespecifiedinRule10AofOrderVIIhasbeenfollowed;

2. **Rule-1(c):**Anorderunderrule9ofOrderIXrejectinganapplication(inacaseopentoappeal)for anordertosetasidethedismissalofasuit;
3. **Rule-1(d):**Anorderunderrule13ofOrderIXrejectinganapplication(inacaseopentoappeal)for anordertosetasideadecreepassedexparte;
4. **Rule-1(f):**Anorderunderrule21ofOrderXI;
5. **Rule-1 (i) :** An order under rule 34 of Order XXI on an objection to the draft of a document or of endorsement;
6. **Rule-1(j):**Anorderunderrule72orrule92ofOrderXXIsettingasideorrefusingtosetasideasale;
7. **Rule-1 (ja) :** An order rejecting an application made under sub-rule (1) of rule 106 of Order XXI, providedthatanorderontheoriginalapplication,thatistosay,theapplicationreferredtoinsubrule (1) ofrule105ofthatOrderisappealable.
8. **Rule-1(k):**Anorderunderrule9ofOrderXXIIrefusingtosetasidetheabatementordismissalofa suit;
9. **Rule-1(I):**Anorderunderrule10ofOrderXXIIgivingorrefusingtogiveleave;
10. **Rule-1(n):**Anorderunderrule2ofOrderXXVrejectinganapplication(inacaseopentoappeal) foranordertosetasidethedismissalofasuit;
11. **Rule-1(na):**Anorderunderrule5orrule7oforderXXXIIIrejectinganapplicationforpermissionto sueasanindigentperson;
12. **Rule-1(p):**Orderininterpleadersuitsunderrule3,rule4orrule6ofOrderXXXV;
13. **Rule-1(q):**Anorderunderrule2,rule3orrule6ofOrderXXXVIII;
14. **Rule-1(r):**Anorderunderrule1,rule2,rule2A,rule"4orrule10ofOrderXXIX.
15. **Rule-1(s):**Anorderunderrule1orrule4ofOrderXL;
16. **Rule-1(t):**Anorderofrefusalunderrule19ofOrderXLItore-admit,orunderrule21ofOrderXLIto re-hear, an appeal;
17. **Rule-1(u):**Anorderunderrule23orrule23-AofOrderXLIremandingacase,wherean appeal wouldliefromthedecreeoftheAppellateCourt;
18. **Rule-1(w):**Anorderunderrule4ofOrderXLVIIgrantinganapplicationforreview.

1. Whereanyorderismadeunderthis Codeagainstapartyandthereuponanyjudgmentispronounced againstsuchpartyandadecreeisdrawnup,suchpartymay,inanappealagainstthedecree,contend thatsuchordershouldnothavebeenmadeandthejudgmentshouldnothavebeenpronounced.
2. In an appeal against a decree passed In a suit after recording a compromise or refusing to record a compromise,itshallbeopentotheappellanttocontestthedecreeonthegroundthatthecompromise should,orshouldnothavebeenrecorded.

Rule: 2. Procedure: The rules of Order XLI [{(and Order XLI-A) by Allahabad High Court Amendment}] shall apply, so far as may be, to appeals from orders.

REFERENCE (Section - 113 and Order XIII)

Section 113 provides provisions relating to reference and empowers any Court (subordinate Court) to stateacaseandreferthesamefortheopinionoftheHighCourt.Suchanopinioncanbesoughtwhenthe Court itself feels some doubt about a question of law. The provisions are subject to such conditions and limitationsasmaybeprescribed.

Object: Theobjectforreferenceistoenablethesubordinate Courtstoobtaininnon-appealablecasesthe opinionoftheHighCourt,onaquestionoflawandtherebyavoidthecommissionofanerrorwhichcouldn ot beremediedlateron.

Conditions for Applications: (Order 46 Rule 1) The following conditions must be fulfilled, before High Court entertains a reference from a sub-ordinate Court, i.e.

1. **Pendency:**Theremustbependencyofasuitorappealinwhichthedecreeisnotthesubjecttoappeal orapendingproceedinginexecutionofsuchdecree.
2. **Questionoflaw:**Aquestionoflaworusagehavingtheforceoflawmustariseinthecourseofsuchsu it, appealorproceeding;and
3. **Doubt in mind of Court:** The Court trying the suit, appeal or executing the decree must entertain a reasonabledoubtonsuchquestion.

Questionsoflaw: ThesubordinateCourtmaybeindoubtrelatingtothequestionsoflaw,whichmaybe-

1. Those which relate to the validity of any Act, Ordinance or Regulation and the reference upon such questionsoflawareobligatoryuponthefulfillmentofthefollowingconditions
    1. Itisnecessarytodecidesuchquestioninordertodisposeofthecase;
    2. TheSub-ordinateCourtisoftheviewthattheimpugnedAct,OrdinanceorRegulationisultravires; and
    3. ThatthereisnodeterminationbytheSupremeCourtorbytheHighCourt,towhichsuchCourtis SubordinatethatsuchAct,OrdinanceorRegulationisultravires.
2. **OtherQuestions:**Inthiscasethereferenceisoptional.

Procedure:

Who can make Reference: A reference can be made by the Court suo-motu or on

application of any party.

Rule 1: The Referring Court must formulate the question of law and give its opinion thereon.

Rule2: TheCourtmayeitherstaytheproceedingormaypassadecreeororder,whichcannotbeexecuted untilreceiptofjudgmentofHighcourtonreference.

Rule3: TheHighCourtafterhearingtheparties,ifitsodesires,shalldecidethepointofreferenceandthe SubordinateCourtshalldisposeofthecaseinaccordancewiththesaiddecision.

ProvisionasinSection113: Theprovisionsrelatingtoreference,ashasbeenspecifiedins.113ofthe Codeareasunder-

Section113:ReferencetoHighCourt: Subjecttosuchconditionsandlimitationsasmaybeprescribed, anycourtmaystateacaseandreferthesamefortheopinionoftheHighCourt,andtheHighCourtmay makesuchorderthereonasitthinksfit:

PROVIDED that where the court is satisfied that a case pending before it involves a question 9S to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation,thedeterminationofwhichisnecessaryforthedisposalofthecase,andisofopinionthatsuch Act,Ordinance,Regulationorprovisionisinvalidorinoperative,buthasnotbeensodeclaredbytheHigh CourttowhichthatCourtissubordinateorbytheSupremeCourt,theCourtshallstateacasesettingoutits opinionandthereasonstherefor,andreferthesamefortheopinionof,theHighCourt.

Explanation:Inthissection,"Regulation"meansanyRegulationoftheBengal,BombayorMadrasCode of RegulationsasdefinedintheGeneralClausesAct,1897(10of1897),orin"theGeneralClausesActofa State.

PowersandDutyofReferencingCourt: Areferencecanbemadeonaquestionoflawarisenbetween thepartieslitigating,inasuit,appealorexecutionproceeding,duringthependencyofsuchsuit,appealor proceedingandtheCourtisindoubtonsuchquestionoflaw.

Powers and Duty of High Court: The High Court entertains the consulting jurisdiction in cases of referenceandcanneithermakeanyorderonmeritsnorcanitmakesuggestions.Incaseofreferencethe HighCourtmayanswerthequestionreferredtoitandsendbackthecasetothereferringCourtfordisposal inaccordancewithlaw.33WhereacaseisreferredtotheHighCourtunderRule1ofOrderXLVIorunder theprovisotosection113,theHighCourtmayreturnthecaseforamendment,andmayalter,cancelorset-asideanydecreeororderwhichtheCourtmakingreferencehaspassedormadeinthecaseoutofwhich thereferencearose,andmakesuchorderasitthinksfit.

Review (Section 114 and Order XLVII)

Meaning: Reviewmeansre-examinationorreconsiderationofthecasebythesamejudge.Itisajudicial re-examinationofthecasebythesameCourtandbythesameJudge.Init,aJudge,whohasdisposedof thematter,reviewshisearlierorderincertaincircumstances.

Section114andOrderXLVII: TheprovisionsrelatingtoreviewareprovidedinS.114(substantiveright) andOrderXLVII(procedure).Thegeneralruleisthatoncethejudgmentissignedandpronouncedoran orderismadebytheCourt,ithasnojurisdictiontoalterit.Reviewisanexceptiontothisgeneralrule.

Section 114:

Review: Subject as aforesaid, any person considering himself aggrieved

a. byadecreeororderfromwhichanappealisallowedbythisCode,butfromwhichnoappealhas beenpreferred;
b. byadecreeororderfromwhichnoappealisallowedbythisCode,or
c. byadecisiononareferencefromaCourtofSmallCauses,

mayapplyforareviewofjudgmenttotheCourtwhichpassedthedecreeormadetheorderandtheCourt maymakesuchorderthereonasitthinksfit.

WhomayapplytoReview: Anypersonaggrievedbyadecreeorordermayapplyforareviewofjudgment wherenoappealisallowedorwhereanappealisallowedbutnoappealhasbeenfiledagainstsuchdecree ororderorbyadecisiononareferencefromasmallcause.

An'aggrievedperson'.meansapersonwhohassufferedalegalgrievanceoragainstwhomadecision hasbeenpronouncedwhichhaswrongfullydeprivedhimofsomethingorwrongfullyrefusedinsomethi ng orwrongfullyaffectedhistitletosomething.

Apersonwhoisnotapartytothedecreeorordercannotapplyforreviewsinceongeneralprincipleof B.W, suchdecreeororderisnotbindingonhimandthereforehecannotbesaidtobeanaggrievedpersonwithin themeaningofsection114andorder47Rule(1).

Apartywhohasarighttoappealbutdoesnotfileanappeal,mayapplyforareviewofjudgment,evenif notwithstandingthependancyofanappealbysomeotherparty,excepts?

i. Wherethegroundofsuchappealiscommontotheapplicantandtheappellant,or
ii. When,beingrespondent,hecanpresenttotheAppellateCourtthecaseonwhichheappliesfort he review.

Grounds of Review: Order XLVII, Rule (1) provides the following grounds:

i. Discoveryofnewandimportantmatterorevidence,whichaftertheexerciseofduediligence,w as notwithinhis(aggrievedperson's)knowledgeorcouldnotbeproducedbyhim(aggrievedpers on) atthetimewhenthedecreewaspassedororder made;or
ii. **onaccountofsomemistakeorerrorappearonthefaceoftherecord;or**
iii. foranyothersufficientreason.

Explanationtosection114specificallyprovidesthat"thefactthatthedecisiononaquestionoflaworwhich thejudgmentoftheCourtisbasedhasbeenreservedormodifiedbythesubsequentdecisionorasuperior courtinanyothercase,shallnotbeagroundforreviewofsuchjudgment".

Procedure: WheretheCourtisoftheopinionthatthereisnotsufficientgroundforareview,itshallreject theapplicationotherwiseitshallgrantthesamebutnosuchapplicationshallbegranteewithoutprevious noticetotheoppositeparty;toenablehimtoappearandbeheardinsupportofthedecreeororder,areview of which is applied for.Where more than one Judge hears a review application and the Court isequally dividedtheapplicationshallberejected.

AppealAgainstOrderonapplicationU/s114: AnorderoftheCourtrejectingtheapplicationshallnobe appealable,butanordergrantingtheapplicationmaybeobjectedtoatoncebyanappealfromtheorder grantingtheapplicationorinanappealfromthedecreeororderfinallypassedormadeinthesuit.

Bar of Certain Application: No application to review an order made on an application for a review or ' decree or order passed or made on a review shall be entertained.

REVISION (SECTION 115)

Meaning:'Revision'means"theactionofrevising,especiallycriticalorcarefulexaminationorperusalw ith aviewtocorrectingorimproving".Revisionis"theactofexaminingactioninordertoremoveandefector grantreliefagainsttheirregularorimproperexerciseornon-exerciseofjurisdictionbyalowerCourt".

Object: The object of Section 115 is to prevent the subordinate Courts from acting arbitrarily, capricious and illegally or irregularly in the exercise of their jurisdiction. It enables the Court to correct, when necessary, errors of jurisdiction 'committed by the subordinate Courts and

provides the means toaggrievedpartytoobtainrectificationofanon-appealableorder.ThepowersU/s115areintendedtomeet theendsofjusticeandwheresubstantialjusticehasbeenrenderedbytheorderofthelowerCourttheHigh Courtwillnotinterfere.

Provision U/s 115:

1. TheHighCourtmaycallfortherecordofanycasewhichhasbeendecidedbyanycourtsubordinate tosuchHighCourtandinwhichnoappealliesthereto,andifsuchsubordinatecourtappears-
   a. tohaveexercisedajurisdictionnotvestedinitbylaw,or
   b. tohavefailedtoexerciseajurisdictionsovested,or
   c. tohaveactedintheexerciseofitsjurisdictionillegallyorwithmaterialirregularity,Th eHigh Courtmaymakesuchorderinthecaseasitthinksfit:

PROVIDEDthattheHighCourtshallnot,underthissection,varyorreverseanyordermade,oranyorder decidinganissue,inthecourseofasuitorotherproceeding,exceptwheretheorder,ifithadbeenmadein favorofthepartyapplyingforrevision,wouldhavefinallydisposedofthesuitorotherproceedings.

2. The High Court shall not, under this section vary or reverse any decree or order against Which an appeallieseithertotheHighCourtortoanycourtsubordinatethereto.
3. Arevisionshallnotoperateasastayofsuitorotherproceedingbeforethecourtexceptwheresuchsu it orotherproceedingisstayedbytheHighCourt.

Explanation: Inthissection,theexpression"anycasewhichhasbeendecided"includesanyordermade, oranyorderdecidinganissue,inthecourseofasuitorotherproceeding.

Provision relating to Revision in Uttar Pradesh: For S. 115, the following section shall be substituted and be deemed to have been substituted with effect from July 1, 2002, namely:

"115. Revision -

1. AsuperiorCourtmayreviseanorderpassedinacasedecidedinanoriginalsuitorotherproceedingb y asubordinateCourtwherenoappealliesagainst'the'orderandwherethesubordinateCourthas:
   a) exercisedajurisdictionnotvestedinitbylaw;or
   b) failedtoexerciseajurisdictionsovested;or
   c) actedinexerciseofitsjurisdictionillegallyorwithmaterialirregularity.
2. Arevisionapplicationundersub-section(1),whenfiledintheHighCourt.shallcontainacertificateon thefirstpageofsuchapplication,belowthetitleof thecase,totheeffectthatnorevisioninthecaselies to the district Court but lies only to the High Court either because of valuation or because the ordersoughttoberevisedwaspassedbythedistrictCourt.
3. ThesuperiorCourtshallnot,underthissection,varyorreverseanyordermadeexceptwhere-,
   a. theorder,ifithadbeenmadeinfavourofthepartyapplyingforrevision,wouldhavefina lly disposedofthesuitorotherproceeding;or

b. theorder,ifallowedtostand,wouldoccasionafailureofjusticeorcauseirreparableinjuryto thepartyagainstwhomitismade.

4. Arevisionshallnotoperateasastayofsuitorotherproceedingbeforetheexceptwheresuchsuit orotherproceedingisstayedbythesuperiorCourt.

Explanation I : In this section,-

a) theexpression"superiorCourt"means-
   I. the district Court, where the valuation of a case decided by a Court subordinate to it does not exceedfivelakhrupees;
   ii. theHighCourt,wheretheordersoughttoberevisedwaspassedinacasedecidedbythedistrict Courtorwherethevalueoftheoriginalsuitorotherproceedingsinacasedecidedbya Court subordinatetothedistrictCourtexceedsfivelakhrupees.

b) theexpression"order"includesanorderdecidinganissueinanyoriginalsuitor other proceedings.

ExplanationII: Theprovisionsofthissectionshallalsobeapplicabletoorderspassed,beforeorafterthe commencement of this section, in original suits or other proceedings instituted before such commencement."-U.P.Act14of2003,S.2(w.e.f.1-7-2002).

Conditions: The following conditions must be satisfied before the revisional power can be exercised:

a. acasemusthavebeendecided;
b. the Court deciding the case must be one which is a Court sub-ordinate to the High Court or the SessionCourts,asthecasemaybe;
c. theordershouldbeoneinwhichnoappeallies;and
d. thesub-ordinateCourtmusthave
   i. exercisedjurisdictionnotvestedinitbylaw;or
   ii. failedtoexercisejurisdictionvestedinit;or
   iii. actedintheexerciseofitsjurisdictionillegallyorwithmaterialirregularity.

ApplicationofS.115:"……. WhileexercisingitsjurisdictionU/s115,itisnotcompetenttotheHighCourt to correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relationstothejurisdictionoftheCourttotrythedisputeitself.Ascis.(a),(b)and(c)ofsection115indicate, itisonlyincaseswherethesub-ordinateCourthasexercisedajurisdictionnotvestedinitbylaw,orhas failedtoexerciseajurisdictionillegallyorwithmaterialirregularitythattherevisionaljurisdictionofthe High Court can be properly invoked."

It was decided by the Supreme Court in ***Smt. Vidyavati Vs Shri Devidas*** AIR 1977 S. C. 397, that a revisionagainstorderonreviewapplicationbysub-judgetoHighCourtdirectlywithoutgoingintoappealto DistrictCourt,ismaintainable.

MeaningofExpression"casedecided": ApexCourtin***Baldevdasv.FilmistanDistributors*** AIR1970 SC,heldthatacasemaybesaidtohavebeendecidediftheCourtadjudicatesforthepurposeofthesuit

somerightorobligationofthepartiesincontroversy.Everyorderinthesuitcannotberegardedasacase decidedwithinthemeaningofS.115.

ExplanationtoS.115,whichwasaddedbytheAmendmentActof1976,makesitclearthattheexpression "case decided" includes any order made, or any order deciding an issue, in the course of a suit or proceeding. The expression 'any case which has been decided', now, after the Amendment Act means "eachdecisionwhichterminatesapartofthecontroversyinvolvingthequestionofjurisdiction.

Interlocutory Orders: Section 115 applies even to interlocutory orders.Interlocutory Orders which are not appealable are subject to revision U/s 115 of the Code, if the conditions laid down in the section are fulfilled.

LimitationforRevision: Theperiodoflimitationforrevisionapplicationis90days decreeorordersought to berevised.

Abatement: TheprovisionsofOrderXXIIdonotapplytorevisionapplicationandsuchapplicationdoes of abateonthedeathoftheapplicantoronaccountoffailuretobringlegalheirsofdeceasedapplicantrecord.

Noletterspatentappealliesfromanordermadeintheexerciseofrevisionaljurisdictionandnorevisionlies againstanorderpassedbyasinglejudgeofaHighCourt.

RESTITUTION

Restitutionis"anactofrestoringathingtoitsproperowner",andmeansrestoringtoapartythebenefit whichtheotherpartyhasreceivedunderadecreesubsequentlyheldtobewrong.Theprovisions'elatingt o restitutionhavebeenprovidedinsection144oftheCode.Section144doesnotconferanynewsubstantiv e right.Itmerelyregulatesthepowerofthecourtinthatbehalf.

Thedoctrineofrestitutionisanequitableprincipleandisbaseduponthewell-knownmaxim"**actusuriae neminemgravabit**",i.e.theactofcourtshallharmnoone.

LordCairnshasexplainedinAlexenderRoservComptoirD'sEscomptedeParis,(1871)LR3PC that"oneofthefirstandhighestdutiesofallcourtsistotakecarethattheactofthecourtdoesnoinjuryto the suitors". The law also imposes an obligation on the party who received benefit of an erroneous judgmenttomakerestitutiontotheotherpartyforwhathehaslost;anditisthedutyofthecourttoenforce thisobligation.

Meaning: Theprincipleofthedoctrineofrestitutionisthat,onthereversalofadecreethelawimposesan obligationonthepartytothesuitwhoreceivedanunjustbenefitoftheerroneousdecreetomakerestitutio n totheotherpartyforwhathehaslost.Theobligationarisesautomaticallyonthereversalormodificationo f the decree and necessarily carries with it the right to restitution of all that has been done under the erroneousdecree;andthecourtinmakingtherestitutionisboundtorestoretheparties,sofarastheycan be restored, to the same position they were in at the time when the court by its erroneous action had displaced themfrom,

Illustration: A obtains a decree against B for possession of immovable property and in execution of the decreeobtainspossessionthereof.Thedecreeissubsequentlyreversedinappeal.Bisentitledunderhis

sectiontorestitutionoftheproperty,eventhoughthere.isnodirectionforrestitutioninthedecreeoftheappellate Court.

Conditions: Before restitution can be ordered under this section, the following three conditions must be satisfied:

a. Therestitutionsoughtmustbeinrespectofthedecreeororderwhichhadbeenreversed or varied;
b. The party applying for restitution must be entitled to benefit under the reversing decreeor order;and
c. Thereliefclaimedmustbeproperlyconsequentialonthereversalorvariationofthedecree ororder.

In other words, (i) there must be an erroneous judgment; (ii) the benefit of that erroneous judgment has been received by one party; and (iii) the erroneous judgment has been reversed, set aside or modified.

If these conditions are satisfied, the court must grant restitution. It is not discretionary but obligatory.

WhoMayApply?: Inordertoentitleapersontoapplyunderthissection,twoconditionsmustbesatisfied:

a. Hemustbeapartytothedecreeorordervariedorreversed.

   The expression "party" is not confined to mean only a technical party to the suit or appeal but includes any beneficiary under the final judgment; and

b. Hemusthavebecomeentitledtoanybenefitbywayofrestitutionorotherwiseunderthereversing decree ororder.
   Thus, a trespasser cannot get restitution.

Against Whom Restitution Can be Granted: Restitution can be ordered under this section not only againstthepartytothelitigation,butalsoagainsthislegalrepresentatives,e.g.,transfereependentelite, attachingdecree-holder,etc.Section144appliesonlytothepartiesortheirrepresentativesanddoesnot applytosureties.Hence,restitutioncannotbeclaimedagainstasurety.Italsocannotbegrantedagainsta bona fideauction-purchaser.

WhoMayGrantRestitution: Anapplicationforrestitutionliestothecourtwhichhaspassedthedecreeor made theorder.

InherentPowertoGrantRestitution: Section144oftheCodeembodyingthedoctrineofrestitutiondoes notconferanynewsubstantiverighttotheparty.notavailableunderthegenerallaw.Itmerelyregulatesthe power of courts. The doctrine is based on equity and against unjust enrichment. Section 144 is not exhaustive.Hence,thereisalwaysaninherentjurisdictiontoorderrestitution.

LimitationandAppeal: AnapplicationunderSection144isanapplicationforexecutionofadecreeandis governedbyArticle136oftheLimitationAct,1963.Theperiodoflimitationforsuchanapplicatoristwel

ve
yearsanditwillstartfromthedateoftheappellatedecreeororder.Thedeterminationof(questionunder Section144hasbeenexpresslydeclaredtobea"decree"underSection2(2)oftheCodeandis,therefore, appealable.

CAVEAT (Section 148-A)

Meaning: Thewordhasnotbeendefinedin theCode.Literally,means"lethimbeware",aformanotice.Iti s
acautionregisteredinapublicCourtorofficetoindicatetotheofficialsthattheyarenottoactinthematter mentionedinthecaveatwithoutfirstgivingnoticetothecaveat.

Caveatmeant"anythinginthenatureofanoppositionatanystage,andisnotconfinedtotheoppositionat thegreatseal,whichwasthemeaningof'caveat'undertheoldpractice".

Itisalegalnoticegivenbyaninterestedpartytosomeofficersnottodoacertainactuntilthepartyinheard inopposition.

Provision: Section 148-A of the Code provides for lodging of a caveat.

Section 148-A: Right to lodge a caveat:

1. Whereanapplicationisexpectedtobemade,orhasbeenmade,inasuitorproceedinginstituted,or abouttobeinstituted,inaCourt,anypersonclaimingarighttoappearbeforetheCourtonthehearing ofsuchapplicationmaylodgeacaveatinrespectthereof.
2. Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been
lodged(hereinafterreferredtoasthecaveator)shallserveanoticeofthecaveatbyregisteredpost, acknowledgment due, on the person by whom the application has been, or is expected to be, made under sub-section(1).
3. Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding,theCourtshallserveanoticeoftheapplicationonthecaveator.
4. Whereanoticeofanycaveathasbeenservedontheapplicant,heshallforthwithfurnishthecaveator , atthecaveator'sexpense,withacopyoftheapplicationmadebyhimandalsowithcopiesofanypape r ordocumentwhichhavebeen,ormay, be,.filedby'himinsupportoftheapplication.
5. Whereacaveathasbeenlodgedundersub-section(1),suchcaveatshallnotremaininforceafterthe expiry of ninety days from the date on which it was lodged unless the application referred to in sub- section(1)hasbeenmadebeforetheexpiryofthesaidperiod.

Wherecaveatlie: AccordingtoS.148-A,acaveatcanbelodgedinasuitorproceeding.Theexpression 'CivilProceeding'inS.141ofthe,Codeincludesallproceedings,whicharenotoriginalproceedings.

Wherecaveatdoesnotlie: Theprovisionsofsection148-Aareapplicableonlyinthecaseswherethe' caveatorisentitledtobeheardbeforeanyorderismadeontheapplicationalreadyfiledorproposedtobe filed,butdoesnotapplyincaseswheretheCodedoesnotcontemplatenotice.

Whocanfilecaveat: Anecessaryaswellasproperpartymaylodgeacaveat U/s148-A.Acaveatmaybe filed by any person who is going to be affected by an interim order likely to be passed on an

application
whichisexpectedtobemadeinasuitorproceedinginstitutedoraboutto beinstitutedinaCourt.

Whomaynotfilecaveat: Astrangertotheproceedingorapersonsupportingtheapplicationforinterim reliefmadebytheapplicantcannotlodgeacaveat.

TimeLimit: Accordingtosub-section(5),acaveatfiledU/s148-A(1)shallremaininforcefornine tydays fromthedateofitsfiling.

FailuretohearCaveator: Onceacaveatisfiled,itisaconditionprecedentforpassinganinterimorderto serve a notice of the application on the caveator who is going to be affected by the interim order. But an interimorderpassedwithouthearingthecaveatorisnotwithoutjurisdictionandoperatesunlessset-aside.

INHERENT POWERS OF COURTS (SECTIONS 148, 149 AND 151 TO 153-A)

General: Every Court is constituted for the purpose of administering justice between the parties and,therefore,mustbedeemedtopossess,asanecessarycorollary,allsuchpowersasmaybenecessaryto dotherightandtoundothewronginthecourseofadministrationofjustice.TheCodeisaproceduralaw andtheprovisionsthereofmustbeliberallyconstruedtoadvancethecauseofjusticeandfurtheritsends.

TheinherentpowersareinadditiontothepowersspecificallyconferredontheCourtbytheCode.Theyare complementarytothosepowersandtheCourtisfreetoexercisethemfortheendsofjusticeortoprevent theabuseoftheprocessoftheCourt.

TheCodeisnotexhaustiveandforthesimplereasonthatthelegislatureisincapableofcontemplatingall the possible circumstances which may arise in future litigations, inherent powers come to the rescue in such unforeseencircumstances.

As Justice RagbubarDayalnotedin***Manobarlal.V. SethHeeralalAIR1962SC,***rightlystates:"Theinherent powerhasnotbeenconferreduponthe Court,itisapowerinherentintheCourtbyvirtueofitsdutytodo justice between the parties before it." Thus, this power is necessary in the interest of justice. Sections 148,149,151,152,153 and 153-A of the Code enact the Law relating to the inherent powers of a Court in differentcircumstances.

1. Enlargementoftime:Section148
2. PaymentofCourtFees:Section149
3. Under Section151:-
   i) EndsofJustice:Section151
   ii) AbuseofProcessofCourt:Section151
4. AmendmentsofJudgments,Decrees,OrdersandOthersRecords:Sections152,153and153-A

1.

EnlargementoftimeSection148: Providesthatwhereanyperiodisfixedorgrantedbythe Courtf or the doing of any act, the Court has power to enlarge the said period even if the original period has expiredonfulfillmentoftwoConditions:

i) Aperiodmusthavebeenfixedorgrantedbythe Court;and
ii) Suchperiodmustbefordoinganactprescribedorallowedbythe Code.

2.

PaymentofCourtFeesSection149: EmpowerstheCourttoallowapartytomakeupthedeficienc

yof Court Fees payable on a plaint, memorandum of appeal, etc. even after the expiry of the period of limitationprescribedforfilingofsuchsuits,appealsetc.Section4ofCourtFeesact,1870providest hat nodocumentchargeablewithCourtFeeundertheActshallbefiledorrecordedinanyCourtofJustic e, unlesstherequiredCourtfeeispaid.

Thissectionisasortofprovisotothatrulebyallowingthedeficittobemadegoodwithinthetimefixed by the Court. If the proper Court fee is not paid at the timing of filing suitor appeal etc., but the deficit Courtfeeispaidwithinthetimefixedbythecourt,itcannotbetreatedastimebarred.Thedefective documentisretrospectivelyvalidatedforthepurposesoflimitationaswellasCourtfees.

3. **EndsofJustice:Section151:**Theinherentpowerssavedbysection151canbeusedtosecurethe endsofjustice.ThustheCourtcanrecallitsownOrdersandcorrectmistakes,casetasideasexparte order against the party, etc. etc. What would meet the ends of justice would always depend uponthe factsandcircumstancesofeachcaseandtherequirementsofjustice.

4. **AbuseofprocessofCourt:Section151:**Theinherentpowerssavedbysection151canalsobeused topreventtheabuseoftheprocessofaCourt,whichmaybecommittedbyaCourtitselforbyaparty. **AbusesbyaCourt:**WhereaCourtemploysaprocedureindoingsomethingwhichitneverintendedto doandthereismiscarriageofjustice,theinjusticesodonetothepartymustberemediedonthebasiso f thedoctrineactuscuriaeneminemgravabit(anactoftheCourtshallharmnoone)

AbusesbyaParty:e.g.,byobtainingbenefitsbypracticingfraudontheCourt,oruponapartytothe suit,orcircumventingthestatutoryprovisionsetc.

5. AmendmentsofJudgments,Decrees,OrderandOtherRecords:Sections152,153and153-A:

Sections 152 : Enacts the clerical or arithmetical mistakes in judgments, decrees and orders arising fromanyaccidentalsliporomissions;mayatanytimebecorrectedbytheCourteitherofitsownmot ion (suomoto)oronapplicationofanyoftheparties.

The section 1s based upon two important principles:

i) anactoftheCourtshouldnotprejudiceanyparty,and
ii) itistheduty'oftheCourtstoseethattheirrecordsaretrueandtheyrepres ent thecorrectstateofaffairs.

Illustration: AfilesasuitagainstBforRs.10,000/-andinterestinaCourtX.TheCourtpassesadecreefor RS.10,000/-asprayed.Thedecreecanbeamendedunderthissection,

AfilesasuitagainstBforRs.10,000/-andinterestinaCourtX.TheCourtpassesadecreeforRs.5000/- onlyandnothingmore.Aappliestoamendthedecreebyaddingaprayerfortheinterest.Thedecreecan notbeamendedunderthissection.Ifaggrievedbythedecree,Amayfileanappealoranapplicationfor review.

Sections 153: Confers a general power on the Court to amend defects or errors in "any proceeding in a

suit"andtomakeallnecessaryamendmentsforthepurposeofdeterminingtherealquestionattheissue betweenthepartiesto,thesuitorproceedings.

Sections153-A: ProvidesthatwheretheappellateCourtdismissesanappealsummarilyunderOrder41, Rule11,thepowerofamendmentunderSection152canbeexercisedbytheCourtofthefirstinstance.

AmbitandScope: OfinherentpowersofaCourtu/s151bySubbaRao,Justice,ashethenwasin***Ram Chandv. KanhayalalAIR,1966SC1899,***afterconsideringallthelegalcasesonthesubjectpronounced;

"The inherent power of a Court is in addition to and complementary to the powers expressly conferred undertheCode.Butthepowerwillnotbeexercisedifitsexerciseisinconsistentwith,orcomesintoconfli ct with,anyofthepowersexpresslyorbynecessaryimplicationconferredbytheotherprovisionsoftheCod e. Iftherareexpressprovisionsexhaustivelycoveringaparticulartopic,theygiverisetoanecessary implicationthatnopowershallbeexercisedinrespectofthesaidtopicotherwisethaninmannerprescribe d by the said provisions***. Whatever limitations are imposed by construction on the provisions of section 151 of the Code, they do not control the undoubted power of the Court conferred under Section151oftheCodetomakeasuitableordertopreventtheabuseoftheprocessoftheCourt."***

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UNIT 5

Synopsis

1. Bar of limitation.
2. Expiry of prescribed period when court is closed.
3. Extension of prescribed period in certain cases.
4. Legal disability.
5. Disability of one of several persons.
6. Special exceptions.
7. Continuous running of time.
8. Suits against trustees and their representatives.
9. Suits on contracts entered into outside the territories to which the Act extends
10. Exclusion of time in legal proceedings.
11. Exclusion of time in cases where leave to sue or appeal as a pauper is applied for.
12. Exclusion of time of proceeding bona fide in court without jurisdiction.
13. Exclusion of time in certain other cases.
14. Effect of death on or before the accrual of the right to sue.
15. Effect of fraud or mistake.
16. Effect of acknowledgment in writing.
17. Effect of payment on account of debt or of interest on legacy.
18. Effect of acknowledgment or payment by another person.
19. Effect of substituting or adding new plaintiff or defendant.
20. Continuing breaches and torts.
21. Suits for compensation for acts not actionable without special damage.
22. Computation of time mentioned in instruments.
23. Acquisition of easements by prescription.

Limitation of Suits, Appeals and Applications

Sec.3 - Bar of limitation

(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

(2) For the purposes of this Act,

(a) a suit is instituted,—

> *(i) in an ordinary case, when the plaint is presented to the proper officer;*
>
> *(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and*
>
> *(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;*

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted:

> *(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;*

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.

Comments:

In ***Noharlal Verma v. District Cooperative Central Bank Ltd., AIR 2009 SC 664***, the Supreme Court observed that if a suit, appeal or application is barred by limitation, a Court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal, or application and decide it on merits. Even in the absence of such plea by the Defendant, Respondent or opponent, the Court or authority must dismiss such suit appeal or application, if it is satisfied that the same is barred by limitation.

The provision u/Sec. 3 of the Limitation Act, 1963 interdicts the Courts from entertaining any application or suit which is barred by limitation – ***Salu Varghese v. P.P. Prabhakaran, AIR 2010 (NOC) 588.***

In ***Gannamani Anasuya v. Parvathi Amarendra Chaudhary, 2007 (6) SCJ 414,*** the Supreme Court held that whether a plea that the suit is barred by limitation or not has been raised by the parties, the Court will determine this question, as far as Sec.3 of the Limitation Act is concerned. This kind of jurisdictional fact need not be pleaded.

In ***V.M. Salgaocar & Bros. v. Board of Trustees of Port of Mormugao, AIR 2005 SC 4138,*** the Supreme Court held that irrespective of the fact that limitation has not been set up as a defence, it is the duty of the Court to dismiss any suit instituted after the prescribed period of limitation. If the suit, on the face of it, is barred by the law of limitation, a Court has no option but to dismiss the suit even if the Defendant intentionally has not raised the plea of limitation.

In ***Manindra Land and Building Corporation Ltd. v. Bhutnath Bannerjee, AIR 1964 SC 1336,*** the Supreme Court held that Sec.3 of the Limitation Act directs or imposes authority on the Court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I, without regard to the fact that whether the opposite party had set up the plea of limitation. The Court cannot proceed, since there is duty, to dismiss the application if it is made beyond the period of limitation prescribed. If in interpreting the necessary provision of the limitation act or in determining which provision of the limitation act applies, the subordinate Court comes to a wrong decision, it is open to the Court to interfere with that confusion in revision for the reason that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter.

Sec.3 only bars the remedy, but does not destroy the right

Sec.3 of the Limitation Act only bars the remedy, but does not destroy the right to which the remedy relates to. The right to debt continues to exist notwithstanding that the remedy is barred by limitation. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What Sec.3 refers to is only to the remedy but not to the right of the creditors. Such debt continues to subsist so long it is not paid. It is a settled law that the creditor would be entitled to adjust from the payment of a sum by a debtor towards the time-barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt could be adjusted from the security in his

possession and custody. Therefore, where a debt is barred by limitation, adjustment of securities deposited by guarantor towards debt thereafter is permissible – ***Punjab National Bank v. Surendra Prasad Sinha, AIR 1992 SC 1815.***

This Section is mandatory in its terms and as observed by the Privy Council in ***General Accident Fire and Life Assurance Corporation v. Janmahomed, (1941) 43 Bom LR 346,*** quoted in ***S.Richard Jaison v. Padmanabhar Nadar Paramu Nadar, AIR 1957 TC 171,*** that a Judge cannot on equitable grounds, enlarge the time allowed by law, postpone its operation, or introduce exceptions not recognized by it. Similar observations have been made by the Supreme Court in ***Boota Mal v. Union of India, AIR 1962 SC 1716,*** **and** ***Rajinder Singh v. Santa Singh, AIR 1973 SC 2537,*** where the Supreme Court refused to apply an alien doctrine of lis pendens against the express provisions of the Limitation Act, 1963.

The policy that underlines the bar of limitation can be gathered from ***R.B. Policies at Lloyd's v. Butler, (1949) 2 All ER 226,*** and ***the Halsbury's Laws of England***:

1. It is based on the maxim "interest republicae ut sit finis litium" which means that interest of State requires that a period be put to litigation.
2. Long dormant claims have more cruelty than justice to them.
3. The Defendant might have lost the evidence to disprove a stale claim.
4. Persons with good causes of action should pursue them with reasonable diligence – Law does not help those who sleep over their rights – Vigilantibus non dormentibus jura subvenient
5. Finally that it is a statute of quiet and repose of community and that it is necessary that titles to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense.

It must finally be noted that Sec.3 of the act bars only the remedy and the right continues to subsist. The only exceptions to this are Secs.25 and 27 of the Act where even the title to property gets distinguished.

In the ***State of Punjab v. Surjit Kaur, AIR 2002 P&H 68***, it was held that a welfare State should not indulge in frivolous litigation and in particularly defending a rightful claim on technicalities particularly when even on such technicality it has no case at all.

In ***Antonysami v. Arulanandam Pillai, AIR 2001 SC 2967***, it was held that the fixation of periods of limitation is bound to be to some extent arbitrary and many a times result in hardships. But in construing such provisions equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide.

The Supreme Court in ***L.J. Leach & Co. Ltd. v. Jairdine Skinner & Co., AIR 1957 SC 357,*** held that the Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interest of justice and equity.

Sec.4. Expiry of prescribed period when court is closed

Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court re-opens.

Explanation - A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day.

Comments:

This Section enables a party to legal proceeding to initiate the same on the next day if the previous day happened to be the last day and on that day the Court remained closed for any part of the day. The section does not extend the period prescribed for the presentation of any suit or appeal or application but it only provides that where the period prescribed expires on a particular day when the Court is closed, notwithstanding that fact that application may be made on the day of limitation. It provides for the contingency when the prescribed period expires on a holiday and the only contingency contemplated is 'when the Court is closed'.

Where the limitation expires on Sunday or any other holiday, the suit can be filed on the next day. The party cannot insist that the suit ought to have been filed on Saturday – ***Oriental Insurance Co. Ltd. V. Karur Vysya Bank Ltd., AIR 2001 Mad 489***.

The underlying principles of Sec.4 are:

1) Lex Non Cogit Ad Impossibilia – The law does not compel a man to do something what he cannot possibly perform.
2) Actus Curiae Neminem Gravabit – An act of the Court shall not prejudice anyone.

Sec.5 - Extension of prescribed period in certain cases

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation - The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

Comments:

The procedural laws are devised for advancing the cause of justice and not for imposing penalties. The provisions of Sec. 5 of the limitation Act have to be liberally construed so as to give opportunity to the parties to have a decision on contest rather than denying them on mere technicalities.

The Collector is not a Civil Court. So the provisions of Sec.5 will not be applicable in filing revision before the Collector – ***Akula Veeraiah v. Commissioner of Civil Supplies, AIR 2011 AP 87.***

The provisions of Sec.5 are also not applicable to Order 21 of the Code of Civil Procedure, 1908 – ***Rajmuni Devi v. Ram Naresh Singh, AIR 2011 Pat 30***.

The provision under Sec.5 of the Act cannot be invoked for extension of period of limitation for filing application for reference, prescribed u/Sec.18(2) of the Land Acquisition Act, 1894 – ***Nayantara Gupta v. State of Uttar Pradesh, AIR 2010 SC 1532.***

In ***Pushpaben Balwantrai v. Nand Kumar Ramanlal, AIR 2004 (NOC) 382 Guj,*** theGujarat High Court has held that while deciding the application for condonation of delay, the Court is

required to take into consideration whether there is any sufficient ground for condoning the delay.

The Court is not required to take into consideration the merits of the case. Merits of the case cannot be decided unless the delay is condoned and matter is taken up for hearing after condonation of delay. Thus, the main issues cannot be decided unless delay is condoned by the Court and matter is taken UP for hearing on its own merits.

A justice oriented approach has to be espoused by the Courts and the utmost consideration has to be that ordinarily a litigant ought not to be denied an opportunity of having a dispute determined on merits unless he has, by gross negligence, deliberation inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the Court – ***Ramdas Shivram Sattur v. Rameshchandra Popatlal Shah, 2007 (6) SCJ 737.***

In ***Love Kumar Sethi v. Deluxe Stores, 2007 (145) DLT 275,*** it was held that each day of the delay need not be explained. It should be explained by different species, reasons and causes which do arouse a feeling of confidence.

However, in one of the cases it was held that in order to avail himself of the Section the party in default must satisfy the Court that he had sufficient cause for not making the requisite application right up to the date on which the requisite application was presented. In other words he must satisfactorily account for each day's delay. Unless it is accounted for the Court has not authority in law to condone the delay - ***1973 Cri.L.J. 131***.

Sufficient Cause

Sec.5 of the Limitation Act, 1963 enables the Court to condone delay in filing appeal or application, if the appellant or applicant satisfies the Court that he had 'sufficient cause' for not preferring an appeal or making an application within such period.

However, the expression 'sufficient cause' has not been defined in the Act. It is however, very wide, comprehensive and elastic in nature. It is also construed liberally by Courts so as to advance the cause of justice – ***State of W.B. v. Howrah Municipality, (1972) I SCC 366***.

Such discretion, however, should be exercised judiciously. Sufficient cause cannot be liberally interpreted if negligence, inaction or want of bona fides is attributable to the party in delay. Even though limitation harshly affects rights of a party, but it has to be applied with all its rigour when prescribed by the statute – ***Basavaraj v. Land Acquisition Office, (2013) 14 SCC 81***.

Normally, a party who approaches a Court of law with a grievance should not be deprived of hearing on merits, unless there is something to show that there was total inaction, gross negligence or want of bona fides on his part. Interpreting the words 'sufficient cause' in pragmatic manner and by adopting common sense approach, the Court should try to do substantial justice between the parties - ***Basavaraj v. Land Acquisition Office, (2013) 14 SCC 81***

The question whether there was 'sufficient cause' in not preferring an appeal or application depends upon the facts and circumstances of each cause, and no rule of universal application can be laid down – ***Ibid.***

In ***Collector (L.A.) v. Katiji, AIR 1987 SC 1353,*** the Supreme Court laid down the following principles, while dealing with an appeal or application not preferred within the period of limitation:

1. Ordinarily, a litigant doesn't not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" doesn't mean that a pendantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, common-sense, pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant doesn't not stand to benefit by resorting to delay. In fact, he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds, but because it is capable of removing injustice and is expected to do so.

Sec.6 - Legal disability

(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

(2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so specified.

(3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.

(4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

(5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.

Explanation - For the purposes of this section, 'minor' includes a child in the womb.

Sec.7 - Disability of one of several persons

Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be

given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Explanation – I - This section applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

Explanation – II - For the purposes of this section, the Manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property.

Sec.8 Special exceptions

Nothing in section 6 or in section 7 applies to suits to enforce rights of preemption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application.

Comments:

Sec.6 and 7 provide that where a person or one of several persons is under a legal disability (minor, insane or idiot), he may file a suit or an application within the same period after the disability (minority, insanity or idiocy) has ceased.

Such disability must exist at the time from which the period of limitation is to be reckoned. But once the time has begun to run, subsequent disability will not stop it (Sec.9).

This section is one of the provisions which extends the period of limitation laid down by the schedule. The Section doesn't give a fresh starting point of limitation. It does not prevent the running of time as against a person under disability – ***AIR 1969 Ker 163***. This section doesn't in terms extend the period of limitation prescribed for any legal action but merely enables a person under disability at his choice to have limitation reckoned against him either from the date of accrual of the cause of action or from the date of cessation of the disability. In case the person under disability chooses the prescribed period of limitation to be reckoned from the date of the accrual of the cause of action, the whole period prescribed begins to run from the date of cause of action – ***(1984) 57 Cut LT 262 (269).***

The ground on which the extension is given is the disability of the person entitled to sue or apply. But the Section does not contain the entire law on the subject. It enumerates the kinds of disabilities on account of which limitation will be extended, but the circumstances under which and the extent to which, limitation will be extended on such ground are dealt with not only in this Section but also in Secs.7 and 9. Thus the three Sections together constitute one unit and are supplementary to each other and not mutually exclusive – ***AIR 1965 Mad 541.***

Section 6 allows the minor to extend the limitation to some more time and entitles the minor, insane or idiot to institute the suit or make the application within the same period prescribed in the third column of the Schedule to the Act after the said legal disability has come to an end. Special limitation explained in Section 8 of the act has explained that extended period after cessation of the disability will not cover beyond three years of the death of such legally disabled person or cessation of his said legal disability - ***Darshan Singh V Gurdev Singh, 1995 AIR 75, 1994 SCC (6) 585***

Section 6 does not cover in any way any "intervening" kind of legal disability. When a legal disability is in existence, only then can section 6 be successfully applied. But if a person cannot

be termed to be suffering from any kind of legal disability when such a limitation time-line begins, he cannot in any way avail the relaxation of standards offered by section-6. While reading Section 3, the period of limitation for suits has to be considered by reading Schedule 1 with Sections 4 to 25of the Limitation Act; and, therefore prescribed for a suit by a minor cannot be the period mentioned in Schedule 1, but a special period that is described in Section 6 of the Act. Therefore, in the case of a minor it cannot be said that the period for filing suits under section 6 has expired without taking into account the provisos involved. This ensures that the right of minors to contest suits is not taken away, without offering them any reasonable time period to do so accordingly - ***Udhavji Anandji Ladha and Ors. Vs Bapudas Ramdas Darbar, AIR 1950 Bom 94***

This case stated that cause of action or grievance must take place when the plaintiff (in this particular case the administratrix) dies and the period of limitation is thus initiated with no subsequent disability leading to reset of that clock as per section 9 of the Limitation Act. A plaintiff can only rightfully claim benefit only if such a right existed due to a legal disability as and when the period of limitation began. Any subsequent disability on his part will not stop the running of limitation. Consequently, he will be governed by the same period of limitation as the earlier limited owner, but such a disability can come into his defence if his claims are independent of the earlier claimant's plea - ***Lalchand Dhanalal vs Dharamchand and Ors. , AIR 1965 MP 102.***

This case stated the purpose of section 7 of the Limitation act is to regulate the supposed indulgence that is available to minors to ensure that the benefit of section 6 of the Limitation act does not extend to a correspondingly long period of time but only till the eldest of the lot does not end up as a major - ***Bapu Tatya Desai vs Bala Raojee Desai, (1920) 22 BOMLR 1383***

Section 7 had to be taken as an exception to the general principle enunciated by Section 6 and held that if there are multiple individuals that were jointly entitled to institute a suit and if one of them was disabled, time would not run against any of them until the disability ceased to exist. But if one of the persons entitled to institute the suit was competent to give discharge without the concurrence of the other, then time would begin to run against both of them - ***Smt. Usha Rani Banerjee & Ors. Vs. Premier Insurance Company Ltd, Madras & Ors. AIR 1983 Allahabad 27***

If under some substantive law, a particular law entitles that a legally able person can represent an entire group, he/she can be termed to be powerful enough to discharge that right without any consultation with the other members of that group. Section 7 would not operate in the case of all the joint creditors under disability were well covered by Section 6 of the Act. It is not considered important whether a valid discharge is given by the person competent to give the same. The only question is whether he could give it under the ambit of section 7 of the Limitation Act. A valid discharge of the suit under section 7 can take place by a major with/without the concurrence of the minors - ***T. Kunhammad and Ors. Vs M. Narayanan Nambudiri's Son, AIR 1964 Ker 8.***

Applicability to Child in Womb

A child in the womb can take advantage of the provisions of Section 6 and 8. Section 6 of the Limitation Act would apply to the case of a child in the womb. A child in the mother's womb is deemed to be in existence, at least for purpose of inheritance and thus has a right to challenge any transaction which affects its interest at the time. If so, it has a right of action or cause of action in respect of the said transaction and is entitled to institute a suit upon the same and, as

such a child, as aforesaid cannot, under the Indian Majority Act be held to be a minor that is, a person suffering from disability, as contemplated in the section.

Sec.9 - Continuous running of time

Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it:

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues.

Comments:

According to Section 9 of the Act where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues.

The rule of this Section is based on the English dictum. "Time when once it has commenced to run in any case will not cease to be so by reason of any subsequent event". Thus, when any of the statutes of limitation is begun to run, no subsequent disability or inability will stop this running.

The applicability of this Section is limited to suits and applications only and does not apply to appeals unless the case fell within any of the exceptions provided in the Act itself.

For the applicability of Section 9 it is essential that the cause of action or the right to move the application must continue to exist and subsisting on the date on which a particular application is made. If a right itself had been taken away by some subsequent event, no question of bar of limitation will arise as the starting point of limitation for that particular application will be deemed not to have been commenced.

Thus, time runs when the cause of action accrues. True test to determine when a cause of action has accrued is to ascertain the time, when plaintiff could have maintained his action to a successful result first if there is an infringement of a right at a particular time, the whole cause of action will be said to have arisen then and there.

Section 9 contemplates only cases where the cause of action continues to exist.

Sec.9 applies only where the circumstances arising subsequent to the commencement of limitation amount to 'disability or inability to institute a suit or make an application'. 'Disability' has been defined as the want of legal qualification to act and 'inability', as the physical power to act – ***(1898) 25 Cal 496.*** Thus the two expressions are distinct from each other – ***(1905) 29 Bom 68 (DB).*** But both of them clearly refer to something which pertains to the Plaintiff – ***(1884) 8 Bom 561.*** It is something personal to the Plaintiff or the applicant – ***1970 Lab IC 701.***The Defendants absence from India is not a disability or inability to institute a suit within the meaning of this Section – ***(1898) 25 Cal 496 (FB).*** So also the lack or absence of the cause of action is not a disability or inability. This Section as well as the principle of continuous running of time contemplates cases where the cause of action continues to exist. They cannot apply to cases where the cause of action is cancelled by subsequent events wiping out the time which has run and the starting of fresh period of limitation on the revival of the cause of action from the date of revival - ***1970 Lab IC 701.*** It was held in ***AIR 1919 Cal 706***,that the fact that a Plaintiff,

an alien, was prevented from suing on account of the outbreak of war between his mother-country and Great Britain would amount to either a disability or inability within the meaning of this Section.

Sec.10 - Suits against trustees and their representatives

Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Explanation - For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof.

Comments:

Sec.10 is applicable only against a person in whom property has become vested in trust for any specific purpose. It is an essential condition of trust that property must vest in the trustee. Unless therefore the trustee is constituted as the owner of the property entrusted to him, a trust cannot be said to have been constituted. Unlike English law, the Indian law doesn't recognise a difference between legal and equitable estates. Where, therefore, the property is vested in the trustee, the owner must be the trustee. A mere manager or agent holding property on behalf of another cannot be considered to be a trustee. Similarly, the mere fact that a person is holding the property on behalf of another, will not constitute him a trustee, unless the ownership of the property is also vested in him. Sec.10 applies in the case of a suit only against a person to whom the property is vested in trust for any specific purpose. The implied trusts or obligations in the nature of trusts like that of a partnership firm are not within the scope of this.

In the case of ***T.Kaliamurthy v. Five Gori Thaikal Wakf, AIR 2009 SC 840,*** it was observed by the Supreme Court that provision of Sec.10 of the Limitation Act would not apply to waqf's suit for recovery of possession of suit property against person who claimed to have purchased such properties.

Sec.10 includes cases of resulting trusts which resulted not upon or from the failure of the declared trust or trusts but because of the complete execution to the same without exhausting the trust property the declared trust or trusts being such as could not by themselves, under any conceivable circumstances, have exhausted the whole of the trust property. Where a position that a residue would remain is apparent from the trust instrument itself and is certain from the very beginning. When in such a case the trust property becomes vested in the trustee under or in pursuance of the declared trust, it becomes so vested not only for the purpose of the said trust but also for the purposes of the undeclared or resulting trust which arises in the wake of its fulfilment or complete execution. This resulting trust follows, as it were, the declared trust for the purpose of effectuating the testator's intention and does not in any way affect or tend to affect or supersede or nullify the same.

Justice Krishnamurth held in ***Swapna v. Thankavelu, (1990) 2 Ker LT 604,*** following the decisions reported in ***Partibha Rani v. Surajkumar, AIR 1985 SC 628,*** and ***Maniyamma v. Abdul Rasaak, (1989) 1 Ker LT 636*** that the husband is in the position of a trustee so far as the

ornaments and utensils entrusted to him by the wife are concerned and under Sec.10 of the limitation act, there shall not be any limitation for such a suit by the wife against husband.

The words "in trust for a specific purpose" are, as observed by Garth, C.J. in ***Greender Chunder Ghose v. A.B. Macintosh, 1878 4 Cal LR 193*** intended to apply to trusts created for some defined or particular purposes or objects as distinguished from trusts of a general nature such as the law impresses upon executors and others who hold recognised 'fiduciary positions'.

Computation of Period of Limitation (Sections 12 to 24)

The Limitation Act, 1963 prescribes periods of limitation for suits, appeals or applications. The rules as to computation of period of limitation (Sections 12 to 24) not intended to apply only to periods of limitation prescribed by the Schedule but apply also to periods of limitation provided for by other enactments.

Section 12 of the Limitation Act is first of the sections providing for exclusion of time in computing the period of limitation. The Section 12 of the Act excludes from reckoning the day from which the period is to be reckoned and time requisite for obtaining copies of documents referred to in sub-sections (2) to (4). The true effect of Section 12 is that the periods referred to in the various sub-sections have to be added to the period of limitation.

There need not be any prayer or application by a party for the time to be excluded under Section 12 of the Limitation Act. This Section 12 confers a substantive right upon a party and it is the duty of the Court to exclude the time when the case comes under the purview of any of the sub-sections of Section 12.

Sec.12 - Exclusion of time in legal proceedings

(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment shall also be excluded.

(4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Explanation - In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

Comments:

According to sub-section (1) of Section 12 of the Limitation Act, the first day i.e. the day from which a period of limitation is to be computed, must be excluded. And the last day i.e. the day on which the suit is instituted must be included in the calculation. This rule is applicable whenever time has to be computed from a day specified whenever such time is fixed performance of

contract or is prescribed by law for the doing of an act or for the institution of the proceedings in a Court of Law.

In ***Webb v. Fairmaner, (1838) 3 M&W 473***, when goods were sold on 5th October to be paid for in two months from the date of sale it was held that in computing the period of two months 5th day of October shall be excluded and action for price of goods cannot be started until and after expiration of 5th December. Baron Parke, in delivering the judgment in the case, relied on the observations of Sir W. Grant M.R. in ***Lester v. Garland, (1808) 15 Ves 248,*** to the following effect:

"Upon the technical reasoning, I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive; and therefore, the act cannot properly be said to be passed until the day is passed."

The learned Baron also observed as follows:

"so also, in ***Pellew v. Inhabitant of Wonsford, AIR 1927 Lah 200***, the time was held to be exclusive; and a very reasonable Rule was laid down by Lord Tenterden, which is a very good test to apply, viz., by reducing the time to one day, in which case the party would clearly be entitled to the whole of the next day after the injury was done, otherwise he might have no time at All in which to give notice."

As to the computation of time generally in matters dealt with in the Acts of the legislature, Sec.9 of the General Clauses Act, 1897, adopts the above-mentioned general Rule as follows:

"In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word, 'from' and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'.

In ***Krishna Bilas v. Sonadhan, AIR 1961 Tripura 16***, it is held that in a suit of recovery of possession under Section 9 of the Specific Relief Act, the day of dispossession is to be excluded.

In ***Sita Ram v. State, AIR 1961 All. 151,*** it has been held that for an offence under Section 106 of the Factories Act the date on which the offence came to the notice of the Inspector is to be excluded. In ***Ram Nandan v. Ramadhar, AIR 1966 Pt. 297 (FB)***, it has been held that in computing the limitation for filing appeal against the Panchayat election, the date of declaration of the result of the election is to be excluded.

In ***R. Hamira v. Bani Mani, (1976) 17 Guj. L.R. 729,*** it is held that the day on which the judgment is pronounced should be excluded in computing the period of limitation for an appeal. The limitation for filing an appeal commences from the date of the judgment and not from the date of decree is signed.

In ***State of Bihar v. Rameshwar Prasad, AIR 1994 SC 501***, the Supreme Court has held that in the matter of setting aside the award the date on which the filing of the award was made known to the advocate of the applicant has to be excluded under Section 12(1) of the Limitation Act.

In ***Saketh India Ltd. v. India Securities Lt., AIR 1999 SC 1090***, the notice of returning of the cheque as unpaid was served on the drawer on 29th September, 1995. The period of 15 days for

making payment by the drawer under the proviso (c) to Section 138 of the Negotiable Instruments Act is expired on 14th October, 1995. Therefore, the cause of action to file a complaint under Section 138 of the Negotiable Instruments Act arose on 15th October, 1995. In computing the one month limitation period under Section 142(b) for filing a complaint against the drawer the date of 15th October, 1995 is to be excluded. The Court has held that the complaint filed on 15th November, 1995 is within time as it has been filed on the 30th day excluding 15th October, 1995. This rule has been consistently followed and has been adopted in General Clauses Act and in the Limitation Act.

Sub-section (2) of Section 12 of the Limitation Act applies to appeals, an application for leave to appeal, an application for the review of judgment and also to an application or a petition for revision. Section 12(2) is not of general application but only applies to specific categories mentioned therein.

In ***India House v. Kishan N. Lalwani, AIR 2003 SC 2084***, the Supreme Court has held that no application seeking benefit of Section 12(2) is required and Court is bound by statute to extend the benefit where applicable and no formal application is required to be made. It was held observed as follows:

"The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from, for equitable considerations. At the same time full effect should also be given to those provisions which permit extension or relaxation in computing period of limitation, such as those contained in Sec.12. the underlying purposes of these provisions is to enable a litigant seeking enforcement of his right to any remedy to do so effectively and harsh prescription or time bar not unduly interfering with the exercise of statutory rights and remedies. That is why Sec.12 has always been liberally interpreted"

In ***Commissioner of Sales Tax v. Madanlal, AIR 1977 SC 523***, it has been held that it would be impermissible to read in Section 12(2) a proviso that the time for obtaining the copy shall be excluded only if such copy has to be filed along with the memorandum of appeal or application for leave to appeal or for revision or for review of judgment.

In ***Punni v. State, AIR 1971 All. 387***, it has been held, following the decision of the Supreme Court in ***S.A. Gaffore v. Ayesha Begum, 1970 UJ (SC) 784***, that exclusion of time is allowed even when copy is not required to be filed along with the memorandum.

In ***Krishnji v. N.R. Malti, AIR 1972 Mys. 274***, it is held that when the appeal against the date of signing the decree has to be excluded.

In ***Jagiri v. Doulat, AIR 1928 Lah. 755***, it has been held that an appellant is entitled to deduct the time spent in obtaining a copy of the first judgment of the trial Court as well as of the judgment passed on review.

In ***Udayan Chinubhai v. R.C. Bali, AIR 1977 SC 2319***, it has been held by the Supreme Court that under Section 12(2) of the Limitation Act read with the Explanation, the appellant is not entitled to exclude the time that had elapsed from the date of the judgment till signing of the decree prior to his application for a copy thereof in computing the period of limitation prescribed for filing the appeal.

In ***India Home v. Kishan N. Lalwani, AIR 2003 SC 2084***, the Supreme Court has modified earlier stand and has overruled all the contrary decisions of different High Courts and has held

that Section 12(2) of the Limitation Act says that it is time requisite for obtaining the copy being excluded from computing the period of limitation or the time requisite for obtaining the copy being added to the prescribed period of limitation and treating the result of addition as the period prescribed and that in adopting methodology it does not make any difference whether the application for certified copy was made within prescribed period of limitation or beyond it. The Supreme Court upheld the decision of the Madras High Court which has held that though the application for certified copy of judgment and decree was made after the prescribed period of limitation the period was liable to be excluded in all cases and not depending on whether there is sufficient cause or not.

In ***State of U.P. v. Maharaja Narain, AIR 1968 SC 960***, it has been held that the expression "time requisite" in sub-section (2) of Section 12 cannot be understood as the time absolutely necessary for obtaining the copy of the order and that what is deductible under sub-section (2) of Section 12 is not the minimum time within which a copy of the order appealed against could have been obtained. The section does not permit the exclusion of the period required for obtaining a certified copy of the decree for the purpose of exclusion.

The question whether the appeal preferred was in time or not should be considered on the basis of information available from the copy of the judgment and decree filed along with the Memorandum of Appeal and not from the other copies which the party might have got and used for other purposes with which the Court has nothing to do.

The time spent in obtaining a copy of the judgment also will be excluded under sub-section (3) of Section 12, because it is generally necessary that the judgment on which the decree of the High Court is based should be obtained in order that the parties may ascertain what its terms are, and further filed with the application for leave to appeal.

In computing the period of limitation for an application for leave to appeal the time requisite for obtaining a copy of the judgment complained of must be excluded - ***Baldeo Pershad v. Dwarika, AIR 1957 All. 334***. In applying for leave to appeal to the Supreme Court the applicant was not entitled to get any time spent in obtaining a copy of the judgment deducted in computing the period of limitation - ***Deep Chand v. Bhago, AIR 1965 Punj. 115***.

In ***Biswapati v. Kenington Store, AIR 1972 Cal. 172***, it has been held that Section 12(3) of the Limitation Act does not apply to an application for execution of a decree. The period of limitation for an execution application therefore runs under Article 136 (old 182) from the date of the judgment and not from the date on which the decree is signed.

According to sub-section (4) of Section 12 of the Limitation Act, the period for obtaining copy of the award to be excluded in computing the period of limitation for an application to set aside an award.

An appeal for execution does not fall in any of the categories of legal proceedings mentioned in Section 12 of the Limitation Act. It, therefore, follows that this section is not applicable to an application for execution.

In ***Shahjahan Begum v. Zahirul Hasan, AIR 1972 All. 511***, the Allahabad High Court has held that the Explanation in Section 12 implies that the time requisite for obtaining copy is the time taken by the Court in preparing the decree or order before the application for copy is made as also the time taken in preparing the copy after the application therefore has been made.

In ***Udayam Chinubhai v. R.C. Bali, AIR 1977 SC 2319***, the Supreme Court has held that under Section 12(2) read with the Explanation a person cannot get exclusion of the period that elapsed between the pronouncement of the judgment and the signing of the decree if he made the application for copy only the preparation of the decree. The Supreme Court has pointed out that the time requisite for obtaining a copy under Section 12(2) must be that time which is required for getting a copy of the decree.

In ***State of Assam v. Govinda Chandra Patel, AIR 1991 Gau. 104***, the Guwahati High Court has held that in view of Section 12(2) read with the Explanation, the appellant is not entitled to exclude the time that had elapsed from the date of judgment till the signing of the decree prior to the application for a copy thereof in computing the period of limitation prescribed for filing the appeal.

Sec.13 - Exclusion of time in cases where leave to sue or appeal as a pauper is applied for

In computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded, and the court may, on payment of the court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the court fees had been paid in the first instance.

Comments:

According to Section 13 of the Limitation Act, 1963, in computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded, and the Court may, on payment of the Court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the Court fees had been paid in the first instance.

Section 13 of the Limitation Act specifically excludes the time during which application in forma pauperis is bona fide prosecuted till its rejection from computing the limitation of suit or appeal and it also provides that on plaintiffs paying Court-fee the suit or appeal would be treated as if the Court fee had been paid in the first instance. Such payment of Court- fee should be within such time as was available between the initial filing of the suit and the application and the initial expiry of the period of limitation.

Where the matter is at the stage of suit and an application for permission to sue as a pauper has been made it is competent for the plaintiff to pay the Court fees during the pendency of that proceeding with the permission of the Court and upon the payment of such Court fees the suit is deemed to have been prescribed on the day when the application was first made.

In ***Bashir Ahmad v. Rashida Khatoon, AIR 1975 All. 286***, it has been held that in such an event on payment of Court fee by an applicant who has been made an application for leave to sue or appeal as a pauper, on payment of Court fee the suit or appeal will not be treated as having the same force and effect as if the Court fee had been paid in the first instance, unless the time for payment of Court fee is extended by the Court.

If, however, the Court fee had been paid before the expiry of the period of limitation fixed to which would be added the time during which the applicant had been prosecuting in good faith his

application for leave to sue or appeal as a pauper or within such time as may have been extended by the Court the suit or appeal will be treated as having the same force and effect as having the same force and effect as if the Court fee had been paid in the first instance.

In ***P. Sreedevi v. P. Appu, AIR 1991 Ker. 76***, it has been held that no time-limit has been set out in Section 13 and the Court can extend time at its discretion to whatever extent it thinks fit. But it must be proved that the applicant acted in good faith when he presented the application as pauper.

In the same case, it has been held that an application to sue as an indigent person was rejected with a time to pay the Court fee, but instead of paying Court-fee and converting the suit filed along with application into regular suit, the plaintiff filing suit as a fresh suit on payment of Court- fee, which happened to be beyond limitation the fresh suit could not be saved by invoking Section 13 of the Limitation Act and the suit is liable to be dismissed as time-barred.

Sec.14 - Exclusion of time of proceeding bona fide in court without jurisdiction

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation - For the purposes of this Section -

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Comments:

The principle of the Section is the protection against the bar of limitation of a person honestly doing his best to get his case tried on the merits, but failing through Court being unable to give him such a trial – ***AIR 1970 Pat 50,*** and this principle is applicable not only to cases where the person brings his suit in the wrong Court, but also where he brings his suit in the right Court, but

is nevertheless prevented from getting a trial on the merits by something which, though not a defect of jurisdiction, is analogous to that defect – ***AIR 1949 Cal 24.***

In ***Ramdutt Ramkissen v. E.D.Sasson & Co. AIR 1929 PC 103,*** Lord Salvesen in delivering the judgment of the Privy Council observed as follows:

"It may be assumed that it had been ascertained before these provisions (i.e., Sec.14) were formulated that there was a serious risk of injustice arising if the period of limitation, which is in many cases shorter than in England, should be too strictly applied. In Indian litigation it is consistent with the experience of their Lordships that the time necessary for the decision in a suit may be of much longer duration than one is accustomed to in the Courts of Great Britain. Hence, the necessity for some provision to protect a *bona fide* Plaintiff from the consequences of some mistake which had been made by his advisers in prosecuting his claim."

In order to attract the provisions of this Section three conditions have to co-exist:

1. The Plaintiff must have been prosecuting another civil proceeding which he relies upon with due diligence.
2. The earlier proceedings and the later proceeding must be founded on the same cause of action and
3. The former proceeding must have been prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of like nature is unable to entertain in – ***AIR 1975 Cal 203***

In order to exclude time spent in the earlier proceeding the earlier proceeding should have the effect or preventing the institution of the subsequent suit in relation to the same or identical cause of action – **ILR (1970) 2 Mad 69 (DB).** The entire period from the date of institution of the proceeding in the wrong Court till its disposal can also be said to be the period during which the suit or proceeding was prosecuted and nothing more – ***AIR 1970 Pat 50.***

The element of mistake is inherent in the invocation of this Section. The Section is in fact, intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum – ***ILR (1969) Delhi 487***.

However, where two concurrent remedies were open to applicant and he chose one of them, time spent in prosecuting that remedy cannot be excluded in computing Limitation for the other remedy. Sec.14 will not be applicable in such a case – ***1977 (WLN) (UC) 96 (DB) (Raj)***.

Sec.14 does not give a discretion to the Court but on the other hand the litigant is entitled, as of right, to exclude the period spent in the infructuous proceedings provided the conditions laid down in the Section are satisfied – ***AIR 1963 Punj 556.***

Where the earlier proceedings were dismissed due to non-appearance of the concerned party, it is sufficient to attract Sec.14 since the Court could not dispose of the matter on merit – ***1992 (2) Ker LJ 923.***

The question whether Section 14 of the Limitation Act can be relied upon for excluding the time spent in prosecuting remedy before a wrong forum was considered by a two Judge Bench in ***State of Goa v. Western Builders (2006) 6 SCC 239*** in the context of the provisions contained in Arbitration and Conciliation Act, 1996. The Bench referred to the provisions of the two Acts and observed:

"There is no provision in the whole of the Act which prohibits discretion of the court. Under Section 14 of the Limitation Act if the party has been bona fidely prosecuting his remedy before the court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub- sections (4), (6), (9) and sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section 41, sub-section (2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid sections that wherever the legislature wanted to give power to the court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the statute for curtailing the power of the court under Section 14 of the Limitation Act. Much depends upon the words used in the statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act (sic not) be read in the Act of 1996, which will advance the cause of justice. If the statute is silent and there is no specific prohibition then the statute should be interpreted which advances the cause of justice."

Sec. 16 - Effect of death on or before the accrual of the right to sue

(1) Where a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, or where a right to institute a suit or make an application accrues only on the death of a person, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application.

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, or where a right to institute a suit or make an application against any person accrues on the death of such person, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the Plaintiff may institute such suit or make such application.

(3) Nothing in sub-section (1) or sub-section (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office.

Sec.17 - Effect of fraud or mistake

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have

discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

Comments:

This is an enabling Section which postpones the starting period of limitation for suits and applications in certain cases mentioned in the Section – ***AIR 1959 Mad 26.***

Under Section 18 of the limitation act of 1908 which corresponded to sub-Section of (1) of this Section the mere fact that the cause of action was founded on fraud was not enough to bring the case within the Section – ***AIR 1929 Rang 62.***

A person desiring the invoke the aid of the Section was required to establish not only that there was fraud by the Defendant or the Respondent but also that by means of such fraud he was kept from the knowledge of his right to sue or apply or of the title on which such right was founded – ***AIR 1974 Mad 237.***

Sub-Sec.(1) of Sec.17 has been framed on the lines of Sec.26 of the limitation act, 1939, of the United Kingdom so as to include actions based on fraud and also for relief founded on mistake. Under the sub-Section in the case of fraud limitation is postponed even when the suit or application is based upon fraud of the Defendant or the Respondent or his agent and it is not necessary for the Plaintiff or the applicant to prove in such a case that the knowledge of the right or title on which the suit or the application is founded is concealed by the fraud, though the sub-section can be availed of even in the case of such concealment

Under this Section limitation begins to run from the time when the Plaintiff or the applicant has discovered the fraud or the mistake or could with reasonable diligence have discovered it. The concept of ‘reasonable diligence’ comes into play after the fraud has been perpetrated or committed and, in the name of ‘reasonable diligence’ what the Plaintiff could have done or

should have done before the fraud was committed cannot be taken into account – ***(1979) 20 Guj LR 722 (DB)***.

The word 'reasonable' has been understood as prima facie meaning reasonable in regard to those circumstances of which the actor called on to act reasonably knows or ought to know – ***AIR 1976 Mad 323***.

This Section must be read consistently with the provisions of Sec.9 and, so reading it, it is clear that the fraud must have existed at the inception of the cause of action. A fraud committed after the limitation has begun to run cannot, in view of Sec.9 stop limitation running and this Section will not apply to such cases – ***AIR 1921 Mad 283 (DB)***.

Section 18 of the limitation act of 1908 used the language "where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it was found….. "under that Section there must not only have been fraud but the person injured by it must have been kept from the knowledge of his right to institute a suit or make an application, by means of such fraud – ***(1961) 65 WN 820 (DB).***

It was therefore held in cases decided under that Section that the fraud contemplated by the Section was an actual and active fraud in the means adopted to keep the person injured out of knowledge of his right – ***AIR 1964 MP 57 (DB)***.

The fraud contemplated by this Section is not confined to fraud committed at the inception of the cause of action, but may include fraud committed even before that date. Thus, where fraud is committed by the Decree-Holder in execution proceedings taken for bringing the property of the Judgment-Debtor to sale, this section would apply to an application by the Judgment-Debtor to set aside the sale on the ground of fraud, though the right to apply only arises on the date of the sale and though no fresh act of fraud is proved at the date of the sale. The reason is that the fraud committed in the execution proceedings would have a continuing influence and would retain its power of mischief until that influence ends. If at the date of the cause of action the effect of the antecedent fraud continued so as to keep the person injured from knowledge of his right to seek relief, this Section would clearly apply – ***AIR 1964 Ker 88.***

In ***Narayan Sahu v. Damodhar Das, (1912) 16 Ind Cas 464 (DB) (Cal)***, Jenkins, C.J., held that the view that the fraud contemplated by the Section was fraud committed at the inception of the cause of action and not an antecedent fraud, was not in consonance with the view expressed by their lordships of the Privy Council in ***Rahimbhoy v. Turner, (1893) 17 Bom 341***.

Mistake

Under sub-section (1) clause (c), where relief is claimed from the consequence of mistake the period of limitation will not begin to run until the Plaintiff or applicant could, with reasonable diligence, have discovered the mistake – ***AIR 1973 Cal 119.*** The mistake may be a mistake of fact or mistake of law, both are within the purview of the term 'mistake' – ***1984 Tax LR 2570.*** Where an ex parte decree was passed on 30.04.1965 and an application to set it aside was made on 14.12.1965 on the ground that the lawyer had by mistake noted the date of hearing as 27.11.1965 and the mistake was discovered on that date, it was held that the application was not barred by limitation – ***AIR 1971 MP 162***.

Sec.18 - Effect of acknowledgment in writing

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation - For the purposes of this section,

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to setoff, or is addressed to a person other than a person entitled to the property or right,

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

Comments:

The word 'acknowledgement' in this Section means an admission of the truth of one's own liability. Such admission may be express or implied – ***AIR 1871 Mys 156.*** A statement by X that he is not liable to pay this amount, but Y is liable to pay it is not an acknowledgement of the debt of X – ***ILR (1970) 1 Cal 459.*** In order to understand the liability in respect of which the acknowledgement is made the substance of the letter of acknowledgement must be looked to – ***(1968) 1 Mys LJ 271.*** Astatement that the Plaintiff's claim is under consideration and calling upon him to abstain from going to Court is neither an express nor implied acknowledgement of liability – ***AIR 1970 Mad 108.*** Where an officer of a corporate body is not empowered to acknowledge debt on its behalf, mere recommendation on the office note sheet that amount claimed by the Plaintiff should be paid to him or that payment should be made as soon as sanction is received would not constitute an acknowledgement within the meaning of Sec.18 – ***(1991) 2 Pat LJR 713.***

This Section provides that where an acknowledgement of the right or liability in the manner referred to, is made before the expiration of the prescribed period, a fresh period of limitation shall be computed from the time when the acknowledgement is signed. When the prescribed period has expired and there has been no acknowledgement before such expiration, the suit, appeal, or application as the case may be would be barred by time – ***AIR 1968 Cal 280.*** Generally speaking, a liberal construction should be given to the statement alleged to be an acknowledgement, but it does not mean that when a statement is made without intending to admit the existence of jural relationship such intention should be fastened on the person making the statement by an involved and far-fetched process of reasoning – ***AIR 1971 SC 1482.***

In order that an acknowledgement may give a fresh starting point under this section:

1. It must have been made before the expiration of the period of limitation for the suit, appeal or application – ***1988 Bank J 538 (DB) Bom***.
2. It must be a clear and unambiguous acknowledgement admitting the liability.
3. It must be signed by the party or his authorised agent – ***AIR 1968 All 316***.
4. The acknowledgement must be of a subsisting liability or existing jural relationship though the exact nature or the specific character of the said liability may not be indicated in words – ***(1970) 2 Mys LJ 533***.

Sec.25 - Acquisition of easements by prescription

(1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

(2) Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(3) Where the property over which a right is claimed under sub-section (1) belongs to the Government that sub-section shall be read as if for the words "twenty years" the words "thirty years" were substituted.

Comments:

Under the early English law, prescription was not regarded as a mode of acquiring an easement. Where long user of a particular right was proved, it was regarded as evidence that the servient owner acquiesced in or consented to such user being made, from which acquiescence or consent, a grant or covenant on the part of the servient owner could be presumed, provided the nature of the use was that that it would have been if the person claiming the right had been a grantee or a person in whose favour a covenant had been entered into by the servient owner. A grantee or a covenantee would exercise the right obtained by him openly and peaceably and without fear of interruption. It was wherefore a use of this nature for a long time that gave rise to the presumption of grant or covenant in his favour – ***Peacock on Easements, 3rd Edn. Pg 425***

This Section has followed the general principles of English law as to the acquisition of easements by prescription in that it prescribes that there must be use for twenty years and that such use must be open, peaceful, as of right and without interruption – ***AIR 1925 Cal 788 (DB)***.

Although, thus, this Section contains the elements which have come down from the times when long use was treated as raising a presumption of a grant or covenant, the acquisition of an easement under this Section is independent of the capacity or incapacity of the servient owner to make a grant of the easement. Thus, where a person claimed a prescriptive right to the flow of rain water from his compound to a municipal drain it was held that whether the municipality could grant such an easement was immaterial for deciding the question of acquisition of the easement under Sec.26 of the Act of 1908 corresponding to this Section – ***AIR 1938 Pat 423.***

This section only deals with the acquisition of easements and not to natural rights. An easement is a specific right subtracted from the general rights of ownership. It is a restriction of a natural

right. A natural right is part of the rights of ownership and imports those incidents and advantages which are provided by nature for the use and enjoyment of by a person of his property – ***AIR 1967 AP 81***.

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