THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY
CHENNAI

CIVIL PROCEDURE CODE

STUDY MATERIAL

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PREFACE

The Law regulating the procedure to be followed in civil court is governed by the Civil Procedure Code and this Civil Procedure Code is one of the most important branches of the procedural law. It is a **Procedural law or adjective law which** prescribes the procedure and machinery for the enforcement of the rights and liabilities of parties in accordance with the rules of the substantive law. The main object of this civil procedure code is to consolidate and amend the laws relating to the procedure and practices followed in the Civil Courts in India. As such, it was enshrined in the preamble of the code that it was enacted to consolidate and amend the laws relating to the procedure to be followed in the civil courts having civil jurisdiction in India. The Civil Procedure Code regulates every action in civil courts and the parties before it from the institution of the suit till the final disposal. **The Body of the Code** lays down general principles relating to **Power of the court**, and in the case of the second part, that is, **the Schedule** provides for **the procedures, methods and manners** in which the jurisdiction of the court may be exercise.

It is for general welfare that a period be put on litigation. Further, it is a general principle of law that law is made to protect only diligent and vigilant people. Equity aids the vigilant and not the indolent. Law will not protect people who are careless about their rights. Moreover, there should be certainty in law and matters cannot be kept in suspense indefinably. It is, therefore, provided that Courts of Law cannot be approached beyond fixed period. In civil matters, the limit is provided in Limitation Act, 1963. The body of the Code lays down the procedures for calculation of limitation period and the Schedule provides the exact period of limitation for suits, appeals and applications.

In this course material I have given basic substance of all units of civil procedure code and Limitation Act with case laws and illustrations wherever necessary. I hope the material would help the students who need it the most.

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UNIT- I

The 'Code of Civil Procedure' is a procedure law, i.e., an adjective law. The Code neither creates nor takes away any right. It only helps in proving or implementing the 'Substantive Law'. The Code contains 158 Sections and 51 Orders. The object of the Code is to consolidate (all the laws relating to the procedure to be adopted by the Civil Courts) and amend the law relating to the procedure of Courts of Civil Procedure. The procedural laws are always retrospective in operation unless there are good reasons to the contrary. The reason is that no one can have a vested right in forms of procedure. The Code of Civil Procedure is not retrospective in operation. The Code is not exhaustive.

Definition:

Section-2(2) "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 for dismissal for default.

Explanation: A decree is preliminary where 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.

Decree [Section-2 (2)] and Order [Section-2 (14)]

Essential Elements of a decree: The decision of a Court can be termed as a "decree" upon the satisfaction of the following elements:-

I. There must be an adjudication

II. Such adjudication must have been given in a suit

III. It must have determined the rights of the parties with regard to all or any of the matter in controversy in the suit.

IV. Such determination must be of a conclusive nature and

V. There must be formal expression v of such adjudication.

a) An Adjudication: Adjudication means "the judicial determination of the matter in dispute". If there is no judicial determination of any matter in dispute or such judicial determination is not by a Court, it is not a decree; e.g., an order of dismissal of a suit in default for non appearance of parties, or of dismissal of an appeal for want of prosecution are not decrees because they do not judicially deal with the matter in dispute.

b) **In a Suit:** Suit means a Civil proceeding instituted by the presentation of a Plaint. Thus, every suit is instituted by the presentation of Plaint. Where there is no Civil suit, there is no decree; e.g., Rejection of an application for leave to sue in forma pauper is not a decree, because there cannot be a plaint in such case until the application is granted.

Exception: But where in an enactment specific provisions have been made to treat the applications as suits, then they are statutory suits and the decision given thereunder are, therefore, decrees; e.g., proceeding under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the Arbitration Act, etc.

c) **Rights of the parties:** The adjudication must have determined the rights i.e., the substantive rights and not merely procedural rights of the parties with regard to all or any of the matter in controversy in the suit.

"Rights of the parties" under section 2(2).

The rights of the parties inter se (between the parties) relating to status, limitation, jurisdictions, frame of suit. accounts, etc

"Rights in matters in procedure" are not included in section 2(2); e.g., An order of dismissal for non-prosecution of an application for execution, or refusing leave to sue in forma pauperis, or a mere right to sue, are not decrees as they do not determine the rights of the parties.

d) **Conclusive Determination:** The determination must be final and conclusive as regards the Court, which passes it.

An interlocutory order which does not finally decide the rights of the parties is not a decree; e.g., An order refusing an adjournment, or of striking out defence of a tenant under the relevant Rent Act, or an order passed by the appellate Court under Order 41, rule 23 to decide some issues and remitting other issues to the trial Court for determination are not decrees because they do not decide the rights of the parties conclusively. *But,* An order dismissing an appeal summarily under Order-41, or holding it to be not maintainable, or dismissal of a suit for want of evidence or proof are decrees, because they conclusively decide the rights of the parties to the suit.

e) **Formal Expression:** There must be a formal expression of such adjudication. The formal expression must be deliberate and given in the manner provided by law.

Decree means "formal expression of an adjudication conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit". It may be preliminary or final.

The term 'suit'is not defined in the code. However in *Hansraj- vs- Dehradun-Mussoorie Electric Tramways Co Ltd, Privy council defined 'suit' as a civil proceeding instituted by the presentation of a plaint"

➔ Under certain enactments, specific provisions have been made to treat applications as suits.eg:- proceedings under Indian Succession Act, Hindu Marriage Act, Land Acquisition Act, Arbitration Act. Etc

Provisions in the Code for passing of the Preliminary Decrees:

a. Suits for possession and mesne profit; Order 20 Rule 12

b. Administrative Suits; Order 20 Rule 13

c. Suits for ,Pre-emption; Order 20 Rule 14

d. Suits for dissolution of Partnership; Order 20 Rule 15

e. Suits for accounts between principal and agent; Order 20 Rule 16

f. Suits for partition and separate possession; Order 20 Rule 18

g. Suits for foreclosure of a mortgage; Order 34 Rules 2-3 Besides above the Court has a power to pass a preliminary decree in cases not expressly provided in the Code.

Whether there can be more than one preliminary decree?

Debate was concluded by Supreme Court in *Phoolchand -vs- Gopal Lal, A.I.R. 1967, S.C. 1470, the Apex Court has decided that "C.P.C. does not prohibits passing of more than one preliminary decree, if circumstances justify the same and it may be necessary to do so". That nothing in this code prohibits passing more than one preliminary decree.

FINAL DECREE:

Decree may be said to be final in two ways

(i) when within prescribed period no appeal is filed or matter has been decided by the decree of the highest Court.
(ii) when the decree , so far as regards the Court passing it , completely disposes of the suit.

If an appeal preferred against a preliminary decree succeeds, the final decree automatically falls to the ground for there is no preliminary decree thereafter in support of it. In such case it is not necessary for the defendant to go to the Court to set aside the final decree.

*Sital Parshad -vs- Kishori Lal

Partly Preliminary & Partly Final Decree:-

Eg:- suit for possession of immovable property with mesne profit

(i) decree for possession of property (final)and

(ii) directs an enquiry in to the mesne profit (preliminary)

Deemed decree: e.g. rejection of plaint & the determination of questions under section 144(Restitution); Adjudication under o21 R58, R98 or R100 are deemed decrees.

Rejection of plaint:-

Though does not preclude the plaintiff from the presenting a fresh plaint on the same cause of action.

Section 2(2) of CPC specifically provides that rejection of plaint shall be deemed to be a decree.

Judgement: section 2(9)

"Statement given by a judge on the grounds of a decree or order"

*Balraj Taheja –vs- Sunil Madan

Essential of judgement:

Other than small causes Court

(i) concise statement of the case

(ii) properties for determination

(iii) decision thereon

(iv) reasons for such decision

Orders 2(14):

"Formal expression of any decision of a civil Court which is not a decree" or "Adjudication of a Court which is not a decree is an order".

Similarities between order and decree are

1. both relates to matters in controversy

2. both are decisions given by Court

3. both are adjudications of a Court of law

4. both are a formal expressions of a decision.

Distinction:-

DECREE	ORDER
1. can be passed only in a suit	May originate from suit petition or application

2. Conclusively determines the rights of the parties	May / Not conclusively determines
3. may be preliminary , final partly preliminary or final	There cannot be a order preliminary
4. in every suit there can be one decree	A number of order may be passed
5. every decree is appealable	Every order is not appealable only those orders specified in the code are Appealable
6. second appeal lies to the High Court	No second appeal in case of appealable orders.

Definition: Decree **Holder Sec 2 (3):**

"Decree-Holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.

Definition: Judgment Debtor Sec 2 (10):

"Judgment-Debtor" means any person against whom a decree has been passed or an order capable of execution has been made.

Definition: Legal Representative Sec 2 (11):

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or issued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

Definition Mesne Profit Sec 2 (12):

"means profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made but the person in wrongful possession.

Which means;

→ profit received by a person in wrongful possession together with interest

→ shall not include profits, due to improvements made by him.

Test to ascertain mesne profits is not "what the plaintiff has lost but what the defendant gained.

Principles to be followed:

1. No profit to be given to a person in wrongful possession

2. Restoration of status before dispossession of decree holder.

In *Lucy –vs- Mariappa,

It was held that Interest is an integral part of mesne profit. Interest is allowed in computation of mesne profit itself till the date of payment.

*Mahant narayanan dasjee –vs- Tirupathi devasthanam.

→ Interest shall not exceed 6%per annum.

Terms not defined in the code:-

Affidavit: "Declaration of facts (by party), reduced to writing, affirmed or sworn before an officer having authority to administer Oaths".

Appeal: "Judicial examination of the decision by a Court on the decision of an inferior Court".

Cause of Action: "a bundle of essential facts which is necessary for the plaintiff to prove before he can succeed".

Caveat: "official request that one should not take a particular action without issuing notice to the party lodging the caveat & without affording an opportunity of hearing him".

Execution:- "a process of enforce or giving effect to the judgement , decree or order of a Court" .

Summons: "a document issued from an office of a Court of justice, calling upon a person to attend before the judge / office to give evidence / produce documents".

JURISDICTION OF CIVIL COURTS

Jurisdiction - definition –"power or authority of a Court to hear &determine a cause, to adjudicate & exercise any judicial power in relation to it".

Or "Extent of the authority of Court to administer justice prescribed with reference to the subject matter, pecuniary value and local limits".

In *UOI v. Tarachand Gupta and *Official Trustee v. Sachindra it was held that jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties.

Kinds of jurisdiction:

1. pecuniary jurisdiction
2. territorial jurisdiction and
3. jurisdiction as to subject-matter

Jurisdiction of Court may be original or appellate. In the exercise of original jurisdiction a Court entertains original suits, while in the exercise of its appellate jurisdiction it entertains appeal. The Munsif's Court and the Court of small causes have only original jurisdiction the District Judge's Court and the various other Courts have appellate jurisdiction.

SECTION 9: SUITS OF CIVIL NATURE:

Civil nature pertains to private rights and remedies of a citizen.

Courts to try all civil suits unless barred— 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.

Explanation I.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II- For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.].

A suit is of civil nature if the principal question in the suit relates to the determination of a civil right. This if the principal question in the suit is a caste question or a question relating to religious rites or ceremonies, the suit is not of a civil nature. However, the dispute as to right of worship is one of a civil nature within the meaning of Section 9.

In order to fall within the purview of the term "of a civil nature" the suit must be for the enforceme4nt of rights and obligations of a citizen and not matters which are purely social. If the principal question of civil nature and if the subsidiary question is in religious nature, it shall be construed that it is a suit of civil nature. Under section 9 the civil Courts power is restricted only to suits and or disputes of civil nature.

It will be noticed from the provisions contained in sec 9 of the code that a bar to file a civil suit may be express or implied. An express bar is where a statute itself contains a provision that a jurisdiction of a civil Court is barred e.g., the bar contained in section 293 of the Income Tax Act, 1961.

Expressly barred:-

In **Bata Shoe Company v. Jabalpur Municipality*, it was held that matters falling within exclusive jurisdiction of Revenue Court, under Criminal Procedure Code, Industrial Tribunal, Income Tax Tribunal, Motor Accident Claims Tribunal, Bar Council are completely ousted from the Jurisdiction of civil Courts.

*State of Tamil Nadu v. Ramalinga

→if the remedy provided by the Statute is inadequate all questions cannot be decided by a special tribunal, the jurisdiction of civil Court is not barred.

Suits impliedly barred:-

Suits which are barred by general principles of law are considered to be impliedly barred.

*Premier Automobiles v. K.S.Wadke

→ where an Act creates an obligation and enforces its performance in a special manner, that performance cannot be enforced in any other manner.

*Indian Airlines v. Sukdeo Rai

→ certain suits, though of civil nature are barred from the cognizance of civil Court on the ground of public policy.

Who may decide the jurisdiction of a Court?

*A.R.Antulay v. R.S.Nayak

→ Civil Court has inherent power to decide its own jurisdiction.

Burden of proof:-

Lies on the party who seeks to oust the jurisdiction of civil Court. And it must be construed strictly.

*Abdul v. Bhawani.

SECTION 10: RES SUBJUDICE (Stay of Suit)

Stay of suit— No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Section 10 prevents Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigation in respect of same cause of action, same subject matter and same relief. It must be noted that the second suit is not dismissed as barred, it is only the trial of ht suit that is not proceeded with and is stayed. *The section is no bar to the institution of a second suit.* A decree passed in contravention of section 10 is nullity.

Conditions for the applicability of Section 10:

In order to attract the application of this section it is necessary that the following conditions must be fulfilled.

1. A previously instituted suit is pending in a Court. (includes appeal)
2. The matter in issue in the second suit is also directly and substantially in issue in a previously instituted suit.
3. The previously instituted suit must be pending in the same Court in which the subsequent suit is brought, or in any other Court in India or in any Court beyond the limits of India established or continued by the Central Government or in the Supreme Court.
4. The Court in which the previous suit is pending has competent jurisdiction to grant the relief claimed in the subsequent suit.
5. The parties in the two suits are the same and
6. The parties must be litigating under the same title in both the suits.

*Life Pharmaceuticals (P) Ltd v. Bengal Medical Hall

→ No discretion left to the Court. The order staying proceedings in the subsequent suit must be stayed.

The words "matter in issue" in sec 10 means the entire matter in controversy and not one of the several issues in the case.

In *Kunthi sankara Eaman v. Vankappa Bhatia,

It was held that where the earlier suit was for recovery of rent for a certain period and the subsequent suit is for recovery of rent for subsequent years and for ejectment, the matter in issue in the two suits would not be deemed to be the same and sec10 would not be applicable.

SECTION 11: RESJUDICATA

Section 11 of the CPC embodies the doctrine of *Resjudicata* of the rule of conclusiveness of a judgment. In the absence of such rule, there will be no end to litigation and the parties would be put to constant trouble, harassment and expenses. This doctrine is bases on the maxim "*ex captio res judicata*" means "*one suit and one decision is enough for any single dispute*". The doctrine is a fundamental concept based on public policy and private interest.

The Doctrine of Res Judicata is based on 3 maxims viz

1."*Nemo debet lis vexari pro una et eadem causa*" means "No man should be vexed twice for the same cause".

2."*Interest republicae ut sit finis litium*"- It is in the interest of the state that there should be an end to litigation

3. "*Res judicata pro veritate occipitur*"- A judicial decision must be accepted as correct

The first maxim looks to the interest of the litigant, who should be protected from a vexatious multiplicity of suits, for otherwise a man possessed of wealth and capacity to fight may overawe his adversary by constant dread to litigation.

The second maxim is based on the ground of public policy that there should be an end to litigation.

"*Ex Captio Res Judicata*" -one suit and one decision is enough for any single dispute(roman law)

Principle based on the of giving a finality to judicial decisions. Explanations under section I to VIII

I former suit denote decided prior to the suit in question and not institution.

Indian origin of res judicata:-

The principle of resjudicata (matter already decided) is founded on the ancient principles of Prangnyaya (previous judgment). The principle is thus enunciated in Brihaspati Samriti"

"if a person who has been defeated in a suit according to law files his plaint once again he must be told that he has been defeated already, this is called plea of prang-nyaya".

Section 11: No Court shall try any **suit** or issue in which the matter directly and substantially in issue has been directly and 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.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

Section 11, C.P.C. embodies the rule of conclusiveness as evidence or bars as a plea of an issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a competent Court to try such subsequent suit in which the issue has been directly and substantially reviewed and decided in the judgment and decree in the former suit would operate as res Judicata.

Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies, decided and became final so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the Court is saved.

It is based on public policy, as well as private justice. They would apply, therefore, to i all judicial proceedings whether civil or otherwise. It equally applies to all quasi-judicial proceedings of the tribunals other than the civil Courts.

Res Judicata and Res Sub-Judice:

The rule of res Judicata in section 11 is clearly distinguishable from the rule of res sub-Judice enshrined in section 10. The former relates to a matter already adjudicated upon, i.e., a matter on which judgment has been pronounced, while the latter relates to a matter which is pending judicial enquiry.

The rule in section 10 bars the trial of a suit in which the matter directly and substantially in issue is pending judicial decision in a previously instituted suit by staying the trial of the latter suit; section 11 bars altogether 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.

Essential conditions to invoke section 11:-

(1) the matter must be directly and substantially in issue in the two suits;

(2) the prior suit must have been between the same parties or persons claiming under them;

(3) such parties must have litigated under the same title in the former suit;

(4) the Court which determined the earlier suit must be competent to try the later suit or the suit in which such issue is subsequently raised; and

(5) the question directly and substantially in issue in the subsequent suit should have been heard and finally decided in the earlier suit.

1. Directly and substantially in issue:

The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue, either actually or constructively, in the former suit. The rule of res Judicata only requires the identity of the matter in issue. In order that this condition may be fulfilled it must have been alleged by one party and either denied or admitted, expressly or by necessary implication, by the other. The principle of res Judicata does not depend on whether the cause of action in the two suits are identical. Causes of action in the two suits may be different, but the test is whether the matter directly and substantially in issue is the same in both suits and whether the parties are the same or the suit is between parties claiming under them and litigating under the same title. The expression "cause of action" used in this connection means that the matter in dispute is substantially the same, and the parties are the same or litigating under the same title.

It is the matter in issue directly and substantially, either actually or constructively, and not the subject-matter that forms the test of res Judicata. If the causes of action in the two suits are different, the matter in issue in them will not be the same and hence the decision in the former suit cannot operate as res Judicata. The words 'directly and substantially in issue' in section 11, C.P.C. are not confined to the relief granted in the former suit or to the property which was its subject-matter. The words in section 11 also clearly imply that the decision on a matter not essential for the relief finally granted in the former suit or which did not form one of the decisions cannot be said to have been directly or substantially in issue in the former case. Thus where certain reliefs were granted in a suit to the plaintiff it is not open to the defendant to raise any plea in a subsequent suit which will interfere with the relief in the prior suit. The principle of res Judicata does not extend to anything more than this.

Collaterally or incidentally in issue:

The expression "collaterally or incidentally in issue" means only ancillary to the direct and substantial issue and refers to a matter in respect of which no relief is claimed but which is put in issue to enable the Court to adjudicate upon the matter which is directly and substantially in issue. Collateral and incidental issues are auxiliary issues, while direct and substantial issues are the principal ones. It is only those matters which are directly and substantially in issue that constitute res Judicata and not the matters which are in issue only collaterally or incidentally.

Constructive resjudicata:-

All the issues must be raised in a suit. What ought to have raised if ought not raised the presumption is that the plaintiff abandoned his remedy.

***The State of Uttar Pradesh v. Nawab Hussain:**

In this case the petitioner was dismissed from service. He filed a writ petition for quashing the disciplinary proceeding on the ground that he was not afforded a reasonable opportunity to meet the allegations against him and the action taken against him was mala fide. The petition was dismissed. Thereafter he filed a suit in which he challenged the order

of dismissal on the ground, inter alia, that he had been appointed by the Inspector General of Police and that the Deputy Inspector General of Police was not competent to dismiss him by virtue of Article 311(1) of the Constitution.

It was an important plea which was within the knowledge of the respondent and could well have been taken in the writ petition, but he contented himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the case against him in the departmental inquiry and that the action taken against him was mala fide.

It was, therefore, not permissible for him to challenge his dismissal in the subsequent suit on the other ground that he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the- principle of constructive res Judicata.

On the principle of the constructive res Judicata an objection to the territorial jurisdiction of the Court in the previous suit, which might or ought to have been raised therein, must be deemed to have been heard and decided in favour of the existence of jurisdiction and the party which chooses not to raise the issue in defence is precluded from raising it in a subsequent petition between the same parties.

Where a matter has been constructively in issue so as to bring it under Explanation 4 to section 11, it could not, from the very nature of the case, be heard and decided and it will be deemed to be heard and decided against the party who might and ought to have alleged it.

2. Between the same parties:

The second essential condition to constitute the bar of res Judicata is that the former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Res Judicata not only affects the parties to the suit but their privies, i.e., persons claiming under them. A judgment not inter parties or in rem is not res Judicata in a subsequent suit though it may be received in evidence. Resjudicata not only affects the parties to the suit but also persons claiming under them (privies).

Pro Forma defendant:

Proforma defendant: in a suit would ordinarily be as much bound by the decision therein as any other defendant.

*Sethurama Iyer vs Ramachandra Iyer

Resjudicata applies between co plaintiffs and co defendants.

*Bharat Chandra das v. Pranpopal Chandra das

→ Two conflicting decrees passed by the two competent Courts on the same subject matter. Subsequent decision was hit by section 11 and decree being a nullity.

*Nathai vs Joint Director of Consolidation, Allahabad

→Exparte decrees will operate as resjudicata if a party in spite of service of notice on him, did not put in his appearance to contest the suit / appeal as the case may be.

A pro forma defendant in a suit would ordinarily be as much bound by the decision therein as any other defendant. But where in the former suit, no relief was claimed against him and the nature of two suits is wholly dissimilar and the cause of action arose only in consequence of the decision in the first suit, the second suit is not barred.

To the same effect are the observations in yet another case that a party unnecessarily impleaded in the previous suit is not bound by a decree therein. A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the Court to effectually and completely adjudicate upon the questions involved in the suit.

In such a case no relief is sought against him and the matter in issue in the suit is not in issue between him and any other party. A decision in such a suit cannot be res judicata against him or his representative-in-interests in subsequent proceedings.

Res judicata between co-defendants:

The principle of res judicata also applies to parties arrayed on the same side as between plaintiff's themselves or between defendants themselves. It was observed in Cottingham v. Earl of Shroswbury (3 Hare, 627 at 638) as far back as in the year 1843 that "if a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide the case, and the co-defendants will be bound.

But if the relief given to the plaintiffs does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

The above observations were in answer to the question as to when can a matter be res judicata between co-defendants. Three things emerge from the dictum laid down in the case cited above when the doctrine of res judicata can be applied as between co-defendants, viz.,

(a) There must be a conflict of interest between co-defendants;

(b) It must be necessary to decide that conflict in order to give the plaintiff appropriate relief; and

(c) There must be a decision of the question between the co-defendants.

(d) The co-defendants were necessary or proper parties in the former suit.

The doctrine of res judicata as between parties who have been co-defendants in a previous suit may apply even though the party, against whom it is sought to be enforced, did not in the previous suit think fit to enter an appearance and contest the question.

But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided.

It is settled by a large number of decisions that for a judgment to operate as res judicata between or among co-defendants, it is necessary to establish: (1) that there was a conflict between co-defendants; (2) that it was necessary to decide the conflict in order to give the relief which the plaintiff claimed in the suit; and (3) that the Court actually decided the question.

In *Chandu Lai v. Khalilur Rahman, Lord Simonds said:

"It may be added that the doctrine may apply even though the party against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided."

In *Iftikhar Ahmad v. Syed Meharban Ali (dead) through Lrs. and others

Their lordships of the Supreme Court observed in that they saw no reason why a previous decision should not operate as res judicata between co-plaintiffs if all these conditions are mutatis mutandis satisfied.

In *Sheoparsan Singh v. Ramanandan Prasad Narayan Singh,

In considering any question of res judicata they have to bear in mind the statement of the Board the rule of res judicata "while founded on ancient precedent is dictated by a wisdom which is for all time" and that the application of the rule by the Courts should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

"The raison d'etre of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule."

That a decision operates as res judicata between co-defendants if certain conditions are fulfilled is well settled. These conditions are:

1. That there was a conflict of interest between the defendants;

2. That it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and

3. That the question between the defendants must have been finally decided and

4. The co-defendants were necessary or proper parties in the former suit: Munnia Bibi v. Triloki Nath, AIR 1931 PC 112, Kishun Prasad v. Durga Prasad, AIR 1931 PC 231, Dhan Singh v. Joint Director of Consolidation, AIR 1973 All. 283, and Iftikhar Ahmad v. Syed Meharban Ali, AIR 1974 SC 749."

The law which applies to a case of co-defendants equally applies to a case of co-plaintiffs. The doctrine should, however, be applied to co-defendants with great caution.

Fraud or Collusion:

The reason for care and caution is fraud or collusion. The principle of res judicata is not applicable where signs of fraud or collusion are transparently pregnant or apparent from the facts on record and matter can be reopened.

Under section 11, C.P.C., when the matter 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 claimed, litigating under the same title, the decree in the former suit would be res judicata between the plaintiff and the defendant or as between the co-plaintiffs or co-defendants.

But for application of this doctrine between co-defendants, four conditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit.

If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide the case, and the co-defendants will be bound by the decree. But if the relief given to the plaintiff does not require or involve decision of any case between co-defendants, the co-defendants will not be bound as between each other.

Where the above four conditions did not exist the decree does not operate as res judicata. It must, therefore, be that all the persons who have right, title and interest are made parties to the suit and that they should have knowledge that the right, title and interest would be in adjudication and the finding or the decree therein would operate as res judicata to their right, title and interest in the subject-matter of the former suit.

Even in their absence a decree could be passed and it may be used as an evidence of the plaintiff's title either accepted or negative therein. The doctrine of res judicata would apply even though the party against whom it is sought to be enforced, was not conomine made a party nor entered appearance nor did he contest the question.

The doctrine of res judicata must, however, be applied to co-defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice.

If a party obtains a decree from the Court by practising fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be reopened. There can be no question of res judicata in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record.

In the previous suit which was instituted by the plaintiffs for recovery of sale price an issue was framed on the status of the defendants as to whether they were the tenants of the land in suit under the plaintiffs but in the subsequent suit for recovery of possession this issue was not raised as the defendants in the subsequent suit did not plead that they were the tenants under the plaintiffs.

What they pleaded was that they were in possession since a long time and had, therefore, acquired title by adverse possession. Consequently, in the subsequent suit, the issue

which was raised and tried in the previous suit was not raised, framed or tried and no finding, therefore, came to be recorded as to whether the defendants were tenants of the land in suit.

It is true that the instant suit, which is the subsequent suit, is between the same parties who had litigated in the previous suit and it is also true that the subject-matter of this suit, namely, the disputed land, is the same as was involved in the previous suit but the issues and causes of action were different.

Consequently, the basic requirement for the applicability of the rule of res judicata is waiting and, therefore, in the absence of pleadings, in the absence of issues and in the absence of any finding, it is not open to the defendants to invoke the rule of res judicata on the ground that in the earlier suit it was found by the trial Court that they were the tenants of the land in dispute under the plaintiffs.

Res judicata between co-plaintiffs:

The same conditions as apply to the case of co-defendants for constituting res judicata between them also apply to the case of co-plaintiffs.

A finding to become res judicata as between co-plaintiffs must have been essential for giving relief against the defendant. It must be also on points actively contested between the co-plaintiffs. But where in the prior suit it was not necessary to decide the rights of the plaintiff inter se for granting relief as against the defendants and the later suit relates to the individual right of one of the original plaintiffs, the prior decision will not operate as res judicata.

It is well settled that unless there is an active contest between the parties arrayed on the same side in the previous suit, a decision with regard" to which contest is necessary for the final determination of the matter in controversy in the suit, any decision given in the previous suit cannot operate as res judicata between them or between parties claiming through or under them in any suit.

Representative Suit:

Explanation VII to section 11 says that where persons litigate bona fide in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the person so litigating. It thus refers to cases in which a decision in a suit may operate as res Judicata against persons not expressly named as parties to the suit, i.e., in a representative suit.

Explanation VI to section 11 is, however, not limited only to a representative suit governed by Order I, Rule 8, C.P.C. It applied in other suits also. Explanation VI is not controlled by the provisions of Order I, Rule 8, C.P.C., because there must be a suit in which a person claims a right in common to himself and others, though not governed by Order I, Rule 8, C.P.C.

If the parties in the subsequent suit can be said to have been represented by the parties in the former suit, the decision in the former suit will bind the parties in the subsequent suit. A decree passed against a shebait or a trustee will also bind his successor.

Dismissal of a suit brought by the managing member of a joint family is a bar to a subsequent suit by a junior member who had been pro forma defendant in the former suit, in respect of the same property and on the same cause of action. The son is bound by the decision against the father.

In *Daryao v. State of Uttar Pradesh

➔ Petitioner filed writ petition under Article 226 was dismissed. Again another writ was filed under Article 32. Dismissed u/s 11- resjudicata.

Illustrations: A filed a suit against B for declaration that he is entitled to certain land as heirs of C dismissed- claiming same property under adverse possession based by constructive resjudicata. 'A' filed against 'B' to recover money on a promissory note B contended obtained by undue influence. Objection overruled and suit is decreed. B cannot challenge the pro-note on coercion / undue influence ought to have taken in former suit.

* Management of Sonepat Co-op. Sugar Mills Ltd. v. Ajit Singh, AIR 2005 SC 1050.

The principle of res judicata is a procedural provision. A jurisdictional question if wrongly decided would not attract the principles of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking procedural principle.

* Bhanu Kumar Jain v. Archana Kumar, AIR 2005 SC 626.

There is a distinction between issue estoppel and res judicata. Res judicata debars a Court from exercising its jurisdiction to determine the lis if it has attained finality whereas the doctrine of issue estoppel is invoked against the party. If such issue is decided against him, he would be estopped from raising the same in the latter proceedings. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by Accord.

* Sumer Mal v. State of Rajasthan, AIR 2000 Raj 1.

First writ petition filed on the ground of apprehended bias and subsequent second petition was filed on allegations of actual bias, is not barred by res judicata; G.N. Nayak v. Goa University, AIR 2002 SC 790.

Section 11 of the Code of Civil Procedure has no doubt some technical aspects for instance the rule of constructive res judicata may be said to be technical but the basis of which the said rule rests is founded on the consideration of public policy.

* Smt. Rehana Parveen v. Naimuddin, AIR 2000 MP 1.

The technical principle of res judicata would not be operative more so, if substantial change in circumstances is averred and found prima facie justified.

* Harbhagwan v. Smt. Punni Devi, AIR 1999 P&H 223

Assuming, the cause of action in both the suits was based upon title in the suit land and was akin in all the cases, yet, as referred to above, in as much the earlier two suits were

dismissed as withdrawn with permission to file fresh on the same cause of action, third suit will not be barred by any principle of law.

* Singhai Lal Chand Jain v. Rashtriya Swayam Sewak Sangh, Panna, JT 1996(3) SC 64.

Where the Sangh has been duly represented in the previous Court proceedings and were litigating bonafide which resulted in failure cannot be allowed to lay any objection in execution or to plead nullity of decree hence doctrine of res judicata applies. The decree of ejectment will bind every member of Sangh.

Consent and compromise decrees:

Section 11 is not strictly applicable to compromise decrees as it applies in terms only to what has been heard and finally decided by the Court [estoppel would apply].

A consent decree does not operate as resjudicata because it is merely the record of a contract between the parties to a suit, to which is super added for seal of the Court.

Dismissal for default:

These has been no decision on the merits of the case and no matter in issue has been heard and finally decided within the meaning of section 11.

*Bahir Dal Pal vs Grish Chandra Pal

A suit dismissed by the trial Court for default or for want of jurisdiction does not operate as resjudicata in a subsequent suit.

Obiter dictum: a mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is an obiter dictum.

Cannot said to be a decision on any issue not resjudicata.

*Narinder Singh vs Khaliq-ur-Rahman

*Mst Lakhidebi Gupta vs state of Assam

It is the decision to operate as R and not the reason.

4. Competency of Court to try the subsequent suit:

The fourth condition is that the Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

The decisions of the Courts of limited jurisdiction shall in so far as such decisions are within the competence of the Courts of limited jurisdiction, operate as res judicata in a subsequent suit although the Court of limited jurisdiction may not be competent to try such subsequent suit in which such question is subsequently raised.

Competent Court—Territorial Jurisdiction:

Territorial jurisdiction is not included in the expression 'Court competent to try subsequent suit.' Court deciding former suit need not have territorial jurisdiction to try subsequent suit. Any other construction runs against the trend in the development of laws in this field.

A revenue Court decision on a question of title will not bar a suit in the ordinary civil Courts, unless otherwise provided by law. A finding of a criminal Court also does not bind the civil Court.

The section initially applied only when the Court whose decision is cited as res judicata was competent to try the second case. The expression "competent to try" means competent to try the subsequent suit if brought 'at the time the first suit was brought. Competency relates both to pecuniary jurisdiction and subject-matter, which must be concurrent. It has no reference to territorial jurisdiction.

Where property in two suits is identical, the mere fact that its value has risen in the interval between the two suits and the subsequent suit is, therefore, beyond the pecuniary jurisdiction of the former Court, cannot affect the question of res judicata.

In order to determine whether a Court which decided the former suit has jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit.

5. Heard and finally decided by the Court in the first suit:

The last condition is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. The section requires that there should be a final decision on which the Court has exercised its judicial mind.

A matter will be said to have been heard and finally decided notwithstanding that the former suit was disposed of ex parte or by dismissal under Order XVII, Rule 3, i.e., for failure to produce evidence when time was allowed to do so, or by a decree on an award or by dismissal owing to plaintiff's failure to adduce evidence at the hearing.

But it is necessary, that the decision in the former suit must have been on the merits and so the matter cannot be said to have been heard and finally decided when the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder or misjoinder of parties, on account of multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation, or for failure to pay additional Court fee on a plaint which was undervalued, or for want of a cause of action, or on the ground of limitation, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit.

PLACE OF SUING: SECTIONS 15 -25

Sec15: suit must be instituted at the Court of lowest grade competent to try it. The object of the section is to see that the Courts of higher grade shall not be over burdened with suits. But the Decree passed by a Court of a higher grade cannot be said to be without jurisdiction.

*Nidhi lal vs Mazhar

Mode of valuation:

Plaintiff only valuates the plaint. If plaintiff values the suit as Rs.10,000/- and if it is finally decided to be 15,000/ which is beyond the jurisdiction of the Court, the Court is not deprived of its jurisdiction to pass a decree.

Power & duty of Court:

Normally, Court accepts the valuation of the plaintiff. If the plaintiff deliberately undervalues or overvalues the claim for the purpose of choosing the forum, it is the duty of the Court to return it to be filed in the proper Court.

*Balgonda vs Ramgonda

→Court may require the plaintiff to prove that the valuation is proper.

*Commercial Aviation and Travel Co vs Vimla Pannalal

→If the Court is unable to come to a finding regarding the correct valuation the Court has to accept the valuation of the plaintiff.

Territorial jurisdiction

1. Immovable property [secs 16-18]
2. Movable property [sec 19]
3. Compensation for wrong
4. Other suits [sec 20]

Section 17: if the property situate within jurisdiction of more than one Court, it can be filed before any Court provided within the pecuniary jurisdiction.

Section 18: If it is not possible to confirm the certainly of jurisdiction then one of these Courts may after recording the statement proceed to entertain and dispose of the suit.

Section 19: movable property:

"*Mobilia sequntur personam*" – means "movables follow the person".

As far as the suit is related to the movable property it is at the option of the plaintiff to choose any of the following places viz

1. Where wrong is committed
2. Where the defendant resides
3. Where the Defendant carries on business/ personally works for gain.

It the wrong consists of series of acts or number of transactions, it can be filed before any Court as the plaintiff chooses to sue. It the wrong is done in one place and consequences in another place, it is the option of the plaintiff to choose.

Suit for compensation for wrongs -sec 18:

Section 19 deals with other suits i.e. cases not covered under previous Sections. In such cases it is the option of the plaintiff that

1. Where cause of action arose wholly / partly arises
2. Where the defendant resides or personally works for gain
3. If there are more than one defendant any of them resides or carryon business.

"*Ex dolo malo non oritur action*" –means "an agreement to oust absolutely the jurisdiction of a competent Court is void, being against public policy".

*Patel Roadways Ltd Vs Prasad Trading Co

→ When two or more Courts have jurisdiction, the suit can be filed before any one of such Courts and it is binding and enforceable.

Objection as To Jurisdiction: Section 21:-

Decree of Court without jurisdiction is nullity

*Hiralal vs Kali Nath

→If objection is merely technical, unless raised at the earliest possible opportunity, they will not be entertained in appeal/revision for the first time.

Section 21-A bar of suit: (inserted by amend act 1976):

No substantive suit can be filed set aside a decree passed by a Court on an objection as to the place of suing.

INSTITUTION OF SUIT: ORDER I

Sections 26-35B and orders 1 to 20 (procedures relating to suits)

Orders 1 &2 parties to suit & frame of suit

"Suit" mans any proceeding by one person(s) against another or others in a Court of law wherein the plaintiff pursues the remedy which the law afford him for the reduces of any injury or the enforcement of a set whether at law or in equity.

*Krishnappa vs shivappa

Essentials of a suit:

1. opposing parties
2. subject matter in dispute
3. cause of action
4. relief

Institution of Suit (order 4- sec 26)

sections 26, 2(16), O4 R1

➔ Every suit must be instituted by presentation of plaint in duplicate by the plaintiff or recognized agent or person duly authorized by him. *Ram Gopal vs Ram Sarup

*Din Ram vs Hari Das

Generally, presentation of plaint must be on a working day and during office hours. Thereafter entered in register of civil suits then scrutinized by stamp reporter. If defects, plaintiff/advocate can remove them. Thereafter the suit shall be renumbered.

Parties to suit order II:

Joinder of parties: the question of joinder of parties arises only when an act is done by two or more persons or it affects two/more persons.

OI R1 joinder of plaintiffs: all persons may be joined in one suit as plaintiffs if the following 2 conditions are satisfied.

1. The right to relief alleged to exist in each plaintiff arises out of the same act or transaction and
2. The case is of such nature, if such persons brought separate suits, any common question of law or fact would arise.

In *Krishna vs Narsinghrao, it was held that both the conditions should be fulfilled.

Rule 3:- who may be joined as defendants?

Illustrations: if 'A' entered into contract separately with B, C, D for supply of goods, they are not joinder of defendants.

Rules 2 & 3-A:- where it appears to the Court that any joinder of plaintiffs or defendants may embarrass or delay the trial, it may pass an order for separate trials.

Necessary & Proper Parties:

*Ramesh vs Municipal Corp. of Bombay

➔ *Necessary Party* is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. *Proper*

Party is one whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

In the absence of necessary party no decree can be passed. But in the absence of the proper party decree can be passed (his presence enables the Court to adjudicate more effectually and completely).

Example: in a partition suit by son against the father, all sharers are necessary parties and grandsons are proper parties.

Rule 9: Non Joinder or Mis-Joinder of Parties:-

A person who is either a necessary or a proper party to a suit if not been joined as a party to the suit is known as non-joinder.

Mis joinder: if two / more persons are joined as plaintiffs/ defendants in contravention of O1 R1 and 3 and they are neither necessary nor proper parties.

*Jaganath vs Jaswant Singh

→ A suit cannot be dismissed only on the ground of mis joinder or non joinder of parties. However, this rule does not apply in case of non joinder of necessary party.

*Naba kumar vs radha shyam

→ If the person who is likely to be affected by the decree is not joined as a party in a suit/ appeal the suit or appeal is liable to be dismissed on that ground alone.

Rule13: All objections as to non joinder or mis joinder of parties must be taken at the earliest opportunity, else they will be deemed to have been waived.

Rule10: striking out, addition and substitution of parties:

test:- not whether the plaintiff agrees or objects the addition of parties but whether the presence of such party is required for full and complete adjudication of the dispute.

Representative Suit: Order I Rule 8:

When number of person have similar interest in a suit, one or more of them can sue or be sued on behalf of themselves and others with the permission of the Court or upon a direction from the Court

In *Srinivasa vs Raghava, It was held that the object of the provision is to save the time and expense to ensure a single comprehensive trial of question in which numerous persons are interested to avoid multiplicity of suits.

*TN housing Board vs Ganapathy

→ Provisions should be contented liberally. To apply the rule, following conditions must exist.

1. Parties must be numerous
2. Must have same interest in the suit
3. Permission must have been granted / direction must have been given by the Court.
4. Notice must have been issued to the parties whom it is proposed to represent in the suit.

According to Order 23 Rule 3-B no agreement or compromise can be entered in a representative suit without the leave of the Court because it would affect the interest of the other parties. If personal notice is not possible, publication in news paper can be done to the parties concerned at the expense of the plaintiff.

As far as applicability of Resjudicata to representative suit, Explanation VI of sec 11 deals with representative suit. And where a representative suit has been decided such decision would operate as resjudicata.

ORDER 2: FRAME OF SUIT

The object of the provision is that as far as possible all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit. Where there is common question of law and fact, separate suits are neither necessary nor desirable. And the defendants should not be vexed twice for the same cause. Order II Rule 2 shall be applicable only to the suits and not to appeals.

O2 R1 every suit must include the whole of the plaintiffs claim in respect of the cause of action. O2R2 where the plaintiff omits to sue for or intentionally relinquishes any portion of his claim, afterwards he shall not be allowed to sue in respect of such portion so omitted or relinquished. The provision compels a plaintiff to include in his suit the whole of the claim arising out of the cause of action. They do not compel him to join in the same suit every cause of action or every claim which he has. Bar of subsequent suit under Order II rule 2 will not be applicable if the identity of cause of action in the previous suit and the subsequent suit is not established.

Eg: where previous suit for recovery of sale price was filed, the subsequent suit for recovery of possession of ground that they were owners is not barred under Order II Rule 2 as the cause of action in the subsequent suit was different and distinct.

Omission to sue for all reliefs:-

When a person is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them and reserve his rights with the leave of the Court to sue for the rest. If no such leave is obtained he will be precluded from after wards suing for any relief so omitted. But if the right to relief in respect of which a further suit is brought did not exist at the date of the institution of the former suit, the subsequent suit is not barred.

Exception to the rule of splitting of claims:-

1. Order II Rule 2 does not apply to application for execution. An application for partial execution is not a bar to subsequent application for execution of the rest of the decree.

2. Where a mortgage has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by institution a sit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II Rule2.
3. Failure to claim set off is no bar to.a subsequent suit.
4. The bar of Order II Rule 2, CPC May not apply to a petition for a high prerogative writ under Article 226 of the constitution.

In *sohan raj vs Mahendra Singh, held that not applicable to execution proceedings

*K.V.George vs Water and Power Dept

→ Not applicable to arbitration proceedings

* Devendra vs State of Uttar Pradesh

→ Not applicable to petition under Article 226.

Joinder of cause of action: rules 3- 6:

A plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit. (2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Enables joinder of several cause of action in one suit in the following:

1. One plaintiff, one defendant, several cause of action
2. Joinder of plaintiffs (two or more plaintiffs), several cause of action conditions, (a)cause of action must have arisen from same act or transaction. (b) Common question of law / fact must have been involved.
3. Joinder of defendants and cause of action (a)cause of action must have arisen from same act or transaction. (b) Common question of law / fact must have been involved.
4. Joinder of plaintiffs, defendants and cause of action
5. If plaintiffs are not jointly interested mis joinder suit bad if defendants not jointly interested

R7 objections as to mis joinder of cause of action must be taken at the earliest opportunity otherwise deemed to have been waived.

UNIT –II

PLEADINGS AND TRIAL

PLEADINGS – ORDER VI:

Pleading is defined as plaint or written statement.

'Mogha' definition – "Pleadings are statements in writing drawn up and filed by each party to a case, stating what are his contentions will be at the trial and giving all such details as his opponent needs to be known in order to prepare his answer".

Object of pleadings is to narrow down the area of conflict and to see where the two sides differ and to prevent miscarriage of justice.

In *Ganesh Trading Co v. Moji Ram it was held that the object are meant to give to each side intimation of the case of the other, to enable Court to determine what is really at essence between parties and to prevent deviation from the course which/ litigation on particular cause of action must take.

Rule 2 Basic rule of pleadings (GOLDEN RULES)

1. Should state facts and not law

In *Kedar Lal v. Hari Lal

It was held it is the duty of the parties to state only the facts on which they rely upon for their claims and it is the duty of the Court to apply the law.

2. Facts stated should be material facts:

Material facts: all facts which the plaintiffs cause of action or the defendants defence depends.

*Ramachandran v. Janakiraman

→ Material facts are primary and basic facts which must be pleaded by the party in support of the case. To identify a particular fact is a material fact or not depends on the facts and circumstances of each case.

3. Pleadings should not state 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.

*Sheshadri vs. Pai

→ 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.

Facts are of two types:

(a) Facta Probanda- the facts required to be proved (material facts) and
(b) Facta Probantia – the facts by means of which they are to be proved (particulars or 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 he 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.

4. Facts should be stated in concise form:

The fourth and the last general principles of pleadings is that he pleadings should be drafted with sufficient brevity and precision. The material facts should be stated precisely succinctly and coherently. The words "in a concise form" are definitely suggestive of the fact that brevity should be adhered to while drafting pleadings.

It has been uniformly held that pleadings in India should not be construed very strictly. They have to be interpreted liberally and regard must be had to the substance of the matter than the form thereof.

Amendment of pleadings: - Rules 17 to 18

Amendment of pleadings is basically for the purpose of bringing about final adjudication in a suit and to avoid multiplicity of proceedings. It is in the interest of justice that a suit shall be decided on all points of controversy and accordingly, it is needed that the party shall be allowed to alter or amend their pleadings during the pendency of the suit. There can be a situation where there is change of circumstances in the course of pendency of a proceeding and if a matter in issue arises upon such change of circumstance, then amendment becomes necessary. Amendment of pleadings is provided under Order VI Rule 17 of the Code of Civil Procedure, 1908, which reads as under:

According to Order VI Rule 17 of the Code of Civil Procedure, 1908, the Court may allow the amendment at any stage of the proceedings and for such purpose it may impose conditions i.e. in the form of cost or any other condition. The Court has been given discretion in this regard and the mandatory guidelines upon the Court as well as upon the party seeking amendment is that they shall make only such amendments which are necessary for determination of real controversy between the parties to the suit. At the same time, the *Proviso* to Order VI Rule 17 puts a mandate upon the Court not to allow such amendment after the trail has begun (i.e. if issues have been settled), if its finds that the party could have raised the pleadings by due diligence at an earlier point of time.

However, the *Proviso* need not be given a very rigid effect in all cases as the same is subject to the discretion of the Court. The main object of the legislation is to enable the Court to

allow amendment at any stage. The purpose of the *Proviso* cannot do away with the intent of the legislation. Thus, if an application for amendment of pleadings has been filed after trial has begun, the Court will normally be tilted against the applicant, if it could be raised by due diligence at any earlier stage of proceedings. But in proper cases if the point to be amended is very essential to the suit, the Court may, in the interest of justice and equity, allow the amendment on such conditions as the Court deems fit and proper in the facts and circumstances of the particular case.

It was held by the Hon'ble Supreme Court in *Salem Advocate Case*[1], that by the 2002 Amendment, which added the *Proviso to Order VI Rule 17*, the burden of proof has been shifted upon the applicant who makes the application for amendment after the trail has commenced, to prove that despite due diligence he could not have raised the issue before the commencement of trail. This is for the purpose of preventing frivolous application to delay the proceedings.

PLAINT: ORDER VII

Rule 1. Particulars to be contained in plaint:

The plaint shall contain the following particulars :-

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

(b) the name, description and place of residence of the plaintiff;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(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 his 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.

Rule 2: In money suits

Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed. But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or for movables in the possession of the defendant, or for debts of which the value he cannot,

after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for.

Rule 3. Where the subject-matter of the suit is immovable property:

Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

Rule 4: When plaintiff sues in representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

Rule 5: Defendant's interest and liability to be shown -

The plaint shall show that the defendant is or claims to be interested in subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Rule 6: Grounds of exemption from limitation law

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint.

Rule 7. Relief to be specially-

Every Plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent a if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

Rule 8. Relief founded on separate grounds

Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

Rule 9. Procedure on admitting plaint- Concise statements-

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present, within such time as may be fixed by the Court or extended by it from time to time, as many copies] on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(1A) The plaintiff shall, within the time fixed by the Court or extended by it under sub-rule (1), pay the requisite fee for the service of summons on the defendants.]

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

Rule 10: Return of plaint

At any stage of the suit be returned to be: presented to the Court in which the suit should have been instituted.

Procedure on returning plaint- On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Rule 10A: Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return

(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court-

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,-

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearances is given under sub-rule (3),-

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise direct, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

Rule 10B. Power of appellate Court to transfer suit to the proper Court

(1) Where, on an appeal against an order for the return of plaint, the Court hearing the appeal confirms such order, the Court of appeal may, if the plaintiff by an application so desires, while returning the plaint, direct plaintiff to file the plaint, subject to the provisions of the Limitation Act, 1963 (36 of 1963), in the Court in which the suit should have been instituted, (whether such Court is within or without the State in which the Court hearing the appeal is situated), and fix a date for the appearance of the parties in the Court in which the plaint is directed to be filed and when the date is so fixed it shall not be necessary for the Court in which the plaint is filed to serve the defendant with the summons for appearance in the suit, unless that Court in which the plaint is filed, for reasons to be recorded, otherwise directs.

(2) The direction made by the Court under sub-rule (1) shall be without any prejudice to the rights of the parties to question the jurisdiction of the Court, in which the plaint is filed, to try the suit.]

Rule 11: Rejection of plaint

The plaint shall be rejected in the following cases :-

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

*Abdulla v. Gallappa

(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

*Meenakshi Sundaram v. Venkatachalam

(c) where the relief claimed is properly valued, but the plaint is returned 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

*Mannan Lal v. Chhotaka Bibi --- if paid within specified time the plaint shall be treated as instituted from the date of its presentation.

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

*B.R.Sinha v. State of Madhya Pradesh

In *Gangappa v. Rachawwa it was held that if the plaint itself shows that the claim is barred by limitation it shall be rejected.

Rule 12. Procedure on rejecting plaint

Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Rule 13. Where rejection of plaint does not preclude presentation of fresh plaint

The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Documents relied on in plaint

Rule 14: Production of document on which plaintiff sues

(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

(2) List of other documents -Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

Rule 15: Statement in case of documents not in plaintiff's possession or power

Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

Rule 16: Suits on lost negotiable instruments

Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

WRITTEN STATEMENT: ORDER VIII

A Written Statement is a pleading of the defendant for submission of every material fact to answer the allegation made by the plaintiff in his plaint. The word has not been defined in the code, but the same may be defined as under:
"A Written Statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff in his plaint and also states any new facts in his favour or takes legal objections against the claim of the plaintiff".

Preparation of Written Statement: All relevant rules of pleading apply to a Written Statement and it should be prepared with great caution. In the Written Statement firstly, the defendant should mention the name of the Court trying the suit, then-1the names of the parties. It is not necessary to mention the names, directions and place of residence of all the parties in the title of the Written Statement, but mentioning the name of the 1st plaintiff and 1st defendant is enough. The number of suit may be mentioned thereafter.
The defendant thereupon replies to each para of the plaint except where any preliminary objections like maintainability of suit locus standi of the plaintiff to file the suit, the non-joinder or mis-joinder of parties as to the jurisdiction of the Court or as to limitation, for consideration which is necessary in the 1st instance before the suit is tried on merits.

Rules of Defence: The denial in a Written Statement must be specific and not general. The grounds alleged by the plaintiff must be denied by a defendant specifically with each allegation of fact of which he does not admit the truth, except damages. The denial should not be vague or evasive. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken o be admitted except as regards a person under disability.

In cases where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts in the plaint except as against a person under disability, but the Court, in its discretion, may require any such fact to be proved. Whenever a judgment is pronounced under Rule 2, decree shall be drawn up in accordance with such judgment.

Time to File Written Statement: The defendant shall file his Written Statement of his defence within 30 days from the date of service of summons on him, but the above time may be extended by the Court further for a period, which shall not be later than 90 Days from the date of service of summons.

Extension of time to Present Written Statement: Ordinarily the time schedule prescribed by Order VIII Rule 1 has to be honoured. The extension of time sought for by the defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension of time shall be only by way of exception and for reasons to be recorded in writing, how so ever brief they may be, by the Court.

Subsequent Pleadings: According to Order VIII, Rule 9, no pleading subsequent to the Written Statement of a defendant other than by way of defence to set off or counter - claim shall be presented except by the leave of the Court, but the Court may, at any time require a Written Statement or additional Written Statement from any of the parties and fix a time of not more than 30 days for presenting the same.

Failure to present Written Statement: Where a party fails to file a Written Statement as required under Rule 1 or Rule 9 within a time permitted or fixed by the Court, the Court shall pronounce judgment against him or make such order as it thinks fit and on such judgment a decree shall be drawn up. The provisions regarding duty of defendant to produce documents upon which relief is claimed or relied upon by him have been given in Order VIII, Rule 1-A.

Concept of set off, Equitable Set off and Counter Claim (Order VIII, Rule 6)

Set Off

Order 8, Rule 6 deals with set off which is a reciprocal discharge of debts between the plaintiff and he defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim.

Where the defendant's claims to set off against the plaintiff's demand, in a suit for the recovery of money, any ascertained sum of money legally recoverable by him from the plaintiff, the defendant may present a written statement containing the particulars of the debt sought to be set off.

Example: [R and S sale rice for Rs 25000 to A and M. A sell cloth worth Rs. 28000 to S. A file a suit against S for recovery of price of cloth. S claims set off of the cost of rice in this suit.

➔ S will not allow set off – in dealing parties are not jointly same.

Conditions: A defendant may claim a set-off, if the following conditions are satisfied:-
I. The suit must be for the recovery of money.
II. The sum of money must be ascertained.
III. Such sum must be legally recoverable.
IV. It must be recoverable by the defendant or by all the defendants, if more than one.
V. It must be recoverable by the defendant from the plaintiff or from all plaintiffs'; if more than one.
VI. It must not exceed the pecuniary jurisdiction of the Court in which the suit is brought.
Both the parties must fill in the defendant's claim to set-off, the same character as they fill in the plaintiff's suit.
Equitable set-off: The provision of Rule 6 are not exhaustive. Order VIII, Rule 6 deals with legal set-off while Order XX, Rule 19(3) recognizes an equitable set-off.
An equitable set-off may be claimed by the defendant where the defendant claims set off in respect of an unascertained sum of money, where the claim arises of the same transaction and then such set off is known as equitable set off. Generally, the suits emerge from cross demands in the same transaction and this doctrine is intended to save the defendant from having to take recourse to a separate cross suit.

Example: A sues B to recover Rs. 25,000/- under a contract, B can claim set-off towards damages sustained by him due to breach of the same contract by A.

Counter-Claim (Rules 6-A to 6-G)
Meaning: It is a claim made by the defendant in a suit against the plaintiff and can be enforced by a cross action. Counter claim is a cause of action in favour of the defendant against the plaintiff.
A counter-claim is a weapon in the hands of a defendant to defeat the relief sought by the plaintiff against him and may be set-up only in respect of a claim for which the defendant can file a separate suit and therefore, it is substantially a cross action.
In Laxmidas VIs Nanabhai AIR 1984, 'SC. it was held that the Court has power to treat the counter claim as a cross suit and hear the original suit and counter claim together if the counter claim is properly stamped.

a. A defendant may in addition to his right of pleading a set-off under rule 6, set up, by way of counter- claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered defence or before the time limited for delivering his defence has expired whether such counter claim is in the nature of a claim for damages or not: Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.
b. Such counter claim shall be the same effect as a cross- suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
c. The plaintiff shall be at a liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.
d. The counter-claim shall be treated as a plaint and governed by the rules applicable to the plaints.

Rule 6 B: Counter Claim to be stated: Where any defendant seeks to reply upon ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counterclaim.

Rule 6 C: Exclusion of Counter Claim: Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the-plaintiff may, at the time before issues are settled in relation to the counter-claim, apply to the Court which may, on the hearing of such an application make such an order as it thinks fit.

Rule 6 D: Effect of discontinuance of suit: If in any case in which the defendant sets up a counter claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

Rule 6 E: Default of plaintiff to reply Counter- Claim: If the plaintiff makes default in putting in a reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter claim made against him, or make such order in relation to the counter claim as it thinks fit.

Rule 6 F: Relief to defendant where Counter Claim succeeds: Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party e'ltitled to such balance.

Rule 6 G: Rules relating to written statement to apply : The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter claim.

ORDER-V: SUMMONS AND DISCOVERY, ISSUE OF SUMMONS (SECTION 27 TO 29)

Summons means an intimation sent to the defendant/witness by the Court
Summons To Defendant **(Order 5)** and To Witnesses **(Order 16)**

Meaning: The word summons has not been defined in the Code, but according to the dictionary meaning;

"A summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or office of the court for a certain purpose."

Essentials of summons: Every summons shall be signed by the judge or such officer appointed by him and shall be sealed with the seal of the court [Rulel (3)] and every

summons shall be accompanied by a plaint or if so permitted, by a concise statement thereof.[Rule 2]

Contents of Valid Summons:

a. The summons must contain a direction whether the date fixed is for settlement of issues only or for final disposal of the suit (Rule 5).

b. In cases of summons for final disposal of the suit, the defendant shall be directed to produce his witnesses (Rule 8).

c. The Court must give sufficient time to the defendant to enable him to appear and answer the claim of the Plaintiff on the day fixed (Rule 6).

d. The summons shall contain an order to the defendant to produce all documents in his possession or power upon which he intends to rely on in support of his case (Rule 7).

Summons to Defendant:

Section 27: Where a suit has been duly instituted, a summon may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond 30 days from the date of the institution of the plaint.

Order V: Rule 1 (1)

Rule 1(1): When a suit has been duly instituted, a summon may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of the service of the summons on that defendant;

Provided that no such summon shall be issued when a defendant has appeared at the presentation of Plaint and admitted the plaintiff's claim;

Provided further that where the defendant fails to file the written statement within the said period of thirty ways, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later that ninety days from the date of service of summons.

Appearance of Defendant [Order V Rule 1 (2)]

Rule 1(2) - A defendant to whom a summons has been issued under sub-rule (1) may appear

a. in person, or

b. by a pleader duly instructed and able to answer all material questions relating to the suit, or

c. by a pleader accompanied by some person able to answer all such questions. The Court, however, may order the defendant or plaintiff to appear in person (Rule 3).

Rule 1 (3): Every such summons shall be signed by the judge or such officer as he appoints, and shall be sealed with the seal of the Court.

Exemption from Personal Appearance: Order V Rule 4

No party shall be ordered to appear in person

1. unless he resides

a . within the local limits of the Court's ordinary original jurisdiction, or

b. without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five- sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house. Or

2. Who is a woman not appearing in person (Section 132), or

3. Who is entitled to exemption under the Code (Section 132).

Mode of service of summons: Service of summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the court.

The Code prescribes four principal modes of serving a summons to a defendant:
i) Personal or direct service; (Rules 10 to 15 and 18)
ii) Substituted Service; (Rules 20, 17 and 19)
iii) Service by Court; (Rule 9) and
iv) Service by Plaintiff. (Rule 9-A)

1. Personal or direct service: This is an ordinary mode of service of summons. Under the following categories a service of summons should be made by delivering or tendering a copy thereof to the defendant personally or to his agent or other person on his behalf and for the proper service of summons following principles must be remembered-
a. Where there are two or more defendants, service of summons should be made on each defendant (Rule 11).
b. Wherever it is practicable, the summon must be served to the defendant in person or to his authorized agent (Rule 12).
c. 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).
d. In a suit for immoveable 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).
e. Where the defendant is absent from his residence at the time of the 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).
The serving officer (a person to whom the copy is delivered or tendered to serve on the defendant) after making acknowledgment of service of summons must make an endorsement on the original summons stating the time and" manner of service thereof and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of summons.

2. "Substituted Service" means the service of summons by a mode which is substituted for the ordinary mode of summons. The circumstances for the substituted service are:-
a. i) Where the defendant or his agent refused to sign the acknowledgement or
ii) Where the serving officer, after. due and reasonable diligence cannot find the defendant, who is absent from his residence at the time when the service is sought to be effected on him at his residence 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 serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on 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 or annexed thereto stating the fact about affixing the copy, the circumstances under which to do 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). If the Court is satisfied either on the affidavit of the serving officer or on his examination on oath that the summons has been duly served; or may make further enquiry in the matter as it thinks fit, and shall either declare that the summon has been duly served or order such service as it thinks fit.(Rule19).

In the second mode as provided by Rule 17, the declaration by the court about the due service of the summons is essential. If the provisions of the Rule 19 have not been complied with, the service of summons cannot be said to be in accordance with law.
b. Where the Court is satisfied that there is a reason to believe that the defendant is avoiding the service of summons or for any other reason the summons cannot be served in the ordinary way, the Court shall order that 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)]; or
iii. By an advertisement in the daily newspaper circulating in the locality in which the defendant is last known to have actually or voluntarily resided, carried on business or personally worked for gain [(Rule 20(1-A)].
Substituted service Under Rule 20 is as effective as personal service [(Rule 20(2)].

3) **By Court**: Rule 9 of Order V deals with delivery of summons by Court and states that in cases, where the defendant or his agent, empowered to accept the service of summons, resides within the jurisdiction of the Court in which the suit was instituted, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer or to approved courier services to be served on the defendant.

Declaration by Court: The Court issuing the summons shall declare that the summons had been duly served on the defendant, where
a. the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept that summons by any other means specified in sub-rule (3) when tendered or transmitted to him, and
b. Where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within 30 Days from the date of issue of summons.

4) By Plaintiff: In addition to the provisions of rule 9, the Court, on the plaintiffs application may permit and deliver the summons to such plaintiff for service on the defendant and the provisions of rule 16 and 18 shall apply to a summons personally served under rule 9-A as if, the person effecting service were a serving officer.

Service of summons where defendant resides within jurisdiction of another Court:

A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Courts to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) of rule 9 (except by registered post acknowledgement due), he provision of rule 21 shall not apply.

Discovery (sec. 30 and Order XI)

Section 30 of the Code says that subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion on the application of any party, make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production impounding and return of documents or other material objects producible as evidence.

Meaning of Discovery: Discovery means to compel the opposite party to disclose what he has in his possession or power. The discovery may be either discovery of facts or discovery of documents. Where information as to fact is required, the party is allowed to put a series of questions, known as interrogatories to his adversary.

Where in the opinion of the judge, such proposed questions are proper, then he will compel the other side to answer them on oath before trial. This is called discovery of facts, while where information as to documents is required, then on the application of the party, an order to compel the other party to make a list of relevant documents in his possession or power and for permission to inspect and to take copies of those documents. This is known as discovery of documents. Rules 1 to 11 of Order XI deal with the interrogatories while the rules 12 to 14 of Order XI deal with the discovery of documents. The Court may postpone a premature discovery.

SUMMONING AND ATTENDANCE OF WITNESSES (S.31 AND ORDER XVI)

Summons to Witnesses: According to section 31, the provisions in sections 27,28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects. Rule 8 of Order VXI states that every summons under Order VXI, except under rule 7-A, shall be served in the same manner as a summons to a defendant, and the rules of Order V shall apply.

Attendance of Witnesses: On or before such date, which may be fixed by the Court and shall not be later than 15 days from the date on which issues are settled, a list of proposed witnesses to give evidence or to produce document and obtain summonses to such persons for their attendance in Court, shall be presented in the Court by the parties.
A party shall file an application stating therein the purpose for which the witness is proposed to be summoned to the Court or to such officer as may be appointed by the Court in this behalf within five days of presenting the list of witnesses under rule 1(1).
On being shown sufficient cause for not mentioning that name of the witness in the list produced U/rule 1 (1), a party may be permitted by the Court, to call any witness whose name has not been mentioned in the list of evidence.

Expenses of witness shall be paid into Court by a party applying for summons, within a period to be fixed which shall not be later than 7 days18 from the date of making application under Rule 1 (4). Where the summons is served directly by the party on a witness, the party or his agent shall pay the expenses referred to in rule 2(1) to the witness.

Summons given to Party for Service: (Rule 7 -A) On an application of any party for the issue of summons the Court may permit and then, shall deliver the summons to such party for service, and such summons shall be effected by or on behalf of such party by delivering or tendering to the witness personally a copy thereof.

The provisions of Rule 6 shall apply to summons to produce documents while the procedure provided in Rule 10 shall be applicable where witness fails to comply With summons and rule 12 where the witness fails to appear.
Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.
Witnesses not to be ordered to attend in Person: As per rule 19 of Order XVI, no one shall be ordered to attend in person to give evidence unless he resides:-
a. within the local limits of the Court's Ordinary Original Jurisdiction, or
b. without such limits but at a place less than one hundred or (where there is a railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than five hundred kilometers distances from the Court house: Provided that where transport by air is available between the two places mentioned in this rule and the Witness is paid the fare by air, he may be ordered to attend in person.

APPEARANCE OF PARTIES AND EFFECT OF THEIR NON-APPEARANCE (Order IX)

Introduction: Order IX of the Code provides the law with regard to the appearance of the parties to the suits and the consequences of their non-appearance. Where a party (Plaintiff or Plaintiff and Defendant, both) does not appear when the suit is called on for hearing, the suit may be dismissed and where a party (Defendant) does not appear even when the summons is duly served on him, the Court may Order for the ex-parte hearing of the suit.

Therefore, Order IX can be discussed under the following heads:
a. Dismissal of Suit: The plaintiff's suit may be dismissed under rules 2, 3, 5(1) and 8 of Order IX of the Code, while the Court may order ex-parte hearing of the suit under rule 6(1) of Order IX.

Rule 2: A suit may be dismissed under rule 2 if the summons has not been served upon the defendant due to the failure of the plaintiff to pay Court-fee or Postal charges, if any chargeable for such service or failure to present copies of the plaint as required by rule 9 of Order VII.
Rule 3: The Court may dismiss the suit under rule 3 where, both the parties are absent when the suit is called on for hearing.
Rule 5(1): The Court shall pass an order for dismissal of the suit under rule 5(1), where a summons has been returned unserved on the defendant(s) and the plaintiff fails to apply for a fresh summons for a period of seven days from the date of the return of summons made to the Court by the serving officer.
But, the Court shall not dismiss the suit under rule 5(1), if the plaintiff satisfies the Court that
a. he has failed after using his best endeavors to discover the residence of the defendant who has not been served, or
b. such defendant is avoiding service of process, or
c. there is any other sufficient cause of extending the time, and may extend the time for making such application.

Rule 8: The Court shall make an order of dismissal of suit under rule 8, where the plaintiff remains absent and the defendant is present, when the suit is called on for hearing and the defendant does not admit the claim or part thereof.

Remedies against Dismissal: Where the suit has been dismissed under rule 2 or 3, the plaintiff has remedies either to file a fresh suit (subject to the law of limitation) under rule 4 or to make an application under rule 4 for restoration of the suit. When the suit has been dismissed under rule 5(1), the plaintiff may bring a fresh suit (subject to the law of limitation) under rule 5(2).

When a suit is dismissed under rule 8, the plaintiff shall be precluded to bring a fresh suit on the same cause of action but he may apply to set the dismissal aside under rule 9 of Order IX and the Court shall, after issuing a notice of application on the opposite party set aside the order of dismissal, on being satisfied that there was sufficient cause for plaintiffs non-appearance when the suit is called on for hearing.

2) **Ex- Parte Hearing:** Where only the plaintiff appears and the defendant does not appear when the suit is called on for hearing, and the Court observed that the summons was duly served on defendant then the Court may pass an order that the suit be heard ex-parte.
Remedies: The defendant in the same manner may be allowed by the Court to be heard, as if he had appeared on the day fixed for his appearance, where the Court has adjourned the ex parte hearing and he (defendant) appears on or before such adjourned date and satisfy the Court with good cause for his previous non-appearance.

Setting aside ex-parte hearing: Where in an ex-parte hearing, a decree is passed ex-parte against a defendant, he has the following options –
a. To apply under rule 13 to set aside the ex-parte decree and the Court after service of Notice of such application on the opposite party and on being satisfied that the summons was not duly served on the defendant or he was prevented by any sufficient cause from appearing when the suit was called on for hearing. But no such decree shall be set-aside on the basis of irregularity in the service of summons, When the Court rejects an application under rule 13, such 3n order is appealable under Order XLl Rule 1(d).
b. To file appeal against ex-parte decree
But when an appeal is preferred against ex-parte decree and the same is dismissed on any ground except as being withdrawn by the appellant, no application shall lie under rule 13 for setting aside that ex-parte decree.

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DISCOVERY, INSPECTION AND PRODUCTION OF DOCUMENTS

Order XI – Discovery and production of documents

Order XIII- production, impounding and return of documents

"Discovery" means compel the opposite party to disclose what he has in his possession or power

"Interrogatories" means ask question or to make inquiry closely or thoroughly where a party requires information as to facts from the opposite party.

The object of discovery of document is to ascertain the nature of his opponent's case either for the purpose of proving his case or for destroying the case of the other side.

On an application for leave to deliver interrogatories, the Court shall grant leave as to such interrogatories only which are considered necessary either for disposing fairly of the suit or for saving costs (rule 2). Interrogatories shall be answered by affidavit to be filed within ten days, or within such further time as the Court may allow (Rule 8).

Objections to interrogatories by answer: Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited bona fide for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on the ground of privilege or any other ground, may be taken in the affidavit in answer (Rule 6).

There are three grounds on which production of documents can be resisted as of right. They are:

(i) A party is not bound to produce for the inspection of his opponent documents which of themselves evidence exclusively the party's own case of title;
(ii) A party is not bound to produce any confidential communications between him and his legal adviser; and
(iii) A party is bound to produce any public official document, if its production would be injurious to public interests.

Setting aside and striking out interrogatories:

Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories (Rule 7).

Production of documents:

The Court may at any time during the pendency of any suit order any party to produce on oath any documents in his possession or power relating to the suit (Rule 14).

Inspection of documents:-

Every party to a suit give notice to any other party, in whose pleadings or affidavits reference is made to any document, or who has entered any document in any list annexed to his pleadings to produce such documents for the inspection of the party giving such notice, or of his pleader and to permit him or them to take copies thereof.

Order for inspection: Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit (Rule 18).

Premature discovery:

A discovery is said to be premature when the right to the discovery of any kind of inspection sought depends upon the determination of any issue or question in dispute in eh suit or for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection. In such case the Court may order that such issue or question in dispute in the suit be determined first and reserve the question s to the discovery or inspection (Rule 20).

ORDER XII-ADMISSION: (Rules 1 -9)

Section 58 of the Indian Evidence Act provides that "facts admitted need not be proved".

In *Chandra Kumar v. Narpat Singh, it was held that "what a party himself admits to be true may reasonably be presumed to be so".

Kinds of admission- 1. Admission of facts and 2. Admission of documents on notice(R 2)

Any party may give a notice in writing that he admits the whole or any part of the case of other side (R 1). From the date of service of notice, within 7 days, either party may call upon other party to admit documents. If he refused or neglects the cost of proving such document shall be paid by him (R 2). Documents to be deemed to be admitted if not denied after service of notice to admit documents (R 2A).

On any stage of the proceedings, of its own motion, the Court may call upon any party to admit any document and record whether the party admits or refuses or neglects to admit such document.

*Sitaraman v. Santanuprasad

→ admission of documents means the facts contained in it.

*Videshwar v. Budhiram

→ if any document is admitted only for a limited purpose, it cannot be said that the party thereby accepts the facts stated in the document.

Notice to admit facts- Rule 4:

Any party by notice in writing call on any other party to admit specific fact(s) mentioned in such notice.

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ADMISSIONS – ORDER XII

The Admissions in the Civil Law are spread over many of rules as envisaged in the Code. The Code describes the admissions in three categories :-
1. Actual admissions, oral or by documents;
2. the express or implied admissions from the pleadings or by non traverse by agreement;
3. By agreement or by notice.
The admissions need not be proved unless the court otherwise is of the opinion or requires the same to be proved.
Order VIII Rule 5 of the Code in this regard reads as under :-
"5. Specific denial :- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:
Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.
(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.
(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced."
No doubt, as per this order, if the defendant does not make denial of the admissions, then the court will take such facts as pleaded in the plaint to be admitted. However, the court has been left with the discretion to require the facts to be proved even if these are admitted or if the party does not deny such facts. However, it has been made clear under sub-section (4) that if the court pronounces judgment over admitted facts, then the court would pass a decree.

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.

Judgment on admissions:
Besides a judgment which could be passed under Order 8 Rule 5 CPC, Order XII Rule 6 and Order XV Rule 1 also relate to the judgment on admissions.
Rule 6 of Order XII reads as under :-

*"**6. Judgment on admissions** – (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.*
(2) Whenever a judgment is pronounced under sub- rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."
Rule 1 of Order XV reads as under :-
*"**1. Parties not at issue** – Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce the judgment."*

Order XII Rule 6 of the Code
Relief under Order XII Rule 6 is discretionary in nature. It also confers the court with wide discretion to decree the suit and it is not bound to pass decree in a proper and reasonable case and can call for the evidence before passing the decree. Where the averments made in the written statement gave rise to the trivial issues, the judgment on admission under Order XII Rule 6 CPC cannot be passed. In case ***R.K. Markan vs. Rajiv Kumar Markan, 2003 AIHC 632 (633)*** Delhi, wherein it was observed as under :-
"For passing a decree on the basis of admission of the defendants in the pleadings, law is well settled that the admission has to be unequivocal and unqualified and the admission in the written statement should also be taken as a whole and not in part...."

Order XIV Rule 6 & 7 and Order XXIII Rule 3 of the Code

Order XIV Rules 6 & 7 and Order XXIII Rule 3 of the Code deal with the admissions by agreement, which are reproduced as under :-

*"6. **Questions of fact or law may be agreement be stated in the form of issues** - Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the court in the affirmative or the negative of such issue,-- (a) a sum of money specified in the agreement or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement; (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.*

*7. **Court, if satisfied that agreement was executed in good faith, may pronounce judgment** - Where the court is satisfied, after making such inquiry as it deems proper,--*
(a) that the agreement was duly executed by the parties, (b) that they have a substantial interest in the decision of such question as aforesaid, and (c) that the same is fit to be tried and decided,
it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the court, and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.
From bare reading of Rule 1 of Order XV of the Code, it transpires that the lis could be adjudicated only when the parties are not at issue. The intention of the legislature in introduction of the order XV Rule 1 was not to pass a decree but to decide the suit in the manner as prescribed under the law when the parties are not at issue. Had there been any intention of the legislature to decree the suit in case parties are not at issue, then there was no requirement to introduce Order XII Rule 6 or Order VIII Rule 5 of the Code. The existence of the dispute is the sine qua for the trial. When the court finds the parties prima facie at issue, in that event, the court was to hold enquiry after framing issues, otherwise, it is not open to the court to hold trial. Cause of action which is the main element of trial pre-supposes, denial or threat to the rights of the parties claiming such right.

Discretion of the court to award judgment on admissions:
Admissions before the same are relied upon, it should be clear, unequivocal, categorical and should not be vague and conditional. However, there is discretion of the court to exercise power to pass a decree on the basis of such admissions. Similar view was taken by the Apex Court in its latest judgment delivered in case ***Himani Alloys Ltd. vs. Tata Steel Ltd. 2011 (3) Civil Court Cases 721,*** wherein it was observed as under :
"10. It is true that a judgment can be given on an "admission" contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be

used only when there is a clear „admission□ which can be acted upon. (See also Uttam Singh Duggal & Co. Ltd. vs. United Bank of India [2000 (7) SCC 120], Karam Kapahi vs. Lal Chand Public Charitable Trust [2010 (4) SCC 753] and Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha [2010 (6) SCC 601]. There is no such admission in this case."

Actually, the discretion to pass the decree has its roots in the locus classicus judgment delivered by the Apex Court in case ***Nagubai Ammal and others vs. B. Shama Road and others AIR 1956 SC 593*** wherein it was observed that merely because of written admission was made in a different context, such admission may not become relevant if the party making it has a reasonable explanation of that. The Apex Court in ***Naghubai Ammal's*** case (supra), further observed as under :-

"18. An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it is his detriment, when it might become conclusive by way of estoppel. In the present case, there is no question of estoppel, as the title of Dr. Nanjunda Rao arose under a purchase which was long prior to the admission made in 1932 and in the subsequent years. It is argued for the appellants that these admissions at the least shifted the burden on the plaintiff of proving that the proceedings were not collusive, and that as he gave no evidence worth the name that these statements were made under a mistake or for a purpose and were, in fact, not true, full effect must be given to them. Reliance was placed on the well known observations of Boran Parke in Slatterie v. Pooley (1840) 6 M and W 664 (669) © that "what a party himself admits to be true may reasonably be presumed to be so", and on the decision in 34 Ind App 27 (B), where this statement of the law was adopted. No exception can be taken to this proposition. But before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained.

It has been already pointed out that the tenor of the statements made by Abdul Huq, his legal representatives and the plaintiff was to suggest that the proceedings in O. S. No.100 of 1919-20 were fraudulent and not collusive in character. Those statements would not, in our opinion, be sufficient, without more, to sustain a finding that the proceedings were collusive."

It was also observed in case ***Razia Begum v. Sahebzadi Anwar Begum, 1958 SC 886*** that order 12 Rule 6 should be read along with proviso to Rule 5 of Order 8 CPC. In this case it was observed that the court is not bound to grant declaration prayed for on the mere admission of the claim by the defendant, if the court has reason to insist upon a clear proof apart from admissions. The result of a declaratory decree confers status not only on the parties but for generations to come and so it cannot be granted on a rule of admission and, therefore, insisted upon adducing evidence independent of the admission. The Apex Court in ***Razia Begum's*** case (supra), further observed as under :-

"9. It is also clear on the words of the Statute, quoted above, that the grant of a declaration such as is contemplated by S. 42, is entirely in the discretion of the court. At this stage, it is convenient to deal with the other contention raised on behalf of the appellant, namely, that in view of the unequivocal admission of the plaintiff's claim by the Prince, in his written statement, and repeated as aforesaid in his counter to the application for intervention by the respondents 1 and 2, no serious controversy now survives. It is suggested that the declarations sought in this case, would be granted as a matter of course. In this connection, our attention was called to the provisions of R.6 of O. 12 of the Code of Civil Procedure, which lays down that, upon such admissions as have been made by the Prince in this case,

the Court would give judgment for the plaintiff. These provisions have got to be read along with R. 5 of O. 8 of the Code ...."

As a matter of fact, Section 44 also refers to word "collusion" In a decree passed by way of fraud or collusion could be challenged before the civil court and the admission could imply collusion between the plaintiff and the defendant which could prevent the court to pass a decree that is why the Apex Court in ***Razia Begum's*** case (supra) discouraged to pass the decree which affects not only the parties, but the generations to come.

However, the provisions of Order XII Rule 6, Order VIII Rule 5 and 10 of the Code are meant for commercial transactions and not otherwise where the claim is based on such documents which need proof. It is also settled that normally admissions on the Will, gift, sale or co-parcenary can be proved to be erroneous and cannot be treated as proved on the basis of such admissions. Similarly, if the property is alleged to be co-parcenary, the admissions in this regard is not sufficient to treat it as co-parcenary as the question of co-parcenary is a matter of fact to be proved on evidence. However, when the case is regarding commercial transactions, admission in a notice, minutes of meetings, resolutions passed by the Board of Directors, pleadings or other admission of signatures, then such admissions could be accepted and made the basis of the decree Similar view was taken by the Apex Court in case ***Uttam Singh Dugal and Co. Ltd. vs. United Bank of India 2000 (4) R.C.R. (Civil) 89*** wherein it was observed as under :-

"10. As to the object of the Order XII Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the objects and reasons set out while amending the said rule, it is stated that where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled. We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed."

The object of the provisions of Order XII Rule 6 of the Code were also interpreted in the judgment delivered in case ***M/s Puran Chand Packaging Industrial Pvt. Ltd. vs. Smt. Sona Devi and another, 2009 (2) C.C.C. 39***. This judgment also indicates that: (a) the admissions before being placed reliance must be made by the defendant or party to the proceedings; (b) it should be unequivocally made in unambiguous manner; and © it should not be conditional one or on a different context. The documents containing admissions should be read as a whole and the court is not to take out one or two sentences so as to treat it as admission. Admissions made by a party in its own favour has no value. The Apex Court in ***Sona Devi's*** case (supra), made the following observations :-

9. A perusal of the aforesaid provision would show that before a decree on the basis of admission in the pleadings can be passed, the admission must be made by the defendant or a party to the proceedings in an unequivocal, unambiguous manner. In other words the admission should not be vague or equivocal. Converse of it would mean that if there is an admission made by a party which is conditional wherein certain objections which go to the root of the matter have been raised then it could not be treated as an admission. Reliance in this regard can be placed in ***State Bank of India Vs. M/s Midland Industries and Others AIR 1988 Delhi 153****. Though this is a judgment of the learned Single Judge of this Court but as this judgment lays down the correct proposition of law we have no hesitation in approving the same. Another point which has to be borne in mind while passing a judgment on the basis of an admission is that the document is to be read as a whole and the Court is not to take out*

one or two sentences so as to treat it as an admission. Moreover passing of a judgment on this basis by the Court is a matter of discretion and not a matter of course. Reliance in this regard is placed on ***Maniisha Commercial Ltd. Vs. N.R.Dongrre and Anr. AIR 2000 Delhi 176.***

Though the party can press for judgment on admissions as a matter of legal right on an admission made by the party. However, provisions of Order XII Rule 6 as well as Order VIII Rule 5 of the Code, are enabling provisions conferring the court discretionary power to pass a decree over the same or call the parties for evidence to prove the fact or claim as raised by the plaintiff. The Apex Court discussed the Order XII Rules 1 & 6 and Order 8 Rule 5 of the Code in detail in the judgment delivered in case ***Karam Kapahi & others vs. M/s Lal Chand Public Charitable & Another, (2010) 4 SCC 753*** and laid down the following guidelines :-

1. While comparing Order 12 Rule 6, it is made out that the order 12 Rule 1 is limited to admission by 'pleading or otherwise in writing', but Order 12 Rule 6 is wider enough to include all the pleadings or otherwise by documents. Similar observations were made in ***Uttam Singh's*** *case (supra).*

2. Any answers to the interrogatories are also covered under this rule.

3. Admissions would have to be read along with first proviso to Order 8 Rule 5 (1) of the Code and the court may call upon the parties relying on such admissions to prove its case independently.

4. Where it is commercial transaction, like dispute with regard to rent, admission of non payment of rent, judgment can be rendered on admissions by the court.

5. The provisions of Order XII Rule 6 of the Code is enabling, discretionary and permissible and it is neither mandatory n or it is preemptory since the word "may" has been used.

Order XIV Rule 6

Rule 6 of Order XIV of the Code deals with the issue where the parties are in agreement on some issues of fact or law. If the parties agree and limit the question of fact or law to be decided between them, they may state the same in the form of issues and enter into an agreement in writing that, upon findings of the court, negative or affirmative, on such issues, the court would ascertain the right of the parties. Some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them or as that other may direct; or one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Order XIV Rule 7:

Rule 7 of Order XIV of the Code indicates that when the court is satisfied:-

a) that the agreement was duly executed by the parties;

b) that the parties have a substantial interest in the decision of such question as aforesaid; and

c) If the court finds that such agreement is fit to be tried and decided,

Then the court shall proceed to record and try the issue and state its findings or decision thereon and thereafter decide the case according to the terms of the agreement.

Order XXIII Rule 3 of the Code reads as under :-

"3. Compromise of suit *- Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit: Provided that where*

it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment."

Scope of the Rule:

As a general rule, any matter which can be decided by a court can also be settled by a compromise. The scheme of this rule is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and is a voluntary act on the part of the parties. The court can be instrumental in having an agreed compromise effected and finality attached to the same. This rule gives a mandate to the record, to record a lawful adjustment or compromise and pass a decree in terms of such adjustment or compromise. It is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which the claim is satisfied or adjusted. The agreement, compromise or satisfaction may relate to the whole of the suit or a part of the suit or may also include matters beyond the subject-matter of the suit. However, it clearly envisages that a decree being passed in respect of a part of the subject-matter on a compromise.

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ORDER XIII- Production, Impounding and Return of Documents:

Original documents to be produced at or before the settlement of issues (Original +copy with list).

But it shall be apply to documents (a) produced for the cross-examination of the witnesses of the other party (b) handed over to a witness merely to refresh his memory (R 1).

Rejection of irrelevant or inadmissible documents(R 3):

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Endorsements on documents admitted in evidence (R 4):

Every document which has been admitted in evidence shall be endorsed with the following particulars, namely:

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted,

and the endorsement shall be signed or initialed by the Judge.

*Parshottam v. Lal Manohar

→ parties and their pleaders to produce all documentary evidence on or before the settlement of issues.

*Billa v. Billa

→ The Court has power to receive any document at a later stage if the genuineness of a document is beyond doubt and it is relevant or material to decide the real issue in controversy.

*Imambandi v. Mustaddi

→ the discretion must be exercised judicially be considering the facts and circumstances of each case. The rule must be liberally construed.

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AFFIDAVIT- ORDER XIX: (sections 30 and 139)

Affidavit means "a sworn statement in writing made especially under oath or on affirmation before an authorized officer or Magistrate".

Every affidavit should be drawn up in the first person and should contain only facts and not inferences. An affidavit must contain only facts known to the deponent or information which he believes to be correct.

*State of Bombay v. Purshottam

→ affidavits should be confined to such facts as the deponent is able to prove to his personal knowledge, on which statements of his belief may be admitted.

*Nambiar v. UOI

→ Unless affidavits are properly verified and are in conformity with the rules, they will be rejected.

The **court** may at any time, either of its own motion or, on the application of any party, order that any fact may be proved by affidavit or that the affidavit of any witness may be read at the hearing, on such conditions as it thinks reasonable, unless either party bona fide desires to produce him for cross-examination, and such witness can be produced. [Section 30(c) and Order XIX, Rule 1],
Upon any application evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent, unless he is exempted from personal appearance in court. (Order XIX, Rule 2).

Matters to which affidavits shall be confined:
An affidavit must contain only facts known to the deponent or information which he believes to be correct. Rule 3 of Order XIX states that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated.

Oath Commissioners:
Any court or magistrate, an officer or other person whom a High Court may appoint in this behalf, or any officer appointed by any other court empowered by the State Government may administer the oath to the deponent. (Section 139).

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ORDER XXIV- PAYMENT INTO COURT

The defendant in any suit to recover a debt or damage may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim (Rule 1). Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application (Rule 2). No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof (R 3). However if the plaintiff accepts such amount as satisfaction in part only of his claim he may prosecute suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim (R 4).

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ORDER XXV-SECURITY FOR COSTS:-

At any stage of a suit, either of its own motion or on the application of any defendant the Court may order the plaintiff to furnish security for the payment of all costs incurred and likely to be incurred by any defendant Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiff are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property with India other than the property in suit (Rule 1).

Effect of failure to furnish security (Rule 2):

In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom. Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. The dismissal shall not be set aside unless notice of such application has been served on the defendant.

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TRANSFER OF SUITS: SECS 22-23

When a suit has been instituted by a plaintiff in one civil court of his choice, there may be two choices available to the defendant: either to file his written statement, ie accepting the jurisdiction of the court or to file application for transfer of the suit.

Section 22 and 23 of CPC confers power of the civil court to transfer suits from one civil court to another on the application of the defendant. Section 22 is the substantive section which confers upon the civil court the power. Section 23 specifies the appropriate court for this purpose.

The power of the Court to transfer suit has the following distinguishing features:

This power is a limited power. It is applicable only in respect of the cases where more than one court is competent to entertain the suit and the plaintiff has filed the suit in one of such courts;

1. This power is not available when the plaintiff is suing on a contract which contains "Forum Shopping Clause" – conferring the jurisdiction in respect of adjudication of disputes arising out of the contract on a specified court. In this type of suits, the issue is not whether one particular court has jurisdiction or not, but rather the defendant could file the suit in the court in question , in view of the contractual clause;
1. The application u/s 22 of the CPC can be filed only by the defendant. If multiple defendants are there in the suit, then any one defendant can file application under the section;
2. The application has to be filed within a specified period of time. Section 22 specifies that such application has to be filed at the earliest possible opportunities and in all possible cases at or before settlement of issue. *This provision is very important and is strictly adhered to. The Court cannot relax this by invoking his power u/s 151 of CPC;*

1. Before filing transfer application, the defendant has to give notice to all the other parties. *This is a mandatory provision.* Without complying with this no transfer application is entertained;

1. All the parties to the suit (except the applicant) have the right to file objections to the transfer application. Considering all the objections, the Court shall determine the most appropriate Court to adjudicate upon the suit.

The transfer order is an exercise of administrative power of the Court. This is based on the balance of convenience of the parties. As the matter has various connotations, the Courts are very much circumspect on issuing such orders. Mere apprehension or only flimsy reasons are not sufficient to have such an order.

Competent Court to issue transfer order:

Because of importance on the justice delivery process, the power of transferring any suit from one court to another is given to the higher courts in the judicial hierarchy. Section 23 of the CPC makes a classification of cases based on the transferor and transferee courts:

1. Where the suit is to be transferred from one civil court to another within the same appellate court;
2. Where the suit is to be transferred from one civil court to another within different appellate courts but within the same High Court;
3. Where the suit is to be transferred from one civil court to another with the jurisdiction of different High Courts.

In the first type of case, the transfer application has to be filed to the **appellate court to which both the civil courts are sub-ordinate;**

In the second type of case, the transfer application has to be filed to the **High Court under whose jurisdiction both the civil courts are sub-ordinate;**

In the third type of case, the transfer application has to be filed to **the High Court in whose jurisdiction the transferor civil court is situated.**

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JUDGMENT: Order XX

Defined u/s 2 (9) of the Civil Procedure Code. It means the **statement given by the Judge on the grounds of a Decree or Order.** Thus a judgment sets out the ground and the reason for the Judge to have arrived at the decision.

Judgment is the decision of a court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination – **State of Tamilnadu V. S. Thangaval.**

Judgment is the statement of the Court on the grounds for having arrived at a decision.

A judgment must contain the following components:

1. A crisp statement of facts of the case;

2. The points or issues for determination;

3. The decision on such issues and finally;

4. The reasons for such a decision.

ORDER XX:

Judgment when pronounced.- (1) the Court, after the case has been heard, shall pronounce judgment in an open Court, either at once, or as soon thereafter as may be practicable and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders:

Provided that where the judgment is not pronounced at once, every endeavour shall be made by the Court to pronounce the judgment within thirty from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of the exceptional and extraordinary circumstances of the case, the Court shall fix a future day for the pronouncement of the judgment, and such day shall not ordinarily be a day beyond sixty days from the date on which the hearing of the case was concluded, and due notice of the day so fixed shall be given to the parties or their pleaders.

(2) Where a written judgment is to be pronounced, it shall be sufficient if the findings of the court on each issue and the final Order passed in the case are read out and it shall not be necessary for the court to read out the whole judgment.

(3) The judgment may be pronounced by dictation in open court to a shorthand writer if the Judge is specially empowered by the High Court in his behalf:

Provided that, where the judgment is pronounced by dictation in open court, the transcript of the judgment so pronounced shall, after making such correction therein as may be necessary,

be signed by the Judge, bear the date on which it was pronounced, and form a part of the record.

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REMAND:

Appellate Court Power to remand:- section 107(1) (b), Rule 23 & 23-A

Remand means to send back.

Rule 23 of Order 41 of the Code enacts that where the trial Court has decided the suit on a preliminary point without recording finding on other issues and if the appellate Court reverses the decree so passes, it may send back the case to the trial Court to decide other issues and determine the suit. This is called remand.

By passing an order of remand, an appellate Court directs the lower Court to reopen and retry the case. On remand, the trial Court will re-admit the suit under its original number in the register of civil suits.

Conditions: the appellate Court has power to remand a case either under Rule 23 or under Rule 23-a. a remand cannot be ordered lightly. It can be ordered only if the following conditions are satisfied.

(a) The suit must have been disposed of by the trial Court on a preliminary point.
A point can be said to a preliminary point, if it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the other points in the case.
(b) The decree under appeal must have been reversed.
The appellate Court cannot order remand simply because the judgment of the lower Court is not satisfactory or that the lower Court has misconceived or misread the evidence or has ignored the important evidence or has acted contrary to law or that the materials on which the conclusion is reached are scanty and the appellate Court must decide the appeal in accordance with law.
(c) Other grounds;
Rule 23-a empowers the appellate Court to remand a case even when the lower Court has disposed of the case otherwise than on a preliminary point and the remand is considered necessary by the appellate Court in the interest of justice.

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COMMISSIONS

sections 75-78; Order XXVI ; Rules 1-22:-

Court may issue a commission for the examination of interrogatories who is exempted under the code or who is sick/infirmity/unable to appear before the Court. Order for commission may issued by the Court wither of its own motion or on application supported by affidavit.

Persons for whose examination commission may issue (Rule 4):

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of

(a) any person resident beyond the local limits of its jurisdiction;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) any person in the service of the Government who cannot in the opinion of the Court, attend without detriment to the public service.

Provided that where, under rule 19 of Order XVI, a person cannot be ordered to attend a Court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice. It is also provided that a commission for examination of such person on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

In the interest of justice or for the expeditious disposal of a suit a commission may be issued for examination of any person resident within the local limits of the Court (Rule 4A).

If the Court is satisfied the evidence of a person not within India is necessary, it may issue commission or request to examination such person. Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto (R 6).

Return of commission with depositions of witnesses (Rule 7):-

Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the returned thereto and the evidence taken under it shall form part of the record of the suit.

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ARREST AND ATTACHMENT BEFORE JUDGMENT

ORDER XXXVIII RULES 1-13

Arrest before judgment:

Where at any stage of a suit if the Court is satisfied, by affidavit or otherwise, the defendant may be called upon to furnish security for appearance if

(a) the defendant with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not

furnish security, for his appearance: Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

Security:-

Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have paid by the defendant under the provision to the last preceding rule. (2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Procedure on application by surety to be discharged:

A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation. On such application being made, the Court shall summon the defendant to appear or, if it thinks fit may issue a warrant for his arrest in the first instance. On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Procedure where defendant fails to furnish security or find fresh security:

Where the defendant fails to comply with any order to furnish security, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied.

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees: Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Attachment before judgment:

Where defendant may be called upon to furnish security for production of property:

Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as 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 appear and show cause why he should not furnish security.

Unless the Court otherwise directs the plaintiff shall specify the property required to be attached and the estimated value thereof. The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified. If an order of attachment is made without complying with the provisions such attachment shall be void.

However, where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

Where the defendant shows such cause of furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit (rule 6).

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 the cost of the attachment, or when the suit is dismissed.

Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree (Rule 10). Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a reattachment of the property (Rule 11). An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored.

Agricultural produce not attachable before judgment:

The provisions of this Order shall not authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce (Rule 12). And the small causes Court shall not deemed to empower to make order for the attachment of immovable property (Rule 13).

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TEMPORARY INJUNCTION AND INTERLOCUTORY ORDERS

ORDER XXXIX Rules 1-10:

Temporary injunctions:- (Rules 1-5)

Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in a execution of a decree, or that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors, that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may be order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or

otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within thirty day from the date on which the injunction was granted; and where it is unable so to do, it shall record its reasons for such inability. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

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INTERLOCUTORY ORDERS

Power to order interim sale:

On the application of any party to a suit the Court may order the sale of any movable property being the subject-matter of such suit or attached before judgment in such suit which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Detention, preservation, inspection, etc., of subject-matter of suit:

on the application of any party to a suit, and on such terms as it thinks fit, the Court may make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or, as to which any question may arise therein and authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

An application by the plaintiff for an order abovementioned may be made at any time after institution of the suit and an application by the defendant for a like order may be made at any time after appearance.

Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure; and the Court in its decree may award against the defaulter

the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit

Deposit of money, etc. in Court (Rule 10):

Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

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APPOINTMENT OF RECEIVERS

ORDER XL

Appointment of receivers (Rule 1):

Where it appears to the Court to be just and convenient, the Court may by order

(a) Appointment a receiver of any property, whether before or after decree;

(b) Remove any person from the possession or custody of the property;

(c) Commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such those powers as the Court thinks fit.

Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

Remuneration (Rule 2):

The Court may be general or special order fix the amount to be paid as remuneration for the services of the receiver.

Duties (Rule 3):

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 respect of the property;

(b) submit his accounts at such periods and in such form as the Court directs;

(c) pay the amount due from him as the Court directs; and

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Receiver's duties (Rule 4):

the Court may direct the receiver's property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from his or any loss occasioned by him, and shall pay the balance (if any) to the receiver where a receiver (a) fails to submit his accounts at such periods and in such form as the Court directs, or (b) fails to pay the amount due from him as the Court directs, or (c) occasions loss to the property by his wilful default or gross negligence.

When Collector may be appointed receiver (Rule 5):

Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector appoint him to be receiver of such property.

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APPEALS

Appeal is "the judicial examination of the decision by the higher Court of the decision of an inferior Court". Appeal is a proceeding by which the defeated party approaches a higher authority or Court to have the decision of a lower authority or Court reversed.

In Attorney General v. Sillem, it was held that it is "a right of entering a superior Court and invoking its aid and interposition to redress an error of the Court below".

Sections 96, 100, 104 and 109 of the code of civil procedure confer the right of appeal on the aggrieved persons.

Section 96 to 99 and 107 read with Order 41 deal with first appeals. An appeal is a continuation of a suit. When an appeal is made, the appellate authority can do one of the three things, namely:

(i) It may reverse the order
(ii) It may modify that order and
(iii) It may merely dismiss the appeal and thus confirm the order without any modification.

A first appeal is maintainable on a question of fact, or on a question of law, or on a mixed question of law and fact. First appeal can be filed in a superior Court which may or may not be a High Court whereas a second appeal can be filed only in the High Court. A second appeal can be filed only on a substantial question of law. No second appeal lies if the amount does not exceed Rs. 3,000/-.

If an appeal is preferred in a case in which no appeal lies, the Court may treat the memorandum of appeal as revision.

Who may appeal?

1. A part to the suit who is aggrieved or adversely affected by the decree, or if such paty is dead, his legal representatives.

2. A person claiming under a party to the suit or a transferee of the interests of such party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit.
3. A guardian ad litem appointed by the Court in a suit by or against a minor
4. Any other person, with the leave of the Court, if he is adversely affected by the decree.

A right of appeal is a statutory right. If a statute does not confer such right, no appeal can be filed even with the event or agreement between the parties.

One of the remedies available to the defendant, against whom an ex parte decree is passed, is to file an appeal against such a decree under section 96(2) of the code, though he may also file an application to set aside ex parte decree. Both the remedies are concurrent and can be resorted to simultaneously. One does not debar the other.

Section 96 (3) declares that no appeal shall lie against a consent decree. This provision is based on the principle of estoppel. Section 96 (4) bars appeals on facts from decrees passed in petty suits where the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.

An appeal lies against a preliminary decree. Failure to appeal against a preliminary decree precludes the aggrieved party from challenging the final decree. Where an appeal is filed against a preliminary decree and is allowed and the decree is set aside, the final decree falls to the ground as ineffective since there is no preliminary decree to support the final decree.

Sections 96 to 99-A provides the substantive law as regards first Appeals and Order 41 lays down the procedure relating thereto.

Appeal and Memorandum of appeal denote two different things. An appeal is a judicial examination by a higher Court of the decision of an interior Court. The memorandum of appeal contains the grounds on which judicial examination is invited.

Requirement of a valid appeal:-

In order that an appeal may be said to be validly presented, the following requirements must be complied with.

(i) It must be in the form of a memorandum setting forth the grounds of objections to the decree appealed from;
(ii) It must be signed by the appellant or his pleader;
(iii) It must be presented to the Court or to such officer as it appoints in that behalf;
(iv) The memorandum must be accompanied by a certified copy of the decree;
(v) It must be accompanied by a certified copy of the judgment, unless the Court dispenses with it; and
(vi) Where the appeal is against a money decree, the appellant must deposit the decreetal amount or furnish the security in respect thereof as per the direction of the Court.

Powers of appellate Court: section 107, Rules 23-29 & 33:-

Sections 96 – 108 and Rules 23 to 33 of Order 41 enumerate the powers of an appellate Court while hearing first appeals.

1. Power to decide a case finally : section 107(1) (a), Rule 24
2. Power to remand: section 107(1) (b), Rule 23 & 23-A
3. Power to frame issues and refer them for trial: section 107(1) (c), Rule 25 and 26
4. Power to take additional evidence: section 107(1) (d), Rule 27-29
5. Power to modify decree: Rule 33
6. Other powers: section 107 (2)

I. Power to decide a case finally:

Section 107(1) (a), Rule 24 of Order 41 enables the appellate Court to dispose of a case finally. Where the evidence on record is sufficient to enable the appellate Court to pronounce judgment, it may finally determine the case notwithstanding that the judgment of the trial Court has proceeded wholly upon some ground other than that on which the appellate Court proceeds. The general rule is that a case should be disposed of on the evidence on record and should not be remanded for fresh evidence, except in rare cases.

II. Power to remand:- section 107(1) (b), Rule 23 & 23-A

Remand means to send back.

Rule 23 of Order 41 of the Code enacts that where the trial Court has decided the suit on a preliminary point without recording finding on other issues and if the appellate Court reverses the decree so passes, it may send back the case to the trial Court to decide other issues and determine the suit. This is called remand.

By passing an order of remand, an appellate Court directs the lower Court to reopen and retry the case. On remand, the trial Court will re-admit the suit under its original number in the register of civil suits.

Conditions: the appellate Court has power to remand a case either under Rule 23 or under Rule 23-a. a remand cannot be ordered lightly. It can be ordered only if the following conditions are satisfied.

(d) The suit must have been disposed of by the trial Court on a preliminary point.
A point can be said to a preliminary point, if it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the other points in the case.

(e) The decree under appeal must have been reversed.
The appellate Court cannot order remand simply because the judgment of the lower Court is not satisfactory or that the lower Court has misconceived or misread the evidence or has ignored the important evidence or has acted contrary to law or that the materials on which the conclusion is reached are scanty and the appellate Court must decide the appeal in accordance with law.

(f) Other grounds;
Rule 23-a empowers the appellate Court to remand a case even when the lower Court has disposed of the case otherwise than on a preliminary point and the remand is considered necessary by the appellate Court in the interest of justice.

III. **Power to frame issues and refer them for trial: section 107(1)(c), Rules 25-26.**
Where the lower Court has omitted (i) to frame any issue or (ii) to try any issue or (iii) to determine any question of fact, which is essential to the right decision of the suit upon merits, the appellate Court may frame issues and refer them for trial to the lower

Court and shall direct that Court to take the additional evidence required. The lower Court shall try such issues and shall return the evidence and the finding within the time fixed by the appellate Court.

IV. Power to take additional evidence: Section 107(1)(d), Rules 27-29:

Normally, the appellate Court shall not admit additional evidence for the disposal of an appeal. However section 107(1)(d) is an exception to the general rule and empowers an appellate Court to take additional evidence or requires such evidence to be taken subject to the conditions laid down in Rule 27 of Order 41.

When a party is unable to produce the evidence in the trial Court under the circumstances mentioned in the Court, he should be allowed to produce the same in an appellate Court. The power is discretionary and should be exercised on sound judicial principles and in the interests of justice.

Circumstances:-

(i) Where the lower Court has improperly refused to admit evidence which ought to have been admitted or

(ii) Where such additional evidence was not within the knowledge of the party or could not after exercise of due diligence, be produced by him at the time when the lower Court passed the decree or

(iii) Where the appellate Court itself requires such evidence either (a) to enable it to pronounce judgment, or (b) for any other substantial cause.

In *Shivajirao Nilangekar v. Mahesh Madhav,

The supreme Court stated "the Basic principles of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the nest efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly the additional evidence was relevant for the determination of the issue.

V. Power to modify decree: Rule 33

Rule 33 of Order 41 empowers an appellate Court to make whatever order it thinks fit, not only as netween the appellate and the respondent but also as between the appellant and the respondent but also as between one respondent and another respondent. It empowers an appellate Court not only to give or refuse relief to the appellant by allowing or dismissing the appeal, but also to give such other relief to any of the respondents as the case may require.

The following requirements must be satisfied before invoking Rule 33:

(a) The parties before the lower Court must also be there before the appellate Court and

(b) The question raised must have properly arisen out of the judgement of the lower Court

VI. Other powers: Section 107(2):

Over the above said powers, an appellate Court has the same powers as an original Court. This provison is based on the general principle that an appeal is a continuation of a suit and therefore, an appellate Court can do, while the appeal is pending, what the original Court could have done while the suit is pending.

Thus, an appellate Court is empowered to reappreciate the evidence to add, transpose or substitute the parties, to permit the withdrawal of proceedings etc.

DUTIES OF THE APPELLATE COURT

The code imposes certain duties on appellate Courts and the Court has to decide appeals keeping in mind these following duties viz

(a) Duty to decide appeal finally
(b) Duty not to interfere with decree for technical errors
(c) Duty to reappreciate evidence
(d) Duty to record reasons
(e) Other duties.

SECOND APPEAL

Section 100 of the Code of Civil Procedure, 1908 provides for a second appeal to the High Court from an appellate decree. There is no vested right of appeal unless the statute so provides. If a statute provides for a condition precedent to be satisfied before a Court can exercise its appellate jurisdiction, the Court is under obligation to satisfy itself whether the condition prescribed is fulfilled. Exercise of the appellate jurisdiction without the fulfillment of the statutory mandate would be without jurisdiction and therefore a nullity.

Section 100 CPC reads as follows:

Second appeal.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a *substantial question of law* is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

The legislature has not defined the term "substantial question of law".

The test to determine whether a question is a substantial question of law or not was laid down by a Constitution Bench of the Supreme Court in *Chunilal V. Mehta and Sons Ltd.* v. *Century Spg. and Mfg. Co. Ltd.* While determining the said expression occurring in Article 133(1) of the Constitution of India. The Supreme Court laid down the test as follows:

The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

The above test laid down by the Supreme Court is to be applied by the High Courts to acquire jurisdiction under Section 100 CPC.

Keeping in view the amendment made in 1976, a High Court can exercise its jurisdiction under Section 100 CPC only on the basis of substantial questions of law which are to be framed at the time of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. A judgment rendered by the High Court under Section 100 CPC without following the aforesaid procedure cannot be sustained.

In *M.S.V. Raja* v. *Seeni Thevar* it was held by the Supreme Court that the formulation of a substantial question of law may be inferred from the kind of questions actually considered and decided by the High Court in second appeal, even though the substantial questions of law were not specifically and separately formulated.

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APPEAL TO SUPREME COURT

Appeals to Supreme Court are governed by the provisions of Article 132,133 and 134-A of the constitution of India with regard to civil matters. An appeal shall lie to the Supreme Court from any judgment, decree or final order in civil proceedings of a High Court, if the High Court certifies that –

(i) The case involves a substantial question of law of general importance and
(ii) In the opinion of the High Court the said question needs to be decided by the Supreme Court.

Sections 109 and 112 read with order 45 deals with the appeals to the Supreme Court.

An appeal would lie to the Supreme Court under section 109 of the code only if the following conditions are fulfilled:

(i) A judgment, decree or final order must have been passed by the High Court;
(ii) A substantial question of law of general importance must have been involved in the case and
(iii) In the opinion of the High Court, the said question needs to be decided by the Supreme Court.

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REFERENCE: SECTION 113

Section 113 of the Code empowers a subordinate Court to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the Court itself feels some doubt about the question of law. Such opinion can be sought by a Court when the Court trying a suit, appeal or execution proceedings entertains reasonable doubt about a question of law.

Only a Court can refer a case either on an application of a party or suo mottu. 'Court' means Court of civil jurisdiction. A tribunal or persona designate cannot be said to be a Court and no reference can be made by them.

The right of reference is subject to the conditions prescribed by Order 46 rule 1 and unless they are fulfilled, the High Court cannot entertain a reference from a subordinate Court.

(i) There must be a pending suit or appeal in which the decree is not subject to appeal or a pending proceedings in execution of such decree;
(ii) A question of law or usage having the force of law must arise in the course of such suit, appeal proceedings; and
(iii) The Court trying a sit or appeal or executing the decree must entertain a reasonable doubt on such question.

A reference can be made to the High Court under this rule only in suit or appeal arising out of a suit or in the execution of any such decree, and not in every matter before the court in which a point arises on which the court entertains a reasonable doubt. The object of S. 113 is to enable the subordinate court to obtain, in non-appealable cases, the opinion of the High Court in advance on a question of law and thereby avoid the commission of an error which could not be remedied later on.

The court making a reference may either stay the proceedings or pass a decree contingent upon the decision of the High Court on the point referred, such decree or order not being executable until the receipt of a copy of the judgment of the High Court upon the reference. (Order XLVI, Rule 2). The High Court after hearing the parties, if they desire to be heard, shall decide the points and transmit a copy of its judgment to the court which made the reference. Such court shall then dispose of the case in conformity with the decision of the High Court. The costs consequent on a reference for the decision of the High Court shall be costs in the case. (Order XLVI, Rules 3 and 4).

Reference to High Court was for decision of the vires of the provisions of Bombay Provincial Municipal Corporation Act for not providing hearing to tenant/occupant of premises likely to be demolished/acquired. High Court rejected the reference but suggested that notice may be fixed by Municipality on some conspicuous part of premises. Reference must be decided within four corners of S. 113 and Order XLVI, Rule 3 and once reference was rejected there nothing survived for the High Court to decide and observations were unnecessary for decision of reference.

Power of the High Court:

The High Court may on reference return the case for amendment, or alter, cancel or set aside any decree or order which the court making the reference has passed or made, and make such order as it thinks fit (Order XLVI, Rule 5).

The above provision shows that when the High Court hears a reference it acts like a court of appeal.

Power to refer to High Court questions as to jurisdiction in small causes:

At any time before judgment a court in which a suit has been instituted may refer to the High Court questions as to jurisdiction in small causes where it entertains doubts whether the suit is cognizable by a court of small causes or not. (Order XLVI, Rule 6).

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REVIEW - SECTION 114

Section 114 of the Code gives a substantive right of review in certain circumstances and Order 47 provides the procedure therefor. The provision relating to review constitutes an exception to the general rule that once the judgment is signed and pronounced by the Court it becomes *functus officio* (ceases to have control over the matter) and has no jurisdiction to alter it.

Review simply means 'reconsider', to look again or to re-examine. In legal parlance it is a judicial re-examination of the case by the same Court and by the same judge. In review, a judge, who had disposed of the matter review an earlier order passed by him in certain circumstances.

Section 114 of the **Code of Civil Procedure** (in short CPC) provides for a substantive power of review by a civil court and consequently by the appellate courts. Section 114 of the code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47, Rule 1 of the CPC.

The grounds on which review can be sought are enumerated in Order 47, Rule 1 CPC, which reads as under:

Application for review of judgment

(1) Any person considering himself aggrieved

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

So the **circumstances** when review lies are

(a) cases in which appeal lies but not preferred,

(b) cases in which no appeal lies,

(c) decisions on reference from Court of Small Causes; and

Grounds on which review can be sought:

(i) discovery of new and important matter or evidence, or

(ii) mistake or error apparent on the face of the record, or

(iii) any other sufficient reason.

Scope of an application for review is much more restricted than that of an appeal. The Supreme Court in **Lily Thomas vs. Union of India, AIR 2000 SC 1650** held that the power of review can only be exercised for correction of a mistake and not to substitute a view and that the power of review could only be exercised within the limits of the statute dealing with the exercise of such power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained.

Review by the Supreme Court:

The provisions of Order 47 apply to orders passed under the Code of Civil Procedure. Article 137 of the Constitution confers power on the Supreme Court to review its judgments subject to the provisions of any law made by Parliament or the Rules made under clause (c) of Article 145. The power of the Supreme Court, therefore, cannot be curtailed by the Code of Civil Procedure.

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REVISION - SECTION 115

115. Revision.- (1) The High Court may call for the record of any case which has been decide by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:—

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

(3) A revision shall not operate as a stay of suitor other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation .- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a Suit or other proceeding.

Section 115 authorises the High Court to satisfy itself on three matters:

(a) That the order of the subordinate court is within jurisdiction

(b) That the case is one in which the court ought to exercise its jurisdiction and
(c) That in exercising jurisdiction the court has not act illegally that is in breach of some provision of law or with material irregularity that is by committing some effort or procedure in the course of the trial which is material in that it may have affected the ultimate decision.

It the High Court is satisfied with these three matters, it has no power to interfere because it differs, however profoundly, from the conclusion of the subordinate court on questions of fact or of law. It is well-established that where there is no question of jurisdiction the decision cannot be corrected for a court has jurisdiction to decide wrongly as well as right.

The underlying object of section 115 is to prevent subordinate courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. It enables the High Court to correct, when necessary, errors of jurisdiction committed by subordinate courts and provides the means to an aggrieved party to obtain rectification of a non-appealable order. In other words, for the effective exercise of its superintending and visitorial powers, revisional jurisdiction is conferred upon the High Court.

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CAVEAT- SEC 148-A

Caveat is a latin term which means 'let a person beware'. In law, it may be understood as a notice, especially in probate, that certain actions may not be taken without informing the person who gave the notice.

Caveat is a precautionary measure which is undertaken by people usually when they are having a very strong apprehension that some case is going to be filed in the court regarding their interest in any manner.

In Nirmal Chand v. Girindra Narayan, the it was held that "caveat is a caution or warning given by a person to the court not to take any action in or grant relief to the other side without giving notice to the caveator and without affording opportunity of hearing him.

Section 148A: Right to lodge a caveat:

(1) Where an application is expected to be made, or has been made, in a suit or proceedings instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgement 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, the Court, shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ***ninety days*** from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.

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INHERENT POWERS OF COURTS – SECTION 151

Section 148 to 153 provide for the said inherent powers, which come to the rescue in case of any unforeseen circumstances. They are complementary to the powers otherwise specifically conferred by the Code of Civil Procedure and the court is free to exercise them for the ends of justice or to prevent the abuse of the process of the court by virtue of an obligation to provide justice (ex debitio justitae) in the absence of express provisions of the Code.

Section 148 states that when any period is fixed or granted by the court for the doing of any act, the court has the power to extend the said period even if it has expired.

Section 149 allows the court to allow a party to make up the deficiency of court-fees payable on a plaint, memorandum of appeal etc., even after the expiry of the limitation prescribed for the filing of such suit or appeal.

Section 150 talks of transfer of business of one court to another, wherein the court which receives the said business shall have the same powers and duties as the court from which the business is transferred.

Section 151 talks about the inherent powers of the court and says that nothing in the code shall limit the power of the court to make any order that will necessarily for the ends of justice or to prevent abuse of the process of the court.

Section 152 confers the power to correct any mistakes made in judgements, decrees or orders at any time upon the court, either of its own accord or upon receiving application.

Section 153 allows the court to amend any defect or error in any proceeding in a suit. Also, it dictates that all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such a proceeding. Further, 153A gives the court the power to amend a decree or order where the appeal has been summarily dismissed, and 153B deems the place of trial to be an open court.

SECTION 151

The bare provision of the Section provides as follows:

"Saving of inherent powers of the court.– Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the *ends of justice* or *to prevent abuse of the process of the Court.*"

This indicates, as emphasised, that the said provision, which is the first and only section to explicitly use the term 'inherent power', is brought into the picture only when the following two aspects are in question:

1. The ends of justice are to be achieved (and the Code falls short of the legislation required for this)

In the case of ***Debendranath v. Satya Bala Dass***[AIR 1950 Cal 217 273], the phrase "ends of justice" was explained and it was held that "*ends of justice are solemn words and not mere*

polite expression in juristic methodology and justice is the pursuit and end of all law. But these words do not mean vague and indeterminate notions of justice according to statutes and laws of the land".

Thus this cause of use of inherent powers indicates that the court may exercise the said powers in order for substantive justice to prevail. The Court is allowed to exercise these powers in instances like the following:

- To recall its own orders and correct its mistakes, as was done in ***Keshardeo v. Radha Kissen***[AIR 1953 SCR 136s],
- To pass an injunction in a case not covered by Order 39, as was seen in ***Manohar Lal Chopra v. Sheth Harilal*** [AIR 1962 SC 527],
- To set aside an ex parte order passed against the party, as in ***Martin Burn Ltd. V. R. N. Banerjee***[AIR 1958 SC 79]
- To add, delete or transpose any party to a suit ***Salia Bala Dassi v. Nirmala Sundari Dassi***[AIR 1958 SC 394]

The aforementioned were just a few instances of the exercise of the inherent powers of the Court. The crux of the matter here, however, remains that these powers can be exercised by the Court in the light of justice, equity and good conscience.

2. The process of the court is to be protected from abuse

The 'abuse' herein referred to is said to occur when a Court (being the perpetrator of the said abuse in this case) employs a procedure in doing something that it never intended to do and there is miscarriage of justice. The injustice so done to the party must be remedied on the basis of the doctrine of *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Similarly, a party to a case will become the perpetrator of the abuse in instances when the said party does acts like the following:

- Obtaining benefits by practising fraud on the Court or a party to the proceedings, as seen in ***Daddu Dayal Mahasabhav. Sukhdev Arya***[(1990) 1 SCC 189s]
- Circumventing statutory provisions, as example of which can be found in ***Manilal Mohanlal v. Sardar Sayed Ahmed***[AIR 1954 SC 349s]
- Resorting to or encouraging multiplicity of proceedings, as seen in ***Nair Service Society Ltd. V. K. C. Alexander***[AIR 1968 SC 1165s]
- Introducing scandalous or objectionable matter in the proceedings, as was done by a party in ***Shankarlal v. Ramankilal***[AIR 1951 Kant 23]

Thus, the powers implied by S.151 can also be invoked by the Court on grounds like the ones mentioned above, i.e. on the basis of abuse of the process of the court by either the parties or a lower court. The bottom line in either case is to maintain the sanctity of justice and to uphold the essence of the laws along with their object. Injustice should be eradicated as soon as possible and the provision for the inherent powers of the Court is but another tool to help do the same.

Thus, it can safely be said that the provision for the inherent powers of the Court, be it 148 or 151, is quite essential to the working of our judicial system. This is because, though we can lay claim to one of the finest works of legislation and codification as our constitutional framework along with detailed legislations to support it, there have always been and will

always be eventualities that have not been presupposed. It is this very fact that necessitates the presence of provisions like these. If they were to be removed, the sword that is the judiciary, would stand blunt and ineffective, being constrained by a mere lack in codification, and the core purpose of the law in question would be defeated, just because there was no additional clause.

However, even the Courts cannot be given completely unrestrained freedom and discretion, in order to protect justice and the interests of the people. Hence, several limitations have been imposed upon these powers, as will be observed in the following section.

It is made clear that the substance of this project has been restricted to the topic or occurrences secured by the provisions of Section 151 of the code, just and entire plan is not made the topic of this article.

LIMITATIONS AND SCOPE

Section 151 CPC is not a substantive provision which *creates* or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process. As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances. A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature. While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a *carte blanche* to grant any relief. The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

Supreme Court of India has by a plethora of decisions held that the powers are in addition and complementary to the powers conferred by this code and it can never be said that these

powers can override the provisions of the code. Section 151 is intended only to supplement the other provisions of code and not to evade or ignore them or to invent a new procedure and thus inherent power cannot prevail over statute. Moreover, the only thing which needs to be kept in mind while exercising the inherent powers is that they when exercised do not come in conflict with what has been expressly provided for or those exhaustively covering a particular topic or against the intention of the legislature.

When there is no case of grant of a particular relief under a particular statute, power under sec.151 need not be exercised. Where in a case claiming maintenance by a Hindu woman married to a Hindu Male **having a living lawful wedded wife**, it cannot be granted U/s 25 of Hindu Marriage Act, 1955, the marriage being void under section 5(1) thereof, and such reliefs cannot be granted by invoking sec.151

A court cannot override the express provision of law but if there is no express provision in the statute, then the apex court has held that the court can exercise its power in a suitable case. Hence as per the judgment in the case of ***Ram Chand & Sons Sugar Mills (p) Ltd. v. Kanhaya Lal Bhargava,*** the power u/s 151 cannot be exercised if its exercise is inconsistent with or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the code.

Inherent powers can be exercised when no other remedy is available. Sec.151 hence cannot be invoked as substitute for appeal, revision or review. In exercise of inherent powers however, the court cannot override general principle of law. It could only be for securing ends of justice and prevent abuse of process of court. The inherent powers of the court u/s 151 also cannot be invoked to grant a relief beyond scope of law. For instance if in an auction proceedings once the law has fixed 15 days time to deposit the full amount of purchase money in the court, such period cannot be extended u/s 151. Moving over from the general approach, the following are some of the instances where the inherent powers of the Courts are limited along with case laws:

- In the exercise of inherent powers a court cannot invest itself with jurisdiction not vested in it by law[Raja Soap Factory v. S.P Shantharaj, AIR 1965 SC 1449: (1965) 2 SCR 800; State of W.B v Indira Debi, (1977) 3 SCC 559];
- Grant an order of stay circumventing the provisions of Section 10 of the Code[Manohar Lal Chopra v. Seth Hiralal, AIR 1962 SC 527: 1962 Supp (1) SCR 450];
- To allow set-off in execution proceedings at the instance of an auction-purchaser, ignoring the provisions at the instance of an auction-purchaser, ignoring the provisions of Order 21 Rule 84[Manilal Mohanlal v Sardar Sayed Ahmed, AIR 1954 SC 349s];
- Remand a case, ignoring the provisions of Order 41 Rules 23 and 25[Mahendra Manilal v Sushila Mahendra, AIR 1965 SC 364];
- Reopen the questions which had already been heard and finally decided by it and which are consequently barred by the general principles of *res judicata*[Rikhabdass v Ballabhdas, AIR 1962 SC 551 at p. 554: 1962 Supp (1) SCR 475; UOI v Ram Charan, AIR 1964 SC 215 at p. 218: (1964) 3 SCR 467];
- To appoint a Commissioner keeping aside the provisions of Section 75[Padam Sen v State of UP, 1961 SC 218 at p. 220: (1961) 1 SCR 884];
- Review its orders or judgements in the absence of statutory provisions of Order 9 Rule 9 or 13[Arjun Singh v Mohindra Kumar, AIR 1964 SC 993];

- Direct an arbitrator to make a fresh award[Padam Sen v State of UP, 1961 SC 218 at p. 220: (1961) 1 SCR 884];
- Restrain any party from taking proceedings in a court of law. Or implead legal representatives on record after the suit is abated[UOI v Ram Charan, AIR 1964 SC 215 at p. 218: (1964) 3 SCR 467];
- To make an order restraining execution of the decree against the surety[Bank of Bihar Ltd. v Dr. Damodar Prasad, AIR 1969 SC 297]; or set aside an order which was right when it was made[A.C Estates v Serajuddin & Co., AIR 1966 SC 935 at p. 939: (1966) 1 SCR 235].

After studying the judicial trend/various judicial pronouncements one thing is made clear by the courts that excepting few special cases the court has a whole power to allow reliefs' u/s 151 if it is facilitating in the ends of justice or preventing from the abuse of process of court.

Secondly, if few rudiments are trailed by every court then it would not be troublesome or confusing occupation to focus the stage with reference to when the inherent powers ought to be summoned.

Thirdly, it appears that the ground of having vested with inherent powers might be utilized as positive weapon to support few passes in procedural parts of a case by the courts in the matters where the advice come and contend on details. Also after the research endeavor it is shown that the courts are even cautious enough in respect to the stage and circumstances for conjuring inherent powers and have strictly emulated the standards legislating the provisions of Section 151.

Fourthly, in respect to the correct utilization of inherent powers the courts have summoned them in fitting cases and yes it doesn't imply that there are no occurrences where the courts have abused it however one can say that there is less abuse and as a rule the Apex court or the High courts have redressed such abuse and have compensated the parties.

Thus, in our perspective inherent powers are of utmost importance and are the best illustrations to demonstrate the cautiousness of the legislature to empower all the individuals have access to justice even under such circumstances where there is no express provision and an issue or problem at law has emerged.

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UNIT- III

SUITS IN PARTICULAR CASES

Suits by or Against the Government or the Public Officers in their Official Capacity (Section 79 to 82 and Order XXVII)

Title to Suit: The authority to be named as a plaintiff or defendant, in any suit by or against Government shall be.

1. The Union of India: Where the suit is by or against the Central Government, or
2. The State: Where the suit is by or against the State Government.

Requirement of Notice:

No suit shall be instituted, except as provided in sub-section (2) of section 80 against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity unless a Notice in writing has been issued and until the expiration of two months next after notice.

Notice to whom:

a. Against Government: The Notice issued under section 80(1) shall be delivered to, or left at the office of – 1) In the case of a suit against Central Government i) a Secretary to that Government : when it does not relate to a railway, and 66 ii) the General Manager of Railway : when it relates to a railway.
b. In the case of a suit against the State Government of Jammu and Kashmir - i) a Chief Secretary to that Government; or ii) any other person authorized in this behalf by the State Government.
c. In the case of a suit against any other State Government - i) a Secretary to that Government; or ii) the collector of the district.
d. Against Public Officer : In the case of a suit against Public Officer notice shall be delivered to him or left at his office.

Contents of Notice:

The notice shall contain the following particulars - i) the name, description and place of residence of the plaintiff; ii) the cause of action; and iii) the relief, which the plaintiff claims.

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, in such suit, the Court shall not grant any relief, whether interim or otherwise; except after giving to the Government or Public Officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed in the suit. It is also provided that the Court shall return the plaint for presentation to it after complying with the requirements of section 80(1), if after hearing the parties, the Court is satisfied that no urgent or immediate relief need to be granted. 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. The name, description and residence of the plaintiff, so as to enable the Government or such public officer 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. The cause of action and the relief claimed have been substantially indicated.

Procedure in Suit:
Signature and Verification of Plaint Or Written Statement
Agent and Authorized Agent:

The Court shall allow a reasonable time in fixing a day for the Government to answer the plaint, for the purpose of necessary communication with the Government through proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government. The time so allowed may, at the discretion of the Court, be extended but the time so extended shall not exceed two months in the aggregate. Where in any case the Government Pleader is not accompanied by any person on the part of the Government, who may be able to answer any material. questions relating to the suit, the Court may, direct the attendance of such a person.

Duty of Court:
It shall be the duty of the Court to make every endeavour, if possible to do so consistently with the nature and circumstances of the case, to assists the parties in arriving at a settlement in respect of the subject-matter of the suit and in every such suit or proceeding, at any stage, if it appears to the Court that there is a reasonable opportunity of settlement between the parties, the Court may adjourn the proceeding for such period, as it thinks fit, to enable attempts to be made to effect such a settlement. The power to adjourn proceeding under sub-rule (2) shall be in addition to any other power of the Court to adjourn proceedings.

Procedure in Suit against Public Officer:

The defendant (public officer) on receiving the summons may apply to the Court to grant the extension of time fixed in the summons, to enable to him to make reference to the Government, and to receive orders thereon through the proper channel and the Court shall, on such application extend the time for so long as it appears to it to be necessary. The Government shall be joined as a party to the suit, where the suit is instituted against the public officer for damages or for any other relief in respect of any act alleged to have been done by him in his official capacity.
Where the government undertakes the defence of a suit against a public officer, the government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits. Where no application under sub-rule (1) is made by the government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties.

No need of security from government or a public officer in certain cases:

No such security as is mentioned in rules 5 and 6 of order XLI shall be required from the government or, where the government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

Exemption from Arrest, Personal Appearance and Attachment of Property:

According to section 81 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. the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and b. where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

Execution of decree:

Where, in a suit by or against the Government or by or against a public officer in respect of any act purporting to be done by him in his official capacity, any decree passed against the Union of India or a State or, as the case may be, the public officer, shall not be executed except in accordance with the provisions of sub-section (2) of S. 82. i.e. An execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such decree. 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. is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority; and b. is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree. Definition of 'Government' and 'Government Pleader': Rule 8-8 of Order XXVII provides that in Order XXVII 'Government' and 'Government Pleader' mean respectively" i. in relation to any suit by or against the Central Government or against a public officer in the service of that Government- the Central Government and such pleader as that Government may appoint. ii. in relation to any suit by or against a State Government or against a public officer in the service of a State- the State Government and such Government pleader as defined in Section 2(7), or such other pleader as the State Government may appoint.

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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, rejection of application etc. The general rule for the institution of a suit is that a plaintiff suing in a Court of law is bound to pay Court-fees prescribed under the Court Fees Act at the time of presentation of plaint. Order XXXIII is an exception to the above rule and exempts some (poor) persons from paying the Court fee at the time of institution of the suit i.e. at the time of presentation of plaint and allows prosecuting his suit in forma pauperis, subject to the fulfillment of the conditions laid down in this Order.

Meaning of Indigent Person:

An indigent person is one who is not possessed of sufficient means due bad personal economic condition. The word 'person' includes juristic person. According to Explanation f Rule 1, Order XXXIII, An indigent person is a person, who

a. if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or

b. where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the Subject matter of the suit.

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.

Procedure to sue as Indigent Person: Before an indigent person can institute a suit, permission of Court to sue as an indigent person is required. As per rule 3, the application for permission to sue as a indigent person, shall be presented to the Court by the applicant in person, unless he is exempted from appearing in court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person:

PROVIDED that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs.

Contents of Application: Every such application shall contain the following particulars:-
a. the particulars required in regard to plaints in suits;
b. a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof; and
c. it shall be signed and verified as provided in Order VI rules 14 and 15.
The suit commences from the moment an application to sue in forma pauperis is presented.

According to Rule 1-A, an inquiry to ascertain whether or not a person is an indigent person shall be made.
Rule 1-A : Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the court, unless the court otherwise directs, and the court may adopt the report of such officer as its own finding or may itself make an inquiry into the question.
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 claim and the property of the applicant.
2. If presented by agent, court may order applicant to be examined by commission - Where the application is presented by an agent, the court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.
Rejection of Application: Rule 5: The court shall reject an application for permission to sue as an indigent person
1. Where it is not framed and presented in the manner prescribed by rules 2 and 3, or
2. Where the applicant is not an indigent person, or
3. Where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person:
PROVIDED that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person, or
4. Where his allegations do not show a cause of action, or
5. Where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter, or

6. Where the allegations made by the applicant in the application show that the suit would be barred by Where any other person has entered into an agreement with him to finance the litigation.

Fixing of Date and Notice to the opposite Party and the Government Pleader: Where there is ground as stated in rule 5, to reject the application the Court shall fix a day (of which at least ten days notice shall be given to the opposite party and the government pleader) for receiving such evidence as the applicant may adduce in proof of his indigency, and for hearing any evidence which may be adduced in disproof thereof.

Procedure at Hearing: On the date fixed, the Court shall examine the witness (if any) produced by either 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 either allow or refuse to allow the applicant to sue as an indigent person.

Procedure if Application Admitted: Where the application is granted, it shall be deemed the plaint in . e suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except at the plaintiff shall not be liable to pay any court fee or fees payable for service of process in respect of any petition, appointment of a pleader or other proceedings connected with the suit.

Withdrawal of Permission: The Court may, on the application of the defendant, or of the government pleader and after giving seven days notice in writing to the plaintiff, withdraw the permission granted to he plaintiff to sue as an indigent person on the following conditions:

1. if he is guilty of vexatious or improper conduct in the course of the suit;
2. if it appears that his means are such that he ought not to continue to sue as an indigent person; or
3. if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter.

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 Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject matter of the suit.

b. Where Indigent person fails: (Rule 11) Where the plaintiff fails in the suit or the permission granted 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 him in consequence of the failure of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or

II. because the plaintiff does not appear when the suit is called on for hearing, the court shall order the 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 death of the plaintiff or of any person added as a co-plaintiff, the court shall order that 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 shall be recoverable by the State government from the estate of the deceased plaintiff.

According to rule 15, where the application to sue as an indigent person is refused, it shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided he pays the costs incurred by the Government Pleader and the opposite party in opposing in application.

When an application is either rejected under rule 5 or refused under rule 7, the Court will grant time to the applicant to pay the requisite Court fee within the specified time or within time extended by the Court from time to time, and upon payment of such Court fee and on payment of the costs referred to in rule 15 within that time, the suit shall be deemed to have been instituted on the date on which the application for permission to sue as an indigent person was pr.esented.

The costs of an application for permission to sue as an indigent person and of an inquiry into indigence shall be costs in the suit.

Defence by an indigent person: Rule 17: Any defendant, who desires to plead a set off or counter claim, may be allowed to set up such claim as an indigent person, and the rules contained in this Order shall, so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint. 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, and where an indigent person is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.

Indigent Person: A person unable to pay Court fees on memorandum of appeal may apply to allow him to appeal as an indigent person. The necessary inquiry as prescribed in Ord.er XXXIII will be made before granting or refusing the prayer. But where the applicant was allowed to sue as an indigent person in the trial Court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.

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SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND

(ORDER XXXII)

Since a Minor is not capable of entering into a contract, even suit, which is instituted by him, will be filed in his name by his "next Friend", i.e. any other person who has attained majority in some way.

- Such "Next Friend" should be closely related to the minor so as to bonafidely ascertain the interests of the minor, for instance father, mother, brother, sister etc, or guardian. He does not become a party to the suit but merely represents minor's interest.
- To avoid any discourage vexatious--- litigation by such person, the code provides that, the courts can order the next friend to give security for payment of all the costs incurred or likely to be incurred by the defendant.
- Any person can be appointed, as the "Next Friend" or guardian of the minor as long as he is of sound mind, has attained majority, has no interests adverse to that of the minor's and he is not defendant or plaintiff in the suit.
- Where there is neither any guardian appointed by a competent Authority, nor any other person fit and willing to act as a guardian for the suit, the Court can appoint any of its officers as a guardian to the suit.

- The court may direct the costs incurred by such officer in his capacity as guardian to be borne by :
    - Any of / or all parties to the suit, or
    - Out of property of the minor, or
    - Out of Any fund in the court in which minor, is interested.
- A "Next Friend" is not allowed to enter into any agreement/ compromise on the minor's behalf, which may be in reference to the particular suit unless the court permits him to do so.
- A "next friend" may retire but not before, he first recommends another person to take his place and gives security for all the costs that have already been incurred in the suit.
- on attaining majority :
- On attaining majority, it shall be at the option of the minor plaintiff whether to proceed with the suit or opt out.
- In case he opts to proceed with the suit, he will have to make an application for discharge of "Next Friend", and permission to proceed on own name.

In case he opts out, he can apply for an order to dismiss the suit / application on making payment of costs incurred by the opposite party or which has been paid by his next friend.

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INTERPLEADER SUIT
(SECTION 88AND ORDER XXXV)

Meaning: An interpleader suit is a suit in which the real dispute is not between the plaintiff and the defendant but between the defendants only and the plaintiff is not really interested in. the subject matter of the suit.
Object: The primary object of instituting an interpleader suit is to get claim of rival defendants adjudicated.
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 the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:
Provided that where any suit is pending in which the -rights of the parties can properly be decided, no such suit of interpleader shall be instituted.

Conditions for Application: Before the institution of an interpleader suit, the following conditions must be satisfied:
a. Existence of some Debt, Money or Moveable or Immoveable Property: there must be some debt, sum of money or other moveable or immoveable property in dispute;
b. Adverse Claim by two or more persons: two or more persons must be claiming the above debt, money or property, adversely to one another;

c. The person from whom the debt, money or property is being claimed should not be interested in it: the person from whom such debt, money or property is claimed, must not be claiming any interest therein other than the charges and costs:
d. The above person must be ready to deliver it: The above person must be ready to pay or deliver it to the rightful claimant; and
e. No Pendency of Suit: there must be no suit pending in which the rights of the rival claimants can be properly decided.

Who may not institute an interpleader suit?
An Agent or Tenant:
An agent cannot sue his principal or a tenant his landlord for the purpose of compelling them to interplead with persons claiming through such principals or landlords, because ordinarily, an agent cannot dispute the title of his principal and a tenant cannot dispute the title of his landlord during the subsistence of tenancy.

Procedure in Inter pleader Suit: Order XXXV provides the procedure for the institution of an interpleader suit.

Plaint in Interpleader Suit: In every interpleader suit the plaint in addition to other statements necessary for plaint, state –
a. that the plaintiff claims no interest in the subject matter in dispute other than the charges or costs;
b. the claims made by the defendants severally; and
c. there is no collusion between the plaintiff and any of the defendants.

Payment of thing claimed into Court: The Court may order the plaintiff to place the thing claimed in the custody of the Court when the thing is capable of being paid into Court or placed in the custody of Court and provide his costs by giving him a charge on the thing claimed.

Procedure where defendant is suing plaintiff (Stay of Proceedings): Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceeding as against him; and his cost in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

Procedure of First Hearing:
1. At the first hearing, the Court may
a. Declare that the plaintiff is discharged from ali liabilities to the defendants in respect of the thing claimed, award him his costs and dismiss him from the suit; or
b. if it thinks that justice or convenience so require, retains all parties until the final disposal of the suit.
2. Where the Court finds that the admission of the parties or other evidence enable the Court to do so, it may adjudicate the title to the thing claimed.
3. Where the admissions of the parties do not enable the Court so to adjudicate the Court may direct -
a) that an issue or issues between the parties be framed and tried, and

b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner.

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SUMMARY SUITS- ORDER XXXVII

Introduction:

Summary suit or summary procedure is given in Order XXXVII of Code of Civil Procedure, 1908 (herein after referred as CPC, 1908) whose object is to summaries the procedure of suit in case the defendant is not having any defence.

Application & Scope:

This order is applicable to

1. All the suits upon bills of exchange, hundies, and promissory notes.
2. The suits wherein the plaintiff seeks to recover a debt payable by the defendant, arising either on a written contract or on an enactment where the sum sought to be recovered is fixed or on a guarantee where the claim against the principal is in respect of a debt.[Rule 1(2)]

A suit can be instituted under this order in High Court, City Civil Court, Court of Small Causes or any other Court notified by the High Court [Rule 1(1)].

Institution:

In order to institute a suit under this Order, it is necessary that the nature of suit must be among the one mentioned in the above paragraph. If the category is satisfied, then the suit can be instituted by presenting a plaint in any Court. The plaint shall have to contain the specifications mentioned in *Rule 2(1) of CPC.*

Proceedings:

Once the suit is instituted, summon of the suit as per *Rule 2(2) of CPC* along with a copy of the plaint and annexure will be sent to the defendant[Rule 3(1)]. The defendant will not be defending the suit against him unless, he enters an appearance. In case of default in appearance, the allegations of the plaintiff in the plaint will be deemed to be admitted and a decree in accordance to that will be issued by the Court[Rule 2(3)].

Defendant's Appearance:

After summon is issued to the defendant, he has ten days to make an appearance. This appearance can either be in person or by a pleader [Rule 3(1)]. At anytime within the prescribed period of ten days, the defendant by way of an affidavit or otherwise, can disclose such facts sufficient enough to entitle him the right to defend [Rule 3(5)].

Conditions for Leave to Defend:

In the case of Mechalee Eng&Mafrs v Basic Equip Corporation [AIR 1977 SC 577], the court laid down certain principles for the appearance of the defendant and his right to defend the suit in accordance with Rule 3 of Order XXXVII. These principles are to make sure that the defendant's right to defend is not being taken away from him and the principle of *"audi alteram partem"* is being followed and described what can be considered as sufficient facts to entitle the defendant right to defend and the conditions are:

1. If the defendant satisfies the Court that he has a good defence to the claim on its merits.
2. If the defendant raises a triable issue indicating that he has a fair defence.
3. If the defendant discloses such facts as may be deemed sufficient to entitle him to defend.

Further, in case of Raj Duggal v Ramesh K. Bansal [AIR 1990 SC 2218], the court described what can be considered as a triable issue. Describing, triable issue the Court gave certain conditions which need to be satisfied in order to constitute a triable issue:

1. There is a fair dispute to be tried as to the meaning of document on which the claim is based.
2. Uncertainty as to the amount actually due.
3. Where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross examine plaintiff's witnesses.

Earlier, in the case of Santosh Kumar v Bhat Mool Singh [AIR 1958 SC 32], the Court said that there can't be any thumb rule formula to decide whether leave should be granted or not. It will depend on the facts and circumstances of the case.

Passing of Decree

In the case of summary proceeding, a decree will be passed in the following situations:

1. In case the defendant defaults in its appearance then the allegations of the plaintiff against the defendant will be deemed to be true and a decree in the favour of plaintiff will be issued. As per the decree the plaintiff will be entitled to a sum which will not the exceed the sum mentioned in the summon, together with interest at the rate which will be specified in the decree, up to the date of decree and any other sum for cost.
2. In case the defendant is allowed to defend the case against the plaintiff, the Court may direct him to give security within a specified time and in case the defendant defaults in payment of security within the prescribed time, then the decree will be passed in the favour of the plaintiff.
3. In case the defendant is granted the right to defend and also deposits the security within the reasonable time, the suit will follow the ordinary course and the defendant will be asked to file a written statement under Order VIII.

Setting aside of Decree

The Court has the power to set aside the decree that has been passed under the provisions of Order XXXVII. This power has been enshrined on the Court by Rule 4 of Order XXXVII.

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SUITS BY ALIENS - SEC 83

Section 83. When aliens may sue— Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any Court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court.
Explanation—Every person residing in a foreign country, the Government of which is at war with India and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of this section, be deemed to be an alien enemy residing in a foreign country.

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SUITS BY OR AGAINST FOREIGN RULERS, AMBASSADORS AND ENVOYS SECTIONS 84-87A

84. When foreign State may sue: A foreign State may sue in any competent Court Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.
85. Persons specially appointed by Government to prosecute or defend on behalf of foreign Rulers— (1) The Central Government may, at the request of the Ruler of a foreign State or at the request of any person competent in the opinion of the Central Government to act on behalf of such Ruler, by order, appoint any persons to prosecute or defend any suit on behalf of such Ruler, and any persons so appointed shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Ruler.
(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of such Ruler.
(3) A person appointed under this section may authorize or appoint any other persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.
86. Suits against foreign Rulers, Ambassadors and Envoys— (1) No foreign State may be sued in any Court otherwise competent to try the suit except with consent of the Central Government certified in writing by a Secretary to that Government: Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid [a foreign State] from whom he holds or claims to hold the property.
(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which [the foreign State] may be sued, but it shall to be given, unless it appears to the Central Government that [the foreign State].
(a) has instituted a suit in the Court against the person desiring to sue [it], or
(b) [itself] or another, trades within the local limits of the jurisdiction of the Court, or
(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or
(d) has expressly or impliedly waived the privilege accorded to [it] by this section.
[(3) Except with the consent of the Central Government, certified in writing by a Secretary to that government, no
decree shall be executed against the property of any foreign State.]
(4) The proceeding provisions of this section shall apply in relation to —

[(a) any Ruler of a foreign State;]
[(aa)] any ambassador or Envoy of a foreign State ;
(b) any High Commissioner of a Commonwealth country; and
(c) any such member of the staff of the foreign State or the staff or retinue of the Ambassador] or Envoy of a
foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf.[as they apply in relation to a foreign State].
(5) the following persons shall not be arrested under this Code, namely : —
(a) any ruler of a foreign State;
(b) any Ambassador or Envoy of a foreign State;
(c) any High Commissioner of a Commonwealth country;
(d) any such member of the staff of the foreign State or the staff or retinue of the Ruler, Ambassador or Envoy of a
foreign State or of the High Commissioner of a Commonwealth country, as the Central Government may, by general or special order, specify in this behalf.
(6) Where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard.]
87. Style of foreign Rulers as parties to suits— The Ruler of a foreign State may sue, and shall be sued, in the name of his State:
Provided that in giving the consent referred to in section 86, the Central Government may direct that the Ruler may be sued in the name of an agent or in any other name.
87A. Definitions of "foreign State" and "Ruler" — (1) In this Part,—
(a) "foreign State" means any State outside India which has been recognised by the Central Government; and
(b) "Ruler", in relation to a foreign State, means the person who is for the time being recognized by the Central
Government to be the head of that State.
(2) Every Court shall take judicial notice of the fact —
(a) that a state has or has not been recognized by the Central Government;
(b) that a person has or has not been recognized by the Central Government to be the head of a State.

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SUITS BY OR AGAINST RULERS OF FORMER INDIAN STATES SECTION 87-B

Section 87B: Applications of sections 85 and 86 to Rulers of former Indian States:
(1) In the case of any suit by or against the Ruler of any former Indian State which is based wholly or in part upon a cause of action which arose before the commencement of the Constitution or any proceedings arising out of such suit, the provisions of section 85 and subsections (1) and (3) of section 86 shall apply in relation to such Ruler as they apply in relation to the Ruler of a foreign State.
(2) In this section—
(a) "former Indian State" means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purposes of this;
(b) "commencement of the Constitution" means the 26th day of January, 1950; and
(c) "Ruler" in relation to a former Indian State, has the same meaning as in article 363 of the Constitution

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SUITS RELATING TO PUBLIC NUISANCE

SECTION 91

This section is a procedural provision. It does not purport to create any new right, nor does it purport to deprive anybody of a right derived from the general law of the land. Consequently, it does not control representative suits under Order I, Rule 8 (discussed in detail earlier in Part I) or modify the right of a person to sue apart from the provision of this section.

Thus a representative suit brought not on behalf of the public of a place but of one particular community forming part of it, i.e., for declaration of its right to take out a procession along a particular route and for removal of certain obstructions did not earlier require previous consent of the Advocate-General or the leave of the court.

Meaning of Public Nuisance:
The term "public nuisance" occurring in S. 91 has not been defined in the Code of Civil Procedure. It is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on the highways, etc. (Osborn).

In view of the provisions of S. 3 (48) of the General Clauses Act, the definition of "public nuisance" as given in S. 268 of the Indian Penal Code will apply to the present Code. It says: "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

The consensus of judicial opinion has, in recent years, veered round the view that the English rule that the plaintiffs cannot maintain a suit in respect of an obstruction to a highway unless they prove special damage to themselves personally in addition to the general inconvenience to the public is not applicable in India.

Special Damage:
A suit seeking relief in respect of public nuisance is maintainable although sanction of the Advocate-General as it obtained prior to the Amendment Act, 1976, or the leave of the court, had not been obtained as required by S. 91, C.P.C., if the plaintiff proved special damage. Special damage is that damage which by reason of a nuisance would be suffered by some individual beyond what is suffered by him in common with other persons affected by that nuisance.

Award of damages for previous suit improper:
Where suit for declaration and injunction against nuisance as in representative capacity and another application to treat suit to be instituted under Section 91 were rejected, held that as there was no suit before Court for trial and no written statement was filed the question of defendants claiming damages will not arise.

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SUITS RELATING TO PUBLIC TRUSTS

SECTION 92

The object of the section in requiring the Advocate-General to institute a suit, or permission of the court before suits are instituted, is to protect public interests and the interests of the institution, on the one hand, and to discourage impecunious and improper persons indulging in vexatious and improper suits against trustees, on the other.

Chairman Madappa v. Mahanthadevaru:
The main purpose of S. 92 (1) is to give protection to public trust of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under this section can only be filed either by the Advocate-General or two or more persons having an interest in the trust with the leave of the court.

The object is that before the Advocate-General files a suit or the leave of the court is granted to two or more persons, the Advocate-General or the court would satisfy himself or itself that there is a prima facie case either of the breach of trust or of the necessity for obtaining directions of the court.

Application of the section:
Section 92 is a complete Code by itself in respect of suits based upon an alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. In order to attract the application of the section the following four conditions are necessary, viz., (1) there must be a trust, express or constructive, for public purposes of a charitable or religious nature; (2) the plaint must allege a breach of trust or necessity for direction as to administration of that trust; (3) the suit must be in the interests of the public, i.e., it must be brought in a representative capacity for the benefit of the public and not to enforce individual rights; and (4) the relief claimed should be one of the reliefs set out in the section.

Grant of leave to file a suit is not a mere irregularity which can be cured but is a condition precedent. The provisions of S. 92 are mandatory in nature in that respect and the defendant cannot waive that right and confer jurisdiction on a court.

In regard to the granting of leave to a suit under S. 92, the court does not have to write a reasoned order. It does not even have to give a notice to the defendant of an application for leave to file as the order granting leave is of an administrative nature.

The District Judge while granting leave under S. 92, C.P.C., passes a judicial order. It should indicate that the District Judge applied his mind before granting leave. However as rights of the parties are not affected, it is not necessary to pass a detailed order but it would suffice if the order indicates that it has been passed by the District Judge after due application of mind. Section 92 does not contemplate notice to proposed defendants before granting leave.

It is not in the province of the High Court to question the correctness of the judgment of the Supreme Court. There is a presumption that the Supreme Court considered all the aspects of the matter before giving a declaration of law.

To invoke S. 92 of the Code of Civil Procedure, three conditions have to be satisfied, namely, (i) the trust is created for public purposes of a charitable or religious nature; (ii) there was a breach of trust or a direction of the court is necessary in the administration of such a trust; and (iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the three conditions is not satisfied, the suit falls outside the scope of the said section.

Prior to the amendment of S. 92 by the Amendment Act, 1976, the provisions of the section authorised the Advocate-General, or two or more persons having an interest in the express or constructive trust created for public purposes of a charitable or religious nature and having obtained the consent in writing of the Advocate-General, to institute a suit in the case of any alleged breach of such trust, but the new sub-section (1) permits, besides the Advocate-General, any two or more persons having an interest in the trust and having obtained the leave of the court, to institute a suit to obtain a decree in respect of the matters specified therein.

Further, a new sub-section (3), inserted by the Amendment Act, 1976, empowers the court to alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and to allow the property or income of such trust or any portion thereof to be applied cy pres in one or more of the following circumstances, namely:—

(a) Where the original purposes of the trust, in whole or in part, (i) have been, as far as may be, fulfilled; or (ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust;

(b) Where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) Where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) Where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a suit for such purposes; or

(e) Where the original purposes, in whole or in part, have, since they were laid down, (i) been adequately provided for by other means, or (ii) ceased, as being useless or harmful to the community, or (iii) ceased to be, in law, charitable, or (iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

In order to bring a case within the purview of the provisions of section 92, C.P.C., the suit must be a representative one, brought for the benefit of the public and to enforce a public right to respect of an express or constructive trust upon a cause of action alleging a breach of such trust or necessity for directions as to its administration, against a trustee de jure or de son tort of such trust. But if the suit is between persons who individually claim a right to succeed to the office of trustee the section has no application as the right set up is a personal right to act in a particular office.

Section 92 is properly a representative suit filed in the interest of the public or the section of the public who are interested in the proper administration of the trust and this does not cover a private dispute between one of the beneficiaries and the trust through its mutawali. A suit under S. 92 is a suit of a special nature.

Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the court are necessary for the administration thereof and it must pray for one or other of the reliefs that are specifically mentioned in the section. A suit under S. 92 can proceed only on the allegation that there is a breach of public trust of a religious or charitable character or that the directions from the court are necessary for the administration of the trust.

In order to maintain a suit under S. 92 it must be shown that there exists a trust for public purposes of a charitable or religious nature; that there is a breach of such trust or that the direction of the court is necessary for the administration of the trust and the relief claimed in the suit be one or more of the reliefs mentioned in the section.

Where any of these conditions is absent, S. 92 would have no application to the suit. If the suit does not relate to a public trust but relates to private properties owned by an individual or to a private trust, S. 92 would not apply.

In the case of Swami Parmatmanand Saraswati v. Ramji TYipathi, the Supreme Court observed as follows:

"A suit under S. 92 is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there was a breach of such trust or that the direction of the court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section.

A private trust is outside the operation of S. 92 (Kailash Chand v. Bhupal Nath)

Section 92 applies only to a public trust. The distinction between a private and public trust is that whereas in the former the beneficiaries are specific individuals who are ascertained or capable of being ascertained, in the latter they are the general public or a class thereof and they constitute a body which is incapable of ascertainment.

So to attract S. 92 it must be established that the beneficial interest in the trust is vested in an uncertain and fluctuating body of individuals and the trust is of a permanent character. A religious endowment must, therefore, be held to be private or public according as the beneficiaries there under are specific persons or the general public or section thereof.

Notwithstanding such repeal, however, all rules made, proceeding taken and other things done by any authority or officer under the repealed Act shall be deemed to have been made, taken, or done by the appropriate authority or officer under corresponding provisions of the 1976 Act and shall have effect accordingly, until they are modified, cancelled or superseded under the provisions of that Act.

Interest to maintain suit:
Section 92 of the Code gives the right of the suit only to persons interested and does not give the right of suit only to those who have some direct interest, e.g., who are connected with the

management or who have some special interest greater than that of others who have interest in the trust, but at the same time it restricts the right of suit so that only those who have a real interest in the present and not merely a sentimental interest in future like that of a mere co-religionist could file a suit. The object of the provision is to protect those who are in charge of public trust from being harassed by litigation at the instance of busy bodies who have no real or personal interest in the trust.

The words "interest in the trust" means some such interest which is affected by mismanagement so that the person is interested in having the affairs of the trust set right by court. The word 'interest' in S. 92, C.P.C., connotes a genuine and real concern to see that the trust is properly administered for the purposes for which it is intended.

A suit under S. 92, C.P.C. against a public trust is not similar to a representative suit under Order I, Rule 8, C.P.C. in all respects. Leave of the Court is a condition precedent for the institution of a suit against a public trust for the reliefs set out in section 92, C.P.C., whereas permission to sue under Order I, Rule 8 is not condition precedent and can be granted even after the institution of suit and even at the appellate stage by allowing an amendment, if such amendment does not materially change the nature of the suit.

Abatement:
When one of the two plaintiffs in a suit under S. 92 dies, no question of abatement would arise even if others are not impleaded in his place and it is open to the remaining plaintiff to continue the suit. If all the plaintiffs who obtain the sanction die after the valid institution of the suit, members of the public interested in the trust can get themselves impleaded in the case and prosecute it.

It has been held by the Supreme Court that a suit filed in a representative capacity does not abate on the death of one of the plaintiffs. In Ajai Prakash Singh v. Abhai Prakash Singh and others, it has been held that once a suit is instituted properly after obtaining permission it can be continued by any member of the public interested in the subject-matter without obtaining fresh sanction.

Once permission is granted, the bar against the filing of the suit stands removed and it can be continued either by the remaining plaintiffs or by anyone of them or by even a member of the public and even defendants can be transposed as plaintiffs to continue the suit.

In Shitla alias Shitla Prasad Shukla v. R.S. Misra, it has been held that the suit even on the demise of both the original plaintiff could not abate. No fresh sanction of permission was needed. Persons from the public who have interest in the property can continue the suit.

Relief not asked against some trustees:
Where in a suit filed under the provisions of S. 92, C.P.C., the plaintiffs do not ask for any relief against some of the defendants the court cannot pass any decree as against those defendants.

Judgment in rem:
A judgment in a suit under S. 92 has conclusive effect as against the entire world, either as a judgment in rem or, in the alternative, by treating the whole world as a party to the suit. A suit under S. 92, C.P.C. can be maintained only in respect of a public trust of a permanent

character and the judgment in such a suit would be a judgment in rem and not a judgment in personam.

If nobody raises any objection in a suit with regard to the public or permanent nature of the trust, then after the decision given by the District Judge holding the property to be a public trust and laying down a scheme for its administration it is not open to any party to challenge the permanent nature of the trust.

Dispute as to title to temple property:
In a suit for the settlement of the scheme for the management of a temple it is not appropriate for the court to investigate questions of title to property about which there is dispute.

Validity of representative suit:
The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eyes of law to be parties to the suit. A suit under Section 92, C.P.C. is thus a representative suit and as such binds not only the parties named in the suit-title but all those who share common interest and are interested in the trust.

It is for that reason that Explanation VI to Section 11 of C.P.C. constructively bars by res judicata the entire body of interested persons from re-agitating the matter directly and substantially in issue in an earlier suit under Section 92, C.P.C.

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BY OR AGAINST MILITARY OR NAVAL MEN OR AIRMEN ORDER XXVIIISUITS

1. Officers, soldiers, sailors or airmen who cannot obtain leave may authorize any person to sue or defend for them-
(1) Where any officer, soldier, sailor or airman, actual serving under the Government in such capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.
(2) The authority shall be writing and shall be signed by the officer, soldier, sailor or airman in the presence of
(a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or
(b) where the officer, soldier, sailor or airman, is serving in military, naval or air force staff employment the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.
(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, soldier, sailor or airman by whom it was granted could not obtain leave of absence for the purpose of prosecuting of defending the suit in person.
Explanation—In this Order the expression "commanding officer" means the officer in actual command for the time being of an regiment, corps, ship, detachment or depot which the officer, soldier sailor or airman belongs.
2. Person so authorized may act personally or appoint pleader:
Any person authorized by an officer, soldier, sailor or airman to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, soldier,

sailor or airman could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, soldier, sailor or airman.
3. Service on person so authorized, or on his pleader, to be service:
Process served upon any person authorized by an officer soldier, sailor or airman under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

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SUITS BY OR AGAINST CORPORATIONS- ORDER XXIX

1. Subscription and verification of pleading— In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the security or by any director or other principal officer of the corporation who is able to depose to the facts of the case.
2. Service on corporation— Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served -
(a) on the secretary, or on any director, or other principal officer of the corporation, or
(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.
3. Power to require personal attendance of officer of corporation- The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

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SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN - ORDER XXX

Rule 1: Suing of partners in name of firm:
(1) Any two or more persons claiming or being liable as partners and carrying on business, in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.
(2) Where persons sue or are sued partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice such pleading or other document is signed, verified or certified by any one of such persons.

Rule **2: Disclosure of partners' names**:
(1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demanding writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.
(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1) all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1) the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:
Provided that all proceedings shall nevertheless continue in the name of the firm, but the name of the partners disclosed in the manner specified in sub-rule (1) shall be entered in the decree.

Rule 3: **Service:**
Where persons are sued as partners in the name of their firm, the summons shall be served either—
(a) upon any one or more of the partners, or
(b) at the principal place at which the partnership business is carried on within India upon any person having, at the time of service, the control or management or the partnership business, there, as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without India:
Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within India whom it is sought to make liable.

Rule 4: Rights of suit on death of partner:
(1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872 (9 of 1872) where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.
(2) Nothing in sub-rule (1) shall limit or otherwise effect any right which the legal representative of the deceased may have—
(a) to apply to be made a party to the suit, or
(b) to enforce any claim against the survivor or survivors.

Rule 5: Notice in what capacity served:
Where a summons is issued to a firm and is served in the manner provided by rule 3 , every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

Rule 6: Appearance of partners:
Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Rule 7: No appearance except by partners:
Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

Rule 8: Appearance under protest:
(1) Any person served with summons as a partner under rule 3 may enter an appearance under protest, denying that he was a partner at an material time.

(2) On such appearance being made, either the plaintiff or the person entering the appearance may, at any time before the date fixed for hearing and final disposal of the suit, apply to the Court for determining whether that person was a partner of the firm and liable as such.
(3) If, on such application, the Court holds that he was a partner at the material time, that shall not preclude the person from filing a defence denying the liability of the firm in respect of the claim against the defendant.
(4) If the Court, however, holds that such person was not a partner of the firm and was not liable as such that shall not preclude the plaintiff from otherwise serving a summons on the firm and proceeding with the suit; but in that event, the plaintiff shall be precluded from alleging the liability of that person as a partner of the firm in execution of any decree that may be passed against the firm.]

Rule 9: Suits between co-partners:
This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners, in common; but not execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

Rule 10: Suit against person carrying on business in name other than his own:
Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply accordingly.

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SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS
ORDER XXXI

Rule 1: Representation of beneficiaries in suits concerning property vested in trustees, etc:
In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee; executor or Administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.
Rule 2: Joinder of trustee, executors and administrators:
Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them: Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside India need not be made parties.
Rule 3: Husband of married executrix not to join:
Unless the Court directs otherwise. the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

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SUITS RELATING TO MATTERS CONCERNING THE FAMILY
ORDER XXXIIA

Ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigation concerning affairs of the family requires special approach keeping in mind serous emotional aspects involved. Family counselling as one of the methods of

achieving the ultimate object of preservation of family, hence, should be kept in the forefront. Proceedings in such suits, therefore, may not always be held in open court but may be conducted in camera.

Rule 1: Application of the Order:
(1) The provision of this Order shall apply to suits or proceedings relating to matters concerning the family.
(2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely:-
(a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity
of a marriage or as to the matrimonial status of any person; (b) a suit or proceeding for a declaration as to legitimacy of any person;
(c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability;
(d) a suit or proceeding for maintenance;
(e) a suit or proceeding as to the validity or effect of an adoption;
(f) a suit or proceeding, instituted by a member of the family relating to wills, intestacy and succession;
(g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law.
(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.
Rule 2: Proceedings to be held in camera:
In every suit or proceeding to which this Order applies, the proceeding may be held in camera if the Court so desires and shall be so held if either party so desires.
Rule 3: Duty of Court to make efforts for settlement:
(1) In every suit or proceeding to which this Order applies,
an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.
(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.
(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.
Rule 4: Assistance of welfare expert:
In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 or this Order.
Rule 5: Duty to inquire into facts:
In every suit or proceeding to which this Order applies, it shall be the duty of the Court to inquire, so far is reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.
Rule 6: "Family"- meaning:

For the purposes of this Order, each of the following shall be treated as constituting a family, namely:-
(a) (i) a man and his wife living together,
(ii) any child or children, being issue or theirs; or of such man or such wife,
(iii) any child or children being maintained by such man or wife;
(b) a man not having a wife or not living together with his wife, any child or children, being issue of his, and any child or children being maintained by him;
(c) a woman not having a husband or not living together with her husband, any child or children being issue of hers, and any child or children being maintained by her;
(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him or her; and
(e) any combination of one or more of the groups specified in clause (a), clause (b), clause (c) or clause (d) of this rule.
Explanation—For the avoidance of doubts, it is hereby declared that the provisions of rule 6 shall be without any prejudice to the concept of "family" in any personal law or in any other law for the time being in force.]

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SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY

ORDER XXXIV

All persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage; but a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit: and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. (Order XXXIV, Rule 1). The object of this rule is that all claims affecting the equity of redemption may be disposed of in one and the same suit.

A co-mortgagor is a necessary party to a redemption suit, but a plea of his non-joinder, if not specifically raised in the written statement or at the trial, cannot be raised for the first time in appeal, when it is not established that he has a subsisting interest. A person having paramount title is not a necessary party in a mortgage suit and need not be impleaded. But where persons setting up adverse title of the mortgagor are impleaded without objection and an issue is framed as regards their rights for decision on the merits and the issue is decided, it cannot be said that the court either went beyond its jurisdiction or did anything which was so improper or illegal that the court of appeal must, even in the absence of any prejudice, interfere. The rule is more a rule of convenience and prejudice than a rule affecting the jurisdiction of the court. On un-rebutted evidence of the plaintiffs the trial court decreed the suit for possession by redemption by holding that original mortgagor has not been heard of for the last about 20 years and, therefore, he would be presumed to be dead and the plaintiffs being his legal heirs had a right to file the suit for redemption.

The first appeal by the defendant-mortgagee was dismissed. Defendant for the first time claimed in second appeal that compromise decree for specific performance of sale was passed against the original mortgagor. On evidence it was found that the compromise decree was found by fraud and misrepresentation. The judgment of trial court was upheld as a realistic and reasonable view of the matter.

Grant of prohibitory injunction proper:

Grant of prohibitory injunction in favour of plaintiff though not in actual possession was proper, when the plaintiff was actual owner and defendant had failed to prove title by adverse possession.

Injunction against co-possessor in title suit could not be granted:
Where plaintiff and defendant were members of same family. Status of partition fifty years back was not in dispute. Property had been jointly recorded during consolidation operation. Entry in consolidation records had not excluded possession of defendants with respect to suit plot. Held, that in case of joint possession, parties were to maintain that -status quo, hence, order of refusal of injunction against defendants was proper.

Temporary injunction—Order modified by conditions:
Where there was grant of unconditional order in favour of new contractor ignoring huge investments made by old contractor to operate mine under existing agreement, held that it was not proper. Order was modified by imposing conditions.

Vacation of status quo not proper:
Where suit for declaration and permanent injunction restraining defendants from raising any construction on suit land was filed. Prayer for grant of temporary injunction was made. Trial Court had granted status quo after proper appreciation of all relevant aspects. Held, that vacation of order by appellate Court was not proper due to the fact that there was possibility of defendant altering nature of suit property during pendency. As such, order of Trial Court regarding status quo was upheld.

Injunction—Equitable relief:
Where ex parte order was issued directing parties to maintain status quo in respect of suit land. Petition by respondent alleging violation of interim order was pending. Held, that appellant was not entitled to equitable relief till allegation against them were adjudicated.

Plaintiff not entitled to injunction against defendant to restrain it from withdrawing money:
Where suit for recovery of loan was filed against company. Plaintiff's case was that defendant company had approached it for loan through its Directors. Articles of Association of defendant-company had prohibited borrowing by company. Defendant-company had not approached plaintiff-company for loan.

The said Directors of defendant-company who were actually controlling affairs of Plaintiff-company had in collusion with plaintiff-company arranged whole transaction i.e., routing of money. Money entered into bank account of defendant-company not for its benefit but only to create some evidence. Held, that plaintiff was not entitled to injunction against defendant to restrain it from withdrawing money.

Mere plea of justification by defendants not sufficient for denial of interim relief:
Where interim relief was sought against defendants from making defamatory statements against company. Mere plea of justification was taken by defendants. It was not sufficient for denial of interim relief. Apart from taking plea of justification, defendants had to show that statements were made bona fide and in public interest. As such, rejection of application for injunction without ascertaining whether statements were made bona fide and in larger public interest was liable to be set aside.

Foreclosure suit: Preliminary Decree:
In a suit for foreclosure, if the plaintiff succeeds, the court shall pass a preliminary decree: (a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for principal and interest on the mortgage, the costs of the suit awarded to him and other costs, charges and expenses properly incurred by him, (b) declaring the amount so due at that date, and (c) directing that, if the defendant pays into court the amount so found, or declared due on a date fixed by the court within six months from the date on which such amount is declared, the plaintiff shall deliver up to the defendant all documents in his possession or power relating to the mortgaged property, and shall, if required, retransfer the property to the defendant at his (defendant's) cost free from the mortgage and from all incumbrances created by the plaintiff. If the payment is not made on or before the date so fixed the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property. (Order XXXIV, Rule 2).

Final Decree:
Where the payment is made by the defendant on or before the date so fixed, the court shall on application made by the defendant, pass a final decree ordering the plaintiff to deliver up the documents referred to in the preliminary decree and if necessary ordering him to retransfer at the cost of the defendant the mortgaged property and also, if necessary, ordering him to put the defendant in possession of the property.

Where the payment has not been made by the defendant on or before the date so fixed the court shall, on application made by the plaintiff, pass a final decree, declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. On the passing of a final decree all liabilities of the defendant in respect of the mortgage shall be discharged. (Order XXXIV, Rule 3).

Suit for sale: Preliminary decree:
In a suit for sale if the plaintiff succeeds, the court shall pass a preliminary decree ordering that an account be taken of what was due to the plaintiff at the date of the said deer declaring the amount so due at that date and directing that if the amount found due is paid on or before the date mentioned in the decree, the property be retransferred back to the mortgagor and that if the amount is not paid the property be sold.

If the amount is not paid as directed the plaintiff is at liberty to apply for a final decree directing that the mortgaged property of a sufficient part thereof be sold, and the proceeds of the sale, after deduction there from of the expenses of the sale, be paid into court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff. (Order XXXIV, Rule 4).

Final Decree:
Where on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree the defendant makes payment into court of all amounts due from him, the court shall, on application made by the defendant, pass a final decree or if such decree has been passed, on order ordering the plaintiff to deliver up the documents referred to in the preliminary decree and, if necessary, ordering him to transfer the mortgaged property and, also, if necessary, ordering him to put the defendant in possession of the property.

Where, however, payment has not been made, the court shall on application made by the plaintiff pass a final decree directing that the mortgaged property or a sufficient part thereof be sold. Where the net proceeds of any sale are found insufficient to pay the amount due to the plaintiff the court, on application by him, may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance. (Order XXXV, Rules 5 and 6).

Setting aside of Execution sale:
Under Order XXXIV, Rule 5 of the Code, judgment-debtor is required to make deposit of all amounts due in Court on any time before confirmation of sale is made in pursuance of a final decree.

Redemption: Preliminary decree:
In a suit for redemption if the plaintiff succeeds, the court shall pass a preliminary decree ordering that an account be taken of what was due to the defendant at the date of such decree for principal and interest on the mortgage, the costs of the suit, if any awarded to him and other costs properly incurred by him in respect of his mortgage security together with interest thereon; or declaring the amount so due at that date and directing that, if the plaintiff pays into court the amount so found or declared due on or before such date as the court may fix within six months from the date on which the court confirms and countersigns the account or from the date on which the amount is declared in court, the defendant shall deliver up to the plaintiff all documents in his possession relating to the mortgaged property and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant and that if payment of the amount found due under the preliminary decree is not made on or before the date so fixed, the defendant shall be entitled to apply for a final decree that the mortgaged property be sold or that the plaintiff be debarred from all right to redeem the property, depending upon the nature of the mortgage. (Order XXXIV, Rule 7).

Final Decree:
Where before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree the plaintiff makes payment into court of the money due, the court shall, on application made by the plaintiff, pass a final decree or, if such decree has been passed, an order ordering the defendant to deliver up the documents and, if necessary, ordering him to transfer at the cost of the plaintiff the mortgaged property and, also, if necessary, ordering him to put the plaintiff in possession of the property.

Where, however, the payment has not been made, the court shall, on application made by the defendant, pass a final decree in the case of a mortgage by conditional sale or an anomalous mortgage declaring that the plaintiff is debarred from all right to redeem the mortgaged property and in the case of any other mortgage, not being a usufructuary mortgage, that the mortgaged property be sold and the proceeds of the sale be paid into court and applied in payment of what is found due to the defendant. (Order XXXIV, Rule 8).

In the case of usufructuary mortgage clause (a) of sub-rule (3) of Rule 8 expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not

lost. It will be barred on expiry of the period of limitation prescribed under the Limitation Act.

In the case of preliminary decree for redemption of usufructuary mortgage, no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof. In the case of usufructuary mortgage, the plaintiff need not make any application for extension of time fixed in the preliminary decree.

The mortgagee defendant has no right to make an application to foreclose the right of the plaintiff or sale of hypotheca declaring that the plaintiff has been debarred from making payment in court or to proceed further.

At any time before passing of final decree or confirmation of the sale held in pursuance of the final decree the plaintiff usufructuary mortgagor has been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon.

The outer limit for making such payment is passing of the final decree or confirmation of the sale made in furtherance thereof. The outer limit for a usufructuary mortgagor for making payment of the amount due under the preliminary decree thereby is passing of the decree or the date of confirmation of the sale.

The provisions of S. 21-A of Banking Regulations Act (1949) are not intended to override Order XXXIV, Rule 11 of the C.P.C. or alter provisions of C.P.C. It is the discretion of court to fix the rate of interest for period during pendency of mortgage suits in court. The continuance or fettering of that the mortgaged property be sold or that the plaintiff be debarred from all right to redeem the property, depending upon the nature of the mortgage. (Order XXXIV, Rule 7).

Final Decree:
Where before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree the plaintiff makes payment into court of the money due, the court shall, on application made by the plaintiff, pass a final decree or, if such decree has been passed, an order ordering the defendant to deliver up the documents and, if necessary, ordering him to transfer at the cost of the plaintiff the mortgaged property and, also, if necessary, ordering him to put the plaintiff in possession of the property.

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The mortgagee defendant has no right to make an application to foreclose the right of the plaintiff or sale of hypotheca declaring that the plaintiff has been debarred from making payment in court or to proceed further. At any time before passing of final decree or confirmation of the sale held in pursuance of the final decree the plaintiff usufructuary mortgagor has been given right to make payment of the redemption money due under preliminary decree and the subsequent liability incurred thereon.

The outer limit for making such payment is passing of the final decree or confirmation of the sale made in furtherance thereof. The outer limit for a usufructuary mortgagor for making payment of the amount due under the preliminary decree thereby is passing of the decree or the date of confirmation of the sale. The provisions of S. 21-A of Banking Regulations Act (1949) are not intended to override Order XXXIV, Rule 11 of the C.P.C. or alter provisions of C.P.C. It is the discretion of court to fix the rate of interest for period during pendency of mortgage suits in court.
The continuance or fettering of such discretion are the matters of policy of legislature and Parliament may legislate in this regard in accordance with the provisions of the constitution. With regard to mortgage suits special provisions of Order XXXIV, Rule 11 are only applicable and not Section 34, C.P.C.
It is proper to grant interest at the rate of 6% from the date of suit in mortgage suits for recovery of bank loan.

Sale of property subject to prior mortgage:
Where any property the sale of which is directed is subject to a prior mortgage, the court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. (Order XXXIV, Rule 12).

Application of proceeds:
Such proceeds shall be brought into court and applied as follows : first, in payment of all expenses incident to the sale; secondly, in payment of the amount due to the prior mortgagee on account of the prior mortgage; thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed; fourthly, in payment of the principal money due on account of the mortgage; and, lastly, the residue, if any, shall be paid to the persons proving themselves to be interested in the property sold according to their respective interests therein or upon their joint receipt. (Order XXXIV, Rule 13).

Suit for sale of mortgaged property:
Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. (Order XXXIV, Rule 14).

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FRIENDLY SUITS - ORDER XXXVI SECTION 90

A friendly suit is a suit where the parties do not approach a court by presentation of a plaint as is done in ordinary civil litigation. However, they are interested in the decision of any question of fact or of law. For the said purpose, they enter into an agreement in writing stating such question in the form of a case for the purpose of obtaining the opinion of the court. The court may decide the question if it is satisfied that such question is 'fit' to be decided.

Order 32 provides procedure to tbe followed in friendly suits. Rules 1 and 2 provides the form and contents of an agreement. Such agreemet duly entered into between the parties should be filed in the court having jurisdiction to entertain the suit. It shall be registered as a suit and shall be heard and disposed of by a judgement which will be followed by a decree. Thus, the decree is a consent decree. No appeal lies against such decree. The procedure provided under this Order is rarely invoked because a litigant does not get apparent benefit under it.

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ORDER XXVIIA

SUITS INVOLVING A SUBSTANTIAL QUESTION OF LAW AS TO THE INTERPRETATION OF THE CONSTITUTION OR AS TO THE VALIDITY OF ANY STATUTORY INSTRUMENT

Rule 1: Notice to the Attorney General or the Advocate- General:

In any suit in which it appears to the Court that any such question as is referred to in clause (1) of Article 132, read with Article 147 of the Constitution is involved, the Court shall not proceed to determine that question until after notice has been given to the Attorney General for India if the question of law concerns the Central Government and to the Advocate-General of the State if the question of law concerns a State Government.
Rule 1A . Procedure in suits involving validity of any statutory instrument— In any suit in which it appears to the Court that any question as to the validity of any statutory instrument, not being a question of the nature mentioned in rule 1, is involved, the Court shall not proceed to determine that question except after giving notice—
(a) to the Government pleader, if the question concerns the Government, or
(b) to the authority which issued the statutory instrument, if the question concerns an authority other than Government.]

Rule 2: Court may add Government as party:
The Court may at any stage of the proceedings order that the
Central Government or a State Government shall be added as a defendant in any suit involving any such question as it referred to in clause (1) of Article 132 read with Article 147, of the Constitution, if the Attorney General for India or the Advocate-General of the State, as the case may be, whether upon receipt of notice under rule 1, or otherwise, applies for such addition and the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question of law involved.

Rule 2A: Power of Court to add Government or other authority as a defendant in a suit relating to the validity
of any statutory instrument:
The Court may, at any stage of the proceedings in any suit involving any such question as is referred to in rule 1A, order that the Government or other authority shall be added as a defendant if the Government pleader or the pleader appearing in the case for the authority which issued the instrument, as the case may be, whether upon receipt of notice under rule 1A or otherwise, applies for such addition, and the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question.
Rule 3: Costs:
Where, under rule 2 or rule 2A the Government or any other authority is added as a defendant in a suit, the Attorney-General, Advocate-General or Government Pleader or Government or other authority shall not be entitled to, or liable for, costs in the Court which ordered the addition unless the Court, having regard to all the circumstances of the case for any special reason, otherwise orders.
Rule 4: Application or Order to appeals:
In application of this Order to appeals the word "defendant" shall be held to include a respondent and the word "suit" an appeal.
Explanation—In this Order, "statutory instrument" means a rule, notification, bye-law order, scheme or form made as specified under any enactment.

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UNIT – IV

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. 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 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.

EXECUTION- 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."

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 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. Following persons may file an application for Execution: 1. Decree- holder 2. Legal representative of the decree-holder 3.Representative of a person claiming under the decree-holder 4. Transferee of the decree-holder, in some cases.

Court which may execute a 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 FOR EXECUTION:
Section 51 to 54 describe procedure in execution or mode for execution.

Mode of executing decree under section 51:
(a) By delivery of any property specifically decreed. Property may be movable or immovable
(b) By attachment and sale of the property or by sale without attachment of the property.
(c) by arrest and detention.
(d) by appointing a receiver.
(e) is the residuary clause and comes into play only when the decree cannot be executed in any of the modes prescribed under clause (a) to (d).

Arrest and detention: section 51 (c)
One of the modes of executing a decree is arrest and detention of the judgment-debtor in civil imprisonment. Where the decree is for payment of money, it can be executed by arrest and detention of the judgment-debtor. Following points are very important regarding arrest and detention :-
a. A judgment-debtor may be arrested at any time on any day in execution of a decree. After his arrest, he must be brought before the court as soon as practicable.
b. For the purpose of making arrest, no dwelling house may be entered after sunset or before sunrise. Further, no outer door of a dwelling house may be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or prevent access thereto.
c. No order of detention of the judgment-debtor shall be made where the decreetal amount does not exceed Rs.2000.
d. Where the judgment-debtor pays the decreetal amount and costs of arrest to the officer, he should be released once.
e. A decree for money cannot be executed by arrest and detention where the judgment-debtor is a woman, or a minor, or a legal representative of a deceased judgment-debtor. The Code of Civil Procedure lays down various modes of executing a decree. One of such modes is arrest and detention of the judgment-debtor in a civil prison. The decree-holder has an option to

choose a mode for executing his decree and normally, a Court of law in the absence of any special circumstances, cannot compel him to invoke a particular mode of execution. Sections 51 to 59 and Rules 30 to 41 of Order XXI deal with arrest and detention of the judgment-debtor in civil prison.

The provisions are mandatory in nature and must be strictly complied with. They are not punitive in character. The object of detention of judgment-debtor in a civil prison is twofold. On one hand, it enables the decree-holder to realize 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.

When arrest and detention may be ordered:

Where the decree is for the payment of money, it can be executed by arrest and detention of the judgment-debtor. Likewise, in case of a decree for specific performance of contract or for injunction, a judgment-debtor can be arrested and detained. Again, where a decree is against a corporation, it can be executed with the leave of the Court by detention in civil prison of its directors or other officers.

Who cannot be arrested:

As per the Civil Procedure Code, the following classes of person cannot be arrested or detained in a civil prison:

1. Judicial officers, while going to, presiding in or returning from their Courts;
2. A woman;
3. The parties, their pleaders, mukhtars, revenue agents and recognized agents and their witnesses acting in disobedience to a summons, while going to, or attending or returning from the Court;
4. Members of legislative bodies;
5. Any person or class of persons, whose arrest, according to the State Government, might be attended with danger or inconvenience to the public;
6. A judgment-debtor, where the decreetal amount does not exceed rupees two thousand.

The provisions relating to arrest and detention of the Judgment Debtor protect and safeguard the interest of the Decree Holder if the Judgment Debtor has means to pay and still he refuses or neglects to honour his obligations, he can be sent to civil prison. Mere omission to pay, however, cannot result in arrest or detention of the Judgment Debtor before ordering detention, the court must be satisfied that there was an element of bad faith, " not mere omission to pay but an attitude of refusal on demand verging on demand, verging on disowning of the obligation under the decree", which has been explained by the Hon'ble Krishna Iyer J. in **Jolly George Verghese V/s. Bank of Cochin (1980) 2 SCC 360.**

The Court is required to record reasons for its satisfaction for detention of the judgment-debtor. Recording of reasons is mandatory. Omission to record reasons by the Court for its satisfaction amount to ignoring a material and mandatory requirement of law. Such reasons should be recorded every time and in every proceeding in which the judgment-debtor is ordered to be detained.

Attachment of property: section 51 (b)

A decree may also be executed on the application of the decree-holder by attachment and sale, only sale without attachment of property. The code recognizes the right of the

decree-holder to attach the property of the judgment debtor in execution proceeding and lays down the procedure to effect attachment. Sections 60 to 64 and rules 41 to 57 of Order 21 deals with the subject of attachment of property. The code enumerates properties which are liable to be attached and sold in execution of a decree. It also specifies properties which are not liable to be attached or sold. It also prescribes the procedure where the same property is attached in execution of decrees by more than one court. The code also declares that a private alienation of property after attachment is void.

A decree may have to be executed by attachment and sale of JD's property. Attachment of property in decree for injunction or specific performance is aimed at coercing the J.D. to comply with the decree, or to expose him to a penalty in case of disobedience.

Attachment in a money decree is primarily for sale of property for eventual satisfaction of the decree out of sale proceeds. Before ordering attachment, the Court must satisfy itself that the J.D. has attachable interest in the property, and that the property is not exempt from attachment. While ordering attachment of salary regard may be had to the portion of salary not liable to attachment. Certain allowances are exempt from attachment. In execution of a decree for maintenance one third of the salary of J.D. is exempted from attachment. In other money decrees salary to the extent of first four hundred rupees and two third of the remainder are not liable to attachment. Thus, if the J.D. gets a salary of Rs. 1000/- the first Rs. 400/- plus two third of the remainder or two thirds of Rs. 600/- i.e. Rs.400/- in all Rs. 800/- would be un-attachable, leaving only Rs. 200/- available for attachment. Pay and allowance of military men and wages of labourers and domestic servants are exempt from attachment.

The Court must then determine the mode of attachment. Attachment can be made by seizure or by an order prohibiting the J.D. or other person from dealing with the property or by charging the debtor's interest in the property. When movable property other than agricultural produce is to be attached., it should be actually seized and kept in custody of the attaching officer, except when the property is subject to speedy and natural decay, in which case it may be sold at once. Property which cannot be conveniently removed may be left at the place of attachment in the custody of a respectable person.

Execution against the Agriculturist:

Before ordering attachment in livestock, the D.H. should be asked to deposit sufficient sum for removal of property to Court premises or other place as the Court may direct and also for its maintenance and guarding. Property attached may be placed in custody of D.H. for removal and conveyance to the place appointed by the Court.

Growing crop shall not be attached at any time less than 20 days before it is likely to be fit to be cut or gathered. When crop is attached warrant of attachment should be affixed on the land where the crop is growing, or if the crop has been cut or gathered, on the threshing floor, on the house in which the J.D. resides, and shall also be sent to the Collector. Order for attachment of crop should specify the time at which the crop is likely to be fit to be cut or gathered. The J.D. may be allowed to cut and gather the crop and if he fails the D.H. may be allowed to do the needful.

All objections to attachment, including questions of right, title and interest in the property attached, have to be decided by executing Court and not by a separate suit.

When decree is satisfied the attachment is removed. When the execution application is for any reason dismissed the court has to indicate the period upto which the attachment shall continue. If the Court fails to pass such orders, attachment shall cease at the expiry of period of appeal.

Sale of property:

A decree may be executed by attachment and sale or sale without attachment of any property. Section 65 to 73 and Rules 64 to 94 of Order 21 deals with the subject relating to sale of movable and immovable property. Before ordering sale, the court has to decide whether it is necessary to bring entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and decree to be satisfied is small the court must bring to sale only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree holder.

Properties which are liable to attachment and sale in execution of a decree :-

1. Lands 2. Houses or other buildings 3. Goods 4. Money 5. Banknotes 6.Cheques 7. Bills of exchange 8. Hundis 9. Promissory notes 10. Government securities 11. Bonds or other securities for money 12. Debts 13. Shares in corporation and 14. All other salable property whether movable or immovable.

Enforcement of decree u/s 52 against Legal Representative:

Section 52 (1) empowers a creditor to execute his decree against the property of deceased in the hands of legal representative so long as it remains in his hand. For application of this clause the decree should have passed against the party as the legal representative of the deceased

person, and it should be for the payment of money out of the property of the deceased.

Section 52 (2) empowers a creditor to execute his decree against the legal representative personally if he fails to accounts for the properties received by him from deceased person.

Section 53: Liability of ancestral property:

No legal representative should be held personally accountable where the suit has been filed against a joint Hindu family unless he has received some property of joint Hindu family. Under pious obligation if he has received the property of joint Hindu family then will be held liable. Where the decree has been passed against Karta, no execution be made against the son under pious obligation if the decree is passed after partition. Even after partition a son can be held liable if suit was pending before partition.

Section 54: Partition of estate or separation of share:

Section 54 comes into play when a decree has been passed for partition or for separate possession of a share of an undivided estate paying revenue to the government. Section 54 deals with a case where though the civil court has the power to pass a decree yet it is not competent to execute the same. Under this section the execution of decree shall be made by collector.

PRINCIPLES WITH REGARD TO EXECUTION OF DECREE:

Principles with regard to execution of decree and order can briefly be summarized as under –

- Provision of CPC relating to execution of decree and order shall be made applicable to both Appeal and Suit.

- A decree may be executed by the court which passed the judgment and decree or by some other court which is having competency to implement the judgment passed by such other court.
- The court which passed the decree may send it for execution to other court either on application of the applicant (decree-holder) or by the court itself.
- A court may order for execution of decree on the application of decree holder (a) by delivery of any property which was in possession of judgment-debtor and decree has been specifically passed concerning such property (b) by attachment and sell of the property of the judgment-debtor (c) by arrest and detention (d) by appointing a receiver (e) in such other manner which depends upon nature of relief granted by the court.
- Upon the application of decree-holder, the court may issue "percept" to any other court which is competent in that regard.
- All questions arising between the parties to the suit in the decree shall be determined by the court while executing the decree and not by separate suit.
- Where a decree is passed against a party as the "legal representative" of a deceased person and decree is for payment of money out of the property of deceased person, it may be executed by attachment and sell of any such property.
- Where immovable property has been sold by the court in execution of a decree such sale shall be absolute. The property shall be deemed to be invested in the favour of purchaser, and the purchaser shall be deemed as a party to litigation.
- The court to which decree is sent for execution shall require certifying to the court which has passed decree stating the manner in which decree has been implementing concerning the fact of such execution.

Whether Executing Court can go behind the decree:-

Section 38 lays down the general rule that, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. The executing Court has no power to entertain any objection as to the validity of the decree or as to the legality or correctness of the decree.

The reason underline the above rule is that, although a decree may not be according to law, it is binding and conclusive as between the parties to the suit, unless it is set aside in appeal or revision. It is for the same reason that, the Court executing a decree cannot alter, vary or add to the terms of the decree even with the consent of the parties.

In the case of V. **Ramswami Vs T.N.V.Kailash Theyar reported in AIR 1951 S.C,189**
(192), it was observed that, "*the duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation* ".

It has been held by the Supreme Court in **Karansing Vs Chaman Pawan reported in (1955) 1 SCR 117,** that a decree passed by a Court without jurisdiction is a nullity, and its validity can be set up whenever and wherever, it is sought to be enforced or relied upon, including the stage of its execution.

In **Topanmal Vs M/s Kundomal Gangaram reported in AIR 1960, SC 388,** it was held by the Supreme Court that, an executing Court must take the decree as it stands. An executing Court cannot go behind the decree. It can neither add something in the decree already
passed, nor alter the decree. It cannot grant relief which is not contemplated by the decree.

A Court executing a decree cannot go behind the decree. The court must take the decree as it finds it. It cannot entertain any objection that, the decree is incorrect in law or on facts, because until the decree is set aside by an appropriate proceedings in appeal, or in revision, a decree even
if erroneous, is binding between the parties. It has to see the decree as it is and execute it in accordance with the terms therein. It cannot question the correctness or legality of the directions. However, if the court which passed the decree has no inherent jurisdiction, the decree is incapable of execution. Dealing with this question, the Supreme Court observed in *Karan Singh V.Chaman Paswan* that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up wherever and whenever it is sought to be enforced, whether in execution or in collateral proceedings.

However, where the defect in jurisdiction was of a kind that fell within the saving of S.21 of the Code or S.11 of the Suits Valuation Act, it could not be raised except in the manner and subject to the conditions mentioned therein. This rule holds good only between parties to the decree and their representatives. The Court has no power to entertain any objection as to the validity of the decree that, it was obtained by fraud, or as to the legality or correctness of the decree, e.g. An objection that the decree sought to be executed was passed against a wrong person; or that it was passed against a lunatic or a minor not properly represented; or that the court which passed it, had no jurisdiction to do so. The reason being that a decree, though not according to law, is binding and conclusive between the parties until it is set aside, either in appeal or revision. For the same reason, the court executing a decree, cannot alter, vary or add to the terms of the decree even by the consent of the parties. A decree passed against an unregistered firm in violation of S.69(2) of the Partnership Act is not a nullity and cannot be questioned in execution. It is not open to the executing court to go into the validity of an order amending the decree. Broadly speaking, the distinction is one between a plea that the decree sought to be executed is a nullity and a plea that, it is invalid, improper or erroneous. It has been held that, the award of mesne profit for more than 3 years is in contravention of O.20 R.12, and is a nullity and that the objection can be taken in execution. An objection to the execution of a decree passed on a rent control order is admissible. The executing court cannot entertain an objection that the personal decree passed against the defendant before proceeding against the properties is erroneous. It is also not open to the executing Court to enquire whether the property charged by the decree was not available on the date of decree. Also, the objection based on the absence of territorial jurisdiction could be taken in execution, unless it is apparent on the face of the decree. However, when on the allegations in the plaint, the suit is beyond the pecuniary jurisdiction of the Court, a decree passed by it is a nullity and that objection can be raised in execution.

If the decree is free from ambiguity, the court of execution is bound to execute it whether it be right or wrong. But though a court executing a decree cannot go behind the decree, it is quite competent to construe the decree whether the terms of the decree are ambiguous, and to ascertain its precise meaning, for, unless this is done, the decree cannot be executed. But it cannot, under the guise of interpretation, make a new decree for the parties. The construction of a decree must be governed by the pleadings and the judgment. But when a particular construction has been put upon a decree in former execution proceedings, it is not open to the court to treat that construction as erroneous in a subsequent application.

Objection of parties

Whereas an objection to attachment or claim to attach property if made by a third party, the objector may either proceed by an application under this rule before the executing

Court or he may bring a suit to establish his objection. His failure to proceed by an application under this
rule is no bar to a separate suit. The object of this rule is to give a speedy and summary remedy, but this rule does not deprive him of his remedy by way of suit.

As per Para 345 of Civil Manual, the concerned Court is required to frame issue casting burden of proof on a particular party. Objections or claims filed against execution must not be disposed of without granting an opportunity to lead evidence.

In claim petition, the burden is on the claimant to prove that on the date of attachment, he has some right, title or interest or was in possession of property attached. If the claimant is succeeded in proving that fact, then burden is shifted on decree-holder to prove that the objector was not the owner or holds any interest for judgment-debtor. In a suit filed by a third party to the litigation, burden of establishing right, title or interest in the property is upon the plaintiff.

The Honourable Apex Court in the case of Brahmdeo Choudhary V/s Rishikesh Prasad Jaiswal AIR 1997 SC 856 held that, it can not be said that the only remedy available to the stranger to the decree for possession who has resisted its execution, to have his claim adjudicated is the one under R. 99 of O.21 after he has lost possession to the decree-holder and that he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceeding.

It is also held that it is easy to visualize that a stranger to the decree who claims an independent right, title, and interest in the decreetal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decreetal property even after losing possession as per Order 21 Rule 99. Order 21 rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can adjudicated upon before actual delivery of possession to the decree-holder. While Order 21 rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest dehors the interest of the judgment debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it even if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. Provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executive Court as well as by the decree-holder the remedy available to the decree-holder against such an obstruction is only Order XXI, Rule 97 sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession.

It is also held that the view that claim of stranger obstructionist would only be considered after he has lost possession to decree-holder would result in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder.

In the case of Silver line Forum Pvt Ltd. v. Rajiv Trust and another AIR 1998 SC 1754 held that, " Resistance or obstruction made even by a third party to the execution of decree can be gone into under O.21 R.97.

Rule 97 to 106 are substantial under the caption "resistance to delivery of possession to decree-holder or purchaser." Those rules are intended to deal with every sort of resistance or obstructions offered by any person. Rule 97 specifically provides that when the holder of a decree for possession of immovable property is resisted or obstructed by " any person" in obtaining possession of the property such decree-holder has to make an application complaining of the resistance or obstruction. Sub rule (2) makes it incumbent upon such complaint in accordance with procedure laid down.
It is also held that all question arising between the parties to a proceeding on an application under R. 97 or R. 99 shall be determined by the executing court, if such question are relevant to the adjudication of the application.

Delivery of Immovable Properties: Rules 35-56, section 51 (a)

Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

In **Madhukar Timbak Gore vs Vasant Ramkrishna Kolhatkar, AIR 1983 Bom 277,** it is held that when in execution a question arises as to the identity of the property of which possession has to be delivered to the decree-holder obviously such a question would relate to the execution of the decree and it would be for the executing Court to decide it as required by sub-section (1) of Section 47 of the Code, since it would not be possible for the decree-holder to get it determined by a separate suit, The proposition is so obvious so as not to need any authority.

The Allahabad High Court in Rahim Buxv. Mohammad Shafi has held that in such cases it is for the execution Court to decide the question after taking such evidence as may be necessary as to what is the property of which possession has to be delivered. Thus, Order 21, Rules 35 and 36, Rules 97 to 104 of the Civil Procedure Code provide for the complete code to deal with the execution of decree of delivery of possession to decree-holder or purchaser.

Custody and disposal of movable properties: Rule 31, section 51 (a)

A decree may have to be executed by attachment and sale of J.D.'s property. The attachment of movable property, other than agricultural produce, in possession of judgment debtor is to be made as per provisions of O.21 R 43 of C.P.C by actual seizure.

The attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof. However, when

the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

When the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to rule 43, he may, at the instance of the judgment debtor or of the decree holder or of any other person claiming to be interested in such property, leave it in the village or place where it has been attached, in the custody of any respectable person as the "custodian".However, if the custodian fails, after due notice, to produce such property at the place named by the court before the officer deputed for the purpose or to restore it to the person in whose favour restoration is ordered by the court, or if the property, though so produced or restored, is not in the same condition as it was when it was entrusted to him,—
(a) the custodian shall be liable to pay compensation to the decree holder, judgment debtor or any other person who is found to be entitled to the restoration thereof, for any loss or damage caused by his default; and
(b) such liability may be enforced-
(i) at the instance of the decree holder, as if the custodian were a surety under section 145;
(ii) at the instance of the judgment debtor or such other person, on an application in execution; and
(c) any order determining such liability shall be appealable as a decree.

When the decree directs delivery of specific movable property, the court would have indicated the amount to be recovered as an alternative if delivery of specific movable property cannot be effected. If delivery of such property cannot be effected by seizure or by detention of JD in civil prison or attachment of his other property, the court may award to the D.H. the amount indicated in the decree. If no such amount is indicated in the decree, the executing court would fix such compensation as it thinks fit and award to D.H.

Execution of decrees against person in military service:

When any officer or soldier actually serving Government in military capacity is a party to a suit and cannot obtain leave of absence for prosecuting or defending a suit, he can appoint some other persons to act on his behalf by an authority in writing given in the manner prescribed in Order XXVIII of the Code of Civil Procedure. He is provided by his Unit Commander with a certificate to enable him to obtain priority of hearing. This certificate must be presented by him in person to the Court.

Under Section 28 of the Army/Air Force Act, no arms, clothes, equipment, accoutrement or necessaries of any person subject to either of these Act nor any animal used by him for the discharge of his duties can be seized, nor can his pay and allowances or any part thereof be attached by direction of any civil or revenue Court or revenue officer in satisfaction of any decree or order enforceable against him.

Section 29 of the Army/Air Force Act provides that no person subject to either of these Acts, so long as he belongs to the Armed Force, can be arrested for debt under any process issued by, or by the authority of a civil or revenue Court or a revenue officer. Where, inspite of the above any such arrest is made, the Court of the revenue officer concerned on receipt of a complaint by such person or by his superior officer to that effect, may discharge him and award reasonable costs to the complainants. The costs may be recovered in like manner as if they were awarded to him by a decree against the person obtaining the processes. No Court-fees are payable for the recovery of such costs.

Reciprocal execution of decrees by courts in India and foreign countries:

Any decree passed by any Civil Court established in any part of India to which provisions of this Code do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends.

Under this section, read with sections 44 and 45, the Indian courts have power:

i) to execute decrees of those Indian courts to which the Code does not apply, such as Schedule Districts;

ii) to execute decrees of civil courts outside India, which are established by the authority of the Central Government;

iii) to execute the decrees of revenue courts in any part of India, to which the provisions of the Code do not apply; and

iv) to execute decrees of Indian courts in the state to which the State Government has notifies that s. 45 would apply.

Section 45 contemplates courts established by the Central Government. The words any part of India to which the provisions of this Code do not extend, have been constructed to include the sovereign states like former Indian states to which the Code could not be extended.

Stay of execution:

As per Order XXI Rule 26 the executing Court may stay the execution proceeding, the Court which passes the decree can stay the proceeding on application of judgment-debtor enabling him to file the appeal and to bring the stay to the execution proceeding. Where the suit is pending in any Court decree-holder and judgment-debtor in such circumstances if the Court is found the rights of parties are required to be adjudicated by the Court where such suit is pending and unless the rights are to be determined, the decree cannot be executed in such circumstances, Court can stay the execution proceeding. The appellate Court can also grant the stay to the execution proceeding.

Distribution of assets:

The multiplicity of proceedings may happen in cases where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property (Dundappa Virupaxappa Kallolgi v. Annaji Vardaji MANU/MH/0063/ 1953: AIR 1953 Bom).

It is also aimed at to provide for rateable distribution of assets upon which two or more decree-holders have equal claims. Section 73 of the Code of Civil Procedure is intended to provide expeditious, summary and cheap remedy for the execution of money decrees held against the same Judgment-debtor by several persons, the claims of rival decree-holders getting adjusted without the necessity for separate proceedings.

Section 73 provides that where assets are held by a Court, and more persons than one have, before receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same Judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons (PL. CT. PL. Palaniappa Chettiar v. A.RM.A.L.A. Muthu Veerappa Chettiar MANU/TN/0195/ 1966: AIR 1966 Mad 406; Peddireddy Ganga Raju v. K. Mangamma, AIR 1958 AP 334).

Execution of decree in specific performance of contract:

The court can direct that the act required to be performed by J.D. may be performed as far as practicable by D.H. or any other person for and at the cost of J.D. This is an addition to the remedies of attachment of property and detention of the J.D. in civil prison. A decree for specific
performance of agreement of sale is executed by obtaining from the decree holder a draft of the document prepared in terms of the decree. The draft is then served on the J.D. inviting his objections. After objection, if any, are dealt with and the draft is approved, the J.D., having failed to execute the same, the court would cause it to be registered by sending it to the sub registrar either with an officer of the court or a commissioner appointed for this purpose.

Preliminary Decree and Final Decree:-

Preliminary decree in a partition action is a step in the suit which continues until the final decree is passed. Where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the Court may pass preliminary decree declaring the rights of the several parties interested in the property and giving such further direction as may be required. In a suit for partition by coparcener or co-sharer, the Court is not expected to give decree only for the plaintiff's share, but it has to consider the shares of all the heirs after making them parties to the suit and then to pass preliminary decree. Therefore, the preliminary decree for partition is only a declaration of rights of the parties and the shares they have in the joint family or coparcenery property. The Court can pass more than one preliminary decree depending upon the facts and circumstances. For example, situation giving rises to change in the extent of the shares of the parties to the suit.

Hon'ble Bombay High Court in the case of ***Kusum Dashrath Kharmare Vs. Popat Madhav Gangarde and others, 2008(1) Mh.L.J 267***, laid down the law that, there is nothing in the Code of Civil Procedure which prohibits the Court from passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suit when after the preliminary decree some parties die and shares of other parties are thereby augmented. The proceeding is brought to an end when the final decree is drawn.

Hon'ble Bombay High Court in the case of ***Annasaheb Rajaram Nagane and another Vs. Rajaram Maruti Nagane and others AIR 2001 Bom.303*** gave directions to the Civil Courts as follows: "By way of general directions, all the civil Courts are directed to remit, to the Collector, within four months from the date of signing the decree under Section 54 of CPC, all the relevant papers for partition of property or a separate possession of undivided estate assessed to the payment of revenue to the Government, without there being any application or request or prayer for the same; so as to follow the mandate of Section 54 of CPC. Any application seeking direction to send necessary papers to the Collector, should be disposed of within 30 days from the receipt thereof, treating it as an application filed in the disposed of suit, without opening any independent proceeding in this behalf. Such application should be treated as a request to a Judge or Court to send necessary papers to the Collector for effecting partition under Section 54 of CPC. Such application is really nothing but a request to the Judge or Court to discharge his ministerial duty. In view of this, even no notice to any of the parties to the application is necessary as it is not a petition seeking any adjudication of any of the rights of the parties.

Execution of decree for restitution of conjugal rights: Rules 32-33

A decree of restitution of conjugal rights implies that the guilty party is ordered to live with a aggrieved party. Restitution of conjugal rights is the only remedy which could be used by the deserted spouse against the other. A husband or wife can file a petition for restoration of their rights to cohabit with the other spouse. But the execution of the decree of restitution of conjugal rights is very difficult. The Court though is competent to pass a decree of restitution of conjugal rights, but it is powerless to have its specific performance by any law. The non-compliance of the issued decree results to constructive destruction on the part of the erring spouse. Decree of restitution of conjugal rights could be passed in case of valid marriages only. 58] In a decree of restitution, the party, against whom the decree is passed, cannot be compelled physically to restore cohabitation. A Court is not competent to direct that the wife or husband be, bodily handed over to other spouse and restrain him or her of liberty until he or she is willing to render him or her conjugal rights. As per provisions of the present Act, the aggrieved party can move a petition for a decree after one year from the date of the passing of the decree and the competent Court can pass a decree of divorce in favour of the aggrieved party. Another advantage the aggrieved wife can have from this provision is that she can claim maintenance from the husband.

Modes of early disposal of execution petition:

Taking into consideration the fact that it is only the execution which reveals and signifies the importance of the decrees to be passed, there can be some basic modes for early disposal of execution petition. In that regard some modes can be by reserving some special day for execution

work. Execution of decrees should receive the same attention from the Courts as original civil work and should be methodically and regularly dealt with, as expeditiously as possible. Where parties have to be heard or evidence recorded in the course of execution proceedings, notice should be given, processes issued and dates fixed as in the case of original suits. As a rule, one day during the week should be reserved for execution work so as to ensure proper attention being paid to it; sometimes two days are necessary.

At the time of dealing of execution proceeding, if Court strictly follow the rules, then execution proceeding can be disposed of as early as possible. In this proceeding, Section 5 of Limitations Act is not maintainable. If below 2 years from decree, no notice under Order XXI Rule 22 of C.P.C. be sent. Notice is not necessary if Court feels that unreasonable delay will be caused. In cases of salary attachment, no notice to pay disbursing officer is necessary. It is sufficient if attachment warrant is sent to him.

Stay of proceeding is the obstacle for early disposal of execution proceeding. This is where the proceedings get stuck without any progress. If we strictly follow the provision and decisions of High Court and Supreme Court delay will be considerably cut down and justice will be done in time.

Court cannot stay of execution of its own decree. Only under Order 41 Rule 5 C.P.C., stay can be granted by Trial Court, but for fixed time only. No stay can be granted if appeal is filed with delay condonation petition. If Court is satisfied that appeal is pending, then no purpose in keeping the execution proceeding pending. Execution proceeding can be dismissed with liberty to file fresh execution petition after disposal of appeal. The limitation will be saved since decree will merge in appellate Court decree and time will run afresh after disposal of the appeal.

Decrees in Garnishee:

Garnishee means a judgment-debtor's debtor. He is a person who is liable to pay a debt to a judgment-debtor or to deliver any movable property to him. A garnishee order is an

order passed by a Court ordering a garnishee not to pay money to the judgment-debtor because the latter is indebted to the garnisher.

The primary object of a garnishee order is to make the debt due by the debtor of the judgment-debtor available to the decree-holder in execution without driving him to a suit.

Garnishee proceeding is a process of enforcing a money judgment by the seizure or attachment of debts to accruing due to the judgment-debtor which found part of his property available in execution. Before using attachment, the Court may issue notice to garnishee. Such notice calls upon garnishee to pay the amount to satisfy the decree or to show cause why he should not do so. If garnishee makes payment in the Court, it will amount to harry discharge of his debts. A garnishee has right to show cause why such debts is not payable or why he should not be called upon to make the payment in the Court. If the garnishee disputes the liability, it shall be decided as if it was issue in a suit and upon determination of such issue; the Court can make order as deemed fit.

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UNIT- V

THE LIMITATION ACT, 1963

The law of limitation is based on the Maxim

"Vigilantibus Non Dorminentibus Jura Subvenient"

Means- The law assist those who are vigilant and not those who asleep over their rights.

i.e. the Court of justice require that parties to a litigation shall exercise due degree of vigilance and caution.

Contents of the Act:-

It consists of 32 sections. But sections 28 and 32 were repealed. And the Schedule consists 137 Articles.

The sections deal with the provisions relating to applicability of the Act and the rules for computation of limitation period. But the articles just prescribe the limitation for various suits, Appeals and applications.

Introduction:-

The new Act, 1963 repeals the Indian Limitation Act, 1908 and received the assent of the President on 5th October 1963 and on the same day published in the Gazette.

History:-

Under the Hindu Jurisprudence there was only law of prescription and no law of limitation. Since because the main occupation was agriculture and there was very little of commerce or trade. For the acquisition of title by prescription, a period of 20 years was laid down by certain Smirithi writers.

In England, before the James Statute of 1523, there was no specific law of limitation.

First attempt to introduce a Uniform Law of Limitation applicable alike to Courts established by Royal Charter (in the presidency towns of Calcutta, Madras and Bombay) and other Mofusil Courts was made by the Limitation Act, 1859 (Act XIV of 1859) which came into operation in 1862.

On the basis of decisions of Courts it was amended by Act IX of 1871 which was replaced by Act XV of 1877 with certain alterations. There were other amending Acts which followed the Act of 1877. Finally Indian Limitation Act 1908 was passed. Which underwent amendments from time to time and finally repealed and the Limitation Act, 1963 was passed.

The Act of 1963 – some salient changes:-

Most significant change introduced by the new Act is that the Maximum period of limitation is prescribed as 30 years. This maximum period is prescribed only for 3 kinds of suits. They are:-

(i) suits by mortgagor for the redemption or recovery of possession of immovable property mortgaged

(ii) suits by mortgagee for foreclosure

(iii) suits by or on behalf of the central government or any state government including state of Jammu and Kashmir.

Period of 12 Years –

Period of 12 years is prescribed for various kinds of suits relating to immovable property, trusts & Endowments.

Period of 3 years:-

Period of 3 years is prescribed for suits relating to accounts, contracts, and declaratory suits, suits relating to decrees & instruments and suits relating to movable property.

Period varying from 1 year to 3 years:-

Suit relating to torts and miscellaneous matters and suit for which no period of limitation is provided elsewhere in the schedule of the Act.

Minimum period of limitation:- (10 days)

10 days period is prescribed for application for leave to appear and defend a suit under summary procedure from the date of the service of summons. Under the old Act, the minimum period of 7 days was prescribed for Appeal against a sentence of death passed by a Court of Session or a High Court in the exercise of its original jurisdiction. Since the period was inadequate, now it is raised to 30 days from the date of sentence.

OBJECT:-

'To prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost be a party's own inaction, negligence or laches'.

Case law for the maxim: "Vigilantibus non dorminentibus jura Subvenient" is

- Rangender Singh – Vs- Santa Singh, AIR 1973, SC 2537 at p.2542

The object of the Act is that the interest of the State requires that there should be an end to litigation.

- Boota mal –Vs- UOI, AIR 1962 SC 1716

Held:- equitable consideration are out of place and the strict grammatical meaning of words is the only safe guide in interpreting the statute of limitation.

Interpretation of the Statute of Limitation:-

- Nagendranath –Vs- Suresh Chandra, AIR 1932 PC 165
- General Accident Fire and Life Assurance Corp. Ltd –Vs- Jamahomed Abdul Rahim, AIR 1941 PC 6

It was laid down that the provision of the limitation Act create a bar to the seeking of a remedy by a person in respect of his right such an Act therefore must be strictly construed.

In *Antonysami –Vs- Arulanandan Pillai, (4) CTC 495 at P 501; AIR 2001 SC 2967

Held: -the fixation of periods of limitation are bound to be, to some extent arbitrary and may at time results in hardship. But in constructing such provisions equitable considerations are out of place and the strict grammatical meaning of the word is the only safe guide.

APPLICABILITY:-

Object to compel litigants to be diligent in seeking their remedies in Courts of law by prohibiting the hearing of stale claims.

- it has no application to any proceedings outside the law of Courts
- Limitation Act applies only to suits, Appeals and applications filed in a Court but have no application outside these proceedings.

➔ Hari Raj Singh –Vs- Sanchalak Panchayat Raj, UP Govt, Lucknow, AIR 1968 All 246 P 250

- limitation act applied to all Appeals to all Courts
- it is indeed true that it does not apply to all applications but only to certain applications

➔ Dharama Chand Roy –Vs- Nabin Chandra Mandal, AIR 1963 Cal 253 P254

Sec 2 – Definitions:-

SECTION 2(a):-

"Applicant" includes

(i) a petitioner,

(ii) any person from or through whom an applicant derives his right to apply;

(iii) any person whose estate is represented by the applicant as executor, administrator or other representative;

Section 2 (b):- "application" includes petition.

Refer Bare Act for definitions.

PART II (Sections 3 to 11)

Sec 3 – Bar of Limitation

Scope and Object of Rule of Limitation:-

Limitation does not extinguish the right but only bars the remedy. If a remedy becomes barred under the law of limitation in force at the time, a subsequently change in law giving a longer period of the limitation will not by itself, in the absence of provision for the purpose, revive or rather recreate the remedy.

➔ Section 2 of Limitation Act, 1877 &

➔ Section 31(a) of Act, 1963

Recognize and declare this principle deductible from Section 6 of General Clauses Act.

It is the duty of the Court or the statutory tribunal to find out, whenever a proceeding is presented before it, as to whether the presentation is within the time prescribed by the statute. This was held in

- P.R. Seetharaman –Vs- Govt. of TN AIR 1988 Mad 45 at P 48,49

Time – Barred suit to be dismissed:-

Section 3 places statutory obligation on the Courts to examine whether the suit is filed within limitation or not and of the suit is filed beyond limitation what must follow is that it must be dismissed. Held in

- Syed Jalaluddin Hasan Quadri –Vs- M/s Tara Pharmacy AIR 1966 AP 136 at P 137

In view of section 3, every suit, subject to sections 4 to 24, filed after the prescribed period shall be dismissed although the limitation has not been set up as a defence. The Court has no choice except to reject the suit if such suit is filed beyond the period of limitations. This was held in

- Nachimuthu Gounder @ Duraiyan –Vs- Ganthimathi, 2001(4) CTC 135 at P 138

This provision u/s 3 creates a statutory bar to suit which is filed beyond the period of limitation prescribed by the statute.

Applicability of Sec 3 to Quasi-Judicial proceedings:-

The earlier pronouncement of the Apex Court have settled the rule that the provisions of the Limitation Act, 1963 apply only to proceedings in 'Courts' & not to Appeals or applications before bodies other than Courts such as quasi-judicial tribunals, executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified power conferred on the Courts under CPC & Cr.P.C.

- Menon Ibrahim –Vs- Officer-in-charge, 1994 (1) Civil L.J 301 P 306, 307

Date of presentation of plaint:-

Where a plaint is filed in the Court of Principal Civil Jurisdiction with application for transfer to Subordinate Court and thereafter it is transferred to the Subordinate Court and registered, then the date of presentation of the plaint to Court of Principal Jurisdiction will be taken to be the date on which the suit for the purpose of limitation.

- Arya Prithinidhi Sabha, Punjab, Jullundur –Vs- Dev Raj Vir Bhan, AIR 1963 Puj 208 at P 210, 211

Sec 3(2)(b):- any claim by way of set-off or counter-claim shall be treated as a separate suit and shall be deemed to have been instituted –

(i) in the case of set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of counter claim, on the date on which the counter claim is made in the Court.

Laches:-

Laches pre-supposes not only lapse of time, but also the existence of circumstances which render it unjust to give relief to the plaintiff. Question of laches comes in when the plaintiff seeks to obtain equitable relief. But the principle of laches, which is based on the equitable doctrine, is not applicable to case where the Court has to determine the legal rights of a party.

- Venkattal Baldeoji Mahajan –Vs- Kanhiyalal Jankidas, AIR 1963 MP 155 at P 157,158

When no sufficient ground to condone the delay:-

- Banarsi Das –Vs- State of U.P, AIR 1956 SC 520 at P 522

Fact: - there was a delay of 44 days in filing Appeal in the SC. The appellant urged for the condonation of delay. They contended that the collection of money from large number of petitioners interested in filing the Appeal caused the delay.

Held: - Not sufficient ground for condonation.

Section 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 in the date 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."

Basis of section 4 is based on the following two maxims

(i) "Lex non cogit ad impossibilia"

➔ The law does not compel a man to do that which he cannot possibly perform

(ii) "Actus curiae neminem gravabit"

➔ An act of the Court shall prejudice no man

Section 4 can be invoked only to those cases where period of limitation is prescribed. When such prescribed period expires on the day on which the Court is closed then the proceeding may be launched on the day that the Court re-opens.

Example:- suppose limitation period prescribed for an Appeal is 30 days from the date of order dated 15.04.07. Then the last date of limitation is 15.05.07. If it falls on Sunday or vacation or any holiday declared by the government, then he will be allowed to file it on next working day.

Certain principle were laid down in the case of

- Dhanna Mistry –Vs- Bengal Nagpur Railway Company Ltd, AIR 1934 PAT 367

(i) period of limitation should be computed first

(ii) if section 12 or other similar sections permit the exclusion of any period, it should be added with the prescribed period of limitation

(iii) if the total thus arrives falls on a day when the Court is closed, then sec 4 comes into play.

Section 5:- Extension of prescribed period in certain cases: (Condonation of delay)

"Any Appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 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 sufficient cause within the meaning of this section.

The new section 5 applies to all applications other than those arising under Order XXI of CPC i.e. relating to execution of degrees. And it also applies to all special or local enactments unless specifically excluded by any of them.

- Bonrelal –Vs- Kunj Beharilal, AIR 1969 Raj 299 at P 301

➔ Sections 4 to 24 applicable to Appeals or applications under special or local laws also unless they are expressly excluded by the special or local laws.

<u>General Principles – Condonation of Delay:-</u>

Existence of sufficient cause has to be decided on the facts and circumstances existing in a particular case. Consideration of the existence of a sufficient cause is a discretionary

power with the Court. But such discretionary power has to be exercised on sound judicial principle and not on the mere fancies or whims of the Court.

Duty of the Court in condoning the delay:-

It must be remembered Lord Cairn's words used in

- Rodger –Vs- Comptoir d' Escompte de Paris (1871)

"One of the first and highest duties of all Courts is to take care that the act of the Court does not injury to any of the suitors".

Condonation of delay- number of aspects:-

In condoning delay – the Court has to examine the following aspects viz

(i) whether the petitioner has satisfactorily proved 'sufficient cause' for the delay for not filing the petition in time

(ii) was there any negligence or inaction or want of bonafide on the part of the petitioner

(iii) whether a valuable right that has accrued to the other party will be likely to be defeated by condoning the delay

(iv) whether the petitioner have arguable points on facts and law.

Oral request not sufficient – written request or application mandatory

It is apparent that intention of the Legislature in inserting Rule 3A in Order 41 of CPC, 1908 was to make it mandatory to move an application for condonation of delay by using the phrase "it shall be accompanied by an affidavit".

Case law:-

- Mathurabai G. Sanavane –Vs- Rahibai B. Karthe, 2001 (3) Bom C.R. 428 at P 430

The petitioner acquired knowledge of the 'ex-parte' decree for the first time on 29.08.1994. She approached the Court on the specific plea that her husband was absconding since prior to 1993 and was not traceable. There is no positive claim to rebel her claim. Court had no hesitation to accepting the explanation offered by the petitioner as sufficient reasonable cause for condoning the delay. It was not in dispute that after acquiring the knowledge on 29.08.1994 she immediately rushed to the Court and instituted necessary application and memorandum of Appeal on 5th September 1994.

Condonation of delay – in favour of Govt:-

Even if the applicant is bank discretion cannot be exercised.

- M/s A.P.Chemicals & Minerals Public Limited Co., - Vs- State Bank Of India,

  AIR 2000 AP 18 at P 20

Below Court exercised discretion in favour of the application. But on Appeal it was held that the Court must satisfy the delay and it has to be satisfactorily explained. Therefore the Court had set aside the order of the Court below.

Production of medical certificate – sufficient cause:-

- Jivamal Jethamal – Vs- Mohd Allabdulla, 1991 (1) Guj L.H 374 at P 376

Whether sec 5 is applicable if the appellant of applicant is in imprisonment?

Period of imprisonment may be excluded as sufficient cause.

Θ It is not that imprisonment in jail is always a sufficient cause. It all depends on the facts and circumstances of each case.

- Collector of Balasore –Vs- Ashutosh Roy, AIR 1963 Orissa 102 at P 103

Held:- Court has to consider whether in jail at the material time the defendant was in any way embarrassed or handicapped in his defence by reason of the jail authorities having not given him proper facilities for giving instructions to his lawyer or otherwise having caused disability to the defence.

Interpretation – sufficient cause – liberal:-

- Patel Mahanlal Dhanjubhai Godhasara –Vs- Patel Laxmidas Naranbhai Kansagera, AIR 1988 Guj 48 at P 51

➔ Sufficient cause has to be construed liberally so as to advance the cause of justice and not the cause of technicalities.

➔ As far as possible a case should be decided on merits and a party should not be deprived of his right to get the case examined on merits.

Θ section 5 makes no distinction between the state and the individual with regard to the need of establishing a sufficient cause.

Sufficient cause- no definition:-

The expression "sufficient cause" has not been defined in the Act. But certain rules have been laid down by Judicial decisions.

Firstly – liberal construction of the word sufficient cause and the advancement of substantial justice is the rule.

- G. Ramegowda Major –Vs- Special Land Acquisition Officer, Bangalore, AIR 1988 SC 897

2nd Rule:- the liberal approach is the matter of understanding the word sufficient cause must take into account not only the appellant's case but also on the respondent's right.

- State of West Bengal –Vs- Howrah Municipality, AIR 1972 SC 749

3rd Principle:- every day delay must be explained is not absolute.

Fourthly:- since no litigant benefits by his own delay, the inquiry should not commence with a presumption of negligence or deliberate inaction.

Fifthly:- if the cause of delay as set out by the appellant is having regard to all the facts reasonable it may be sufficient cause.

- John –Vs- Mammoothy, AIR 1985 Kant 120 at P 126

Erroneous legal advice, sickness, distance from the Court and poverty are some of the causes which may be considered as sufficient cause.

- Kumari Amma –Vs- Kavukutty Amma, 1993 (2) K.L.J. 793 at P 796

Ignorance of law, per se, no ground to condone the delay:-

- Thakur dass –Vs- Aflatoon, 1991(1) C.L.J.

Order was passed against a person 4 years ago. But no Appeal was preferred by him till his death. The successor filed Appeal. Dismissed – reason not sufficient.

Test for determining sufficient cause:-

A cause for delay which by due care and attention, the party could avoid cannot be sufficient cause.

* State Health & Engineering Department –Vs- District Forum, Consumer Protection, Bikaner, 1991 CPJ 432

Held:- if there is bonafide cause, then only condonation may be allowed.

Absence of prayer for condonation of delay- no option but to dismiss the Appeal:-

- Kailash District Co-operative Marketing & Supply Federation Ltd, Dhalli –Vs- Sher Singh Mehta, AIR 1988, H.P. 1 at P 2

Note:- limitation Act is not applicable when another Act provides a period of limitation.

Acceptance of Appeal etc after Court hours – Rules regarding the refusal:-

⊖ Nothing in Order IV Rule 1 of CPC to show that presentation must be within office hours. Judge to whom a plaint or application is presented after the Court hours has discretion to accept or reject it. But once the Judge accepts it, he cannot refuse to take it by endorsing his refusal.

⊖ Sec 5 not applicable to suits and is only applicable to Appeals and applications – sufficient cause. In a Court entertaining original suits the refusal to entertain a plaint filed after Court hours put an end to the claim of the plaintiff if that is the last day of limitation.

⊖ though a Judge is not bound to accept a plaint or application presented to him after Court hours and if that is the last day of limitation, if it is not too inconvenient, as far as possible he should accept the plaint or application and direct it to be put up before him the next day in Court for further orders.

- Pindukura Balarami Reddy –Vs- Jaladanki venkatasubbaiah, AIR 1965 AP 386

Applicability of Sec 5 to application u/O 21, Rule 89, CPC:-

The provisions u/sec 5 makes clear that the section is not applicable to applications under Order XXI.

- Mohan Lal –Vs- H.R.Yadav, 1994 (2) SCJ 406

SECTIONS 6,7& 8:- LEGAL DISABILITY:-

SECTION 6:-

Sec 6(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, insane or an idiot
- he may institute the suit or make the application
- within the same period after the disability has ceased
- as otherwise have been allowed from the time specified under the Act.

Sec 6 (2):- if such person

- at the time from which the prescribed period is to be reckoned
- affected by two such disabilities or
- before one disability has ceased affected by another disability
- he may institute the suit or make the application

- within the same period after the disability has ceased.

Sec 6 (3):- where the disability continues up to the death of the person

- his legal representative may institute the suit or make the application
- within the same period after the death.

For example:- if the period of limitation for instituting a suit is 3 years. But at the time when the period is to be reckoned the person is insane and continues upto his death, his legal representative is allowed to file the suit within the same limitation of 3 years.

Sec 6 (4):- where the legal representative referred u/ sub section (3) is affected by any disability at the date of the death of the person, the rules contained in sub-sections (1) and (2) shall apply i.e. he will be allowed to institute the suit or file the application after the disability has ceased.

Sec 6 (5):- where a person under disability dies after the disability ceases

- but within the period allowed to him
- his legal representative may institute the suit or make the application
- within the same period
- as would otherwise have been available to that person if he had not died.

For example:- if the period of limitation for instituting a suit is 3 years. But at the time when the period is to be reckoned the person is insane. He recovered from insanity and turned sane. After then the limitation period start run against him. If he dies after 1 year 4 months after has ceased from disability, the legal representative is allowed to file the suit within the remaining period of 1 year and 6 months.

Scope:- Sections 6,7 and 8 applies only when the disability is in existence at the time when the limitation begins to run. But time is not saved where disability does not exist at the point on which limitation begins to run i.e. if limitation once starts it never stops despite subsequent disability.

Section 6 gives protection to minor. But it does not prevent a minor from instituting a suit through his next friend during minority. Under Order 21, Rule 1 of CPC, a minor has two rights.

(i) he can bring a suit within a specified time after the attainment of majority

(ii) during the subsistence of his minority, he can institute a suit through his next friend.

➔ Sardar Vijaysingh Rao Ghorpde –Vs- Jewan Lal Ram Das Jaiswal, AIR 1963 M.P 100

Period of limitation shall be computed in the case of a minor from the date cessation of his minority.

Applicability to minor:-

Minor succeeding to the estate of his father after his death can bring suit for possession within 12 years from the date of his attainment of majority.

- D. Singh –Vs- G. Singh, 1994 CLJ 665

Child in mother's womb:-

- Aswini Kumar Pan –Vs- Smt. Parimal Debi, AIR 1964 Cal 354 at P 356

Held:- minor. Who at the time he was entitled to sue, was suffering from necessary disability.

Section 6 does not prevent limitation – it merely extends it regarding specified persons.

Section 6(5) removes conflict – when person under disability dies after the disability ceases but within time allowed by law to institute a suit, his legal representative can take advantage on the extended period to the same extent as in the case where the disability of a person continues up to his death.

Earlier cause of action and bar to suit u/s 6 and 9:-

- Lalchand Dhanalal –Vs- Dharamchand, AIR 1965 MP 102

Section 6(1) cannot be availed by the subsequent adopted son.

➔ First instance a person entitled to institute a suit must suffer from disability at the time from which the period of limitation is to be reckoned.

➔ If the suit is based on earlier cause of action, the plaintiff was neither born nor suffers from any disability then section will not apply.

SECTION – 7:- DISABILITY OF ONE OF SEVERAL PERSONS:-

'Discharge' meaning – section 7 not only applies to money claims such as debts but also other rights of the plaintiffs including rights in immovable property.

- Doraisami –Vs- Nondisami, ILR 38 Mad 118

Suit brought by two brothers of an undivided Mitakshara family. But it was filed beyond 3 years after the elder brother's attainment of majority but within 3 years after the younger brother's attainment of majority.

HELD:- Suit was barred by limitation.

- Jawahir Singh –Vs- Udai Prakash

Held:- right of the younger son to challenge an alienation of the father was not extinguished by the omission of the elder brother to file the suit within the period prescribed for him.

Correct Position:-

If there is a manager capable of giving a discharge and if he does not institute a suit within the time allowed by law, the suit by minor member though instituted within 3 years of their attainment of majority will be barred.

After Jawahir Singh's decision unless it is established that he is a 'de jure' manager or 'de facto' manager, he is not a person capable of giving valid discharge.

In HUF only the managing member can give a valid discharge.

Whether minority of one son could enlarge the period of limitation?

His minority cannot in any way benefit t plaintiffs who were major even on the date of alienation.

- Narayan Ramchandra Katkar –Vs- Arjun Bhimrao, 1985 (2) Civil L.J. 455 (Bom)

SECTION 8 : SPECIAL EXCEPTIONS:-

- Nannekhan –Vs- Ganpati, AIR 1954 Hyd 45

➔ If a minor – at the date of his attainment of majority, a large period than that of 3 years provided under law, he can file that suit within the original period of limitation.

➔ But if the period prescribed by law expires during the time when he is a minor, he can file a suit within 3 years from the date of attainment of majority.

For example:-

If the limitation period available for filing of a suit is 12 years and person entitled to file it is a minor of age 12 years, during his minority 6 years of limitation lapse and the remaining 6 years are available to him. In this case he can file a suit within the remaining period of 6 years.

But if suppose the person is minor of age 4 years; the entire limitation of 12 complete years itself lapse during minority i.e. within 16 years. In this case, he will be allowed to file a suit within a period of 3 years from the date of attainment of majority which is the maximum period available to him and not the original period of 12 years.

Section 8 is an exception to section 6 and 7. It is a limitation to the above sections.

SECTION 9 – CONTINUOUS RUNNING OF TIME:-

Maxim of Banning:-"It is almost universal rule in the law of limitation that once time has begun to run, nothing stops it"

Scope: once a right to sue has accrued and time has started running, it could not stop unless there was some direct obstruction to the remedy itself or unless the case fall within some of the exceptions provided in the Limitation Act.

- Ajab Lal Mandar –Vs- Jai Prakash Lal Sahu, AIR 1953 Pat 35

Sec 9 refers only to subsequent disability of inability to sue or make an application. It has nothing to do with a case where execution has been stayed by an order. The time during which the executing cannot go on because of an order resulting in the stay of execution is expressly excluded by sec 15(1) of the Limitation Act.

SECTION 10 – SUITS AGAINST TRUSTEES AND THEIR REPRESENTATIVES:-

When a document creates an **express trust** and by virtue of sec 10 of Limitation Act, the suit against the defendant in whom the property had become vested in trust for a **specific purpose** or his legal representative for the purpose of following such property in his hand or their hands or the proceeds thereof, cannot be barred by any length of time.

** Applicable only to a case of property which has become vested in 'trust for specific purpose'

- Ramachandra Jivaji Kanago –Vs- Laxman Shrinivas Naik, AIR 1945 PC 54

Scope and applicability:-

Reason behind the section – 'an express trust ought not to suffer by the misfeasance or non-feasance of a trustee'.

- Achuthan Pillai –Vs- State of Kerala, AIR 1972 Ker 39

** Sec 10 applicable only to the 'Trust for a specific purpose' i.e. express trust. Therefore it will not apply to an implied trust i.e. trust arising by operation of law.

- Soonderdas Thakersay –Vs- Bai Laxmibai, AIR 1946 Bom 131

** The insolvency Court or the Court Receiver is trustees for the creditors only by operation of law. Sec 10 cannot be utilized against them.

- Kripa Nath –Vs- Ganga Prasad, AIR 1962 All 256

Trustee or Mutawalli:-

Time never runs in favour of a trustee so as to enable him to claim the trust property for himself.

- Biliram & Bros –Vs- Choudri Mohd Afzal, AIR 1948 PC 168

The explanation under sec 10 states that a suit by a beneficiary against a trust for the enforcement of a beneficiary right may not be barred by limitation.

Suit by the wife against husband for recovery of her stridhana – No limitation to such suit:-

- T.C. Chacko –Vs- Annamma, AIR 1994 Ker 107

Held: husband is in the position of a trustee, so far as the ornaments and utensil entrusted to him by the wife are concerned u/s 10. There shall not be any limitation for such a suit by the wife against husband.

Section 11- suits on contracts entered into outside the territories to which the act extends:-

Principle of Lex fori:-

It is well settled that the remedy and procedure only is governed by the law of the country in which the action is brought and not be foreign law.

No foreign law of limitation is a defence to a suit in India unless that law has extinguished the contract and the parties were domiciled in such country during the prescribed period.

- Nabibhati Vazirbai –Vs- Dhyabhai Amulakh, AIR 1916 Bom 200

Held: a decree passed by the native state of Baroda could not be executed in India because the application for execution was barred by the Indian law of limitation although it was clearly not barred by the law of limitation of the Baroda state.

PART III

COMPUTATION OF PERIOD OF LIMITATION (Secs 12-24)

Sec 12(1) – the day from which such period is to be reckoned shall be excluded.

Sec 12(2)- (i) The day on which the judgment complained of was pronounced (ii) Time requisite for obtaining a copy of the decree, sentence of order Appeal from or sought to be revived or reviewed shall be excluded

Sec 12 (3) - where a decree or order is Appealed from or sought to be revised or reviewed or where an application made for leave to Appeal from a decree or order – the time requisite for obtaining the order copy of the judgment shall be excluded

Sec 12 (4) - in computing period of limitation for an application to set aside an award- the time requisite to obtain the copy of award shall be excluded.

Explanation:- in computing the period u/s 12, time requisite for obtaining a copy of a decree or an order, any time taken by the Court to prepare the order copy before an application for an copy thereof is made, shall not be excluded.

Example:-

If judgment was pronounced on 12.06.06 and the application for order copy was filed on 18.06.06 and obtained the copy on 25.06.06, the period of 8 days i.e. from 18.06.06 to 25.06.06 shall be excluded.

But the period of 5 days from 13.06.06 to 17.06.06 shall be included to calculate the limitation period.

Object of sec -12:-

It is not possible to prefer an application for leave to Appeal unless the appellant or applicant has a copy of the judgment on which the decree is passed.

Scope:-

Section includes application for Revision within its scope. The election petition may be treated as an application within the schedule of Limitation Act. It attracts the provision of sec 12(1) read with sec 29(2).

- Purshottam Narayan –Vs- Sugan Chand Pannalal, AIR 1964 MP 27

➔ Party intending to prefer an Appeal and obtains a certified copy. But it was lost or destroyed. He then obtained another copy.

Question arose- can it be said that the period to be excluded should be that which was spent in obtaining the first but not the second, which is an actually filed with the memorandum of Appeal?

➔ the appellant cannot be asked to produce the first copy which is lost or destroyed

➔ nor can be debarred from filing an Appeal or from obtaining another copy

Applying sec 12(2) – limitation Act intended to exclude the time spent in obtaining the particular copy which is filed with the memorandum of Appeal.

"Requisite" meaning:-

There is no definition available for the term 'requisite'. But the Judicial committee of the Privy Council in

- Surty –Vs- Chettyar, AIR 1928 PC 103

"The word 'requisite' is a strong word; it may be regarded as meaning something more than the word 'required'. It means 'properly required' and it throws upon the pleader or counsel for the appellant, the necessity of showing that no part of the delay beyond the prescribed period is due to his default.

Interpretation of Sec 12(2):-

Sec 12 (2) read with 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 by for filing the Appeal'.

- State of Assam –Vs- Gobinda Chandra Paul, (1991) 1 Gau.L.J. 339
- United Commercial Bank –Vs- M.C. Shaw Bonded Warehouse, AIR 1985 Cal 445

Decree was passed on 3rd September 1984. Time for preferring Appeal expired on 29th Oct 1984. The requisition for a certified copy of the decree was put in on 30th Oct '84 i.e. after the expiry of the period of limitation.

Held: - petitioner was not entitled to the benefit of Sec 12(2).

An applicant is not entitled to exclude the period taken in obtaining a copy of the award while computing the period of limitation laid down u/s 18(2) of the Land Acquisition Act.

- Gram Panchayat Murthal –Vs- Land Acquisition Collector, AIR 1972 Punj 36.

In the case of an application for leave to Appeal to the Supreme Court, the time requisite for obtaining a copy of the decree alone is excluded. And the time requisite for obtaining a copy of the judgment shall not be excluded.

- Khagendra Naik –Vs- Nila Bhoi, 26 Cut.L.T 602

Which certified copies are to be taken into account u/s 12:-

- UOI –Vs- M/s Ibrahim Gulaba, AIR 1966 MP 52

➔ As in this case, the Appeal was presented with a certified copy of the judgment and certified copy of the decree Appealed against- requirements of Order XLI, Rule 1 of CPC - both the periods should be excluded.

Sec 12(3) would apply in the case of an application for leave to appeal where it is a decree which is sought to be appealed from. Thus, there can be no doubt that the petitioners are entitled to exclude the time taken for obtaining a copy of the judgment also.

As the petitioner applied for the copy of the decree after the period of limitation had expired, the time requisite for obtaining a copy of the decree shall not be excluded.

- UOI –Vs- Jogendra Kumar Chouhury, AIR 1964 Tripura 23

It was not explained why there was the long delay of 92 days in applying – after decree was prepared and signed by the Court.

Held:- Application has to fail on the ground of limitation.

Fault of the officers of the Court in not preparing decree for a number of months – parties are not to suffer. The period between the date of judgment and date of signing of the decree – not under the control of the party who wished to file the appeal – said period should be allowed to be excluded u/s 12.

In such cases, there can be no doubt that the litigant deserves to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties.

Sec 12(4) – time requisite for obtaining a copy of the reason given by the arbitrator for his award should be excluded in computing the period of limitation.

- M/s Bokaro and Ramgur Ltd –Vs- Kathera Coal Co ltd, AIR 1969 Pat 235

Explanation u/s 12:-

The object behind the explanation is to require the appellant to apply for a copy of the decree even if the decree is not free.

The explanation contemplates that the period between the date of application of the certified copy and the date when the copy is ready can alone be excluded i.e. the appellants will not be entitled to the exclusion of the entire period between date of judgment and date when certified copy of judgment and decree were ready for delivery.

Method of computing the period of limitation:-

- India House –Vs- Kishan N.Lalwani, 2003(1) CTC 113

Held:- while computing the period of limitation, the time requisite for obtaining the copy has to be excluded without regard to the fact whether copy was applied for before the expiry of the period of limitation or not.

Section 13:- Exclusion of time in cases where leave to sue or appeal as a pauper is applied for:-

- Newly introduced section. When 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 shall be excluded.

- Bibi Basiran –Vs- Lal Mohammad, AIR 1968, Pat 285

Section 14:- exclusion of time of proceeding bonafide in court without jurisdiction:-

Object: - to give relief to a person who institutes proceedings which by reasons of some technical defect are thrown out.

Scope: - Requisite for the purpose of Sec14 (1) is defect of jurisdiction of other similar cause which render the Court unable to entertain the suit and to proceed to trial.

Applicability:-

The essentials for the applicability of section 14 is

(i) The suit must not have been entertained by the former Court for want of jurisdiction.

(ii) The plaintiff must be prosecuting his case with due diligence and in good faith.

Pre-requisite conditions:-

(a) Parties in the civil suit and in the subsequent proceeding in (which the condonation is prayed for) must be the same

(b) The suit and the later proceeding must seek the same relief.

(c) The Court where the earlier suit was filed was unable to entertain it from defect of jurisdiction or other cause of a like nature.

Benefit of extended period of limitation cannot be given to a defendant in the earlier suit u/s 14:-

- Chaniamaneni Netaji –Vs- Jonnalagadda Hanumantha Rao, 2002(5) ALD 495

➔ Benefit given only to plaintiff because he is debarred from filing a suit for the same relief in two different Courts separately or simultaneously. There is no bar for a defendant to file a suit separate suit in a Court even during the pendency of the suit against him and seeking a relief to which he might be entitled to.

** Exclusion of time u/s 14 can be granted only in case where the error is an error which might be committed by a reasonable and prudent person exercising due care and attention.

We know well that the District Court has no power to grant time for filing the appeal before the superior Court. It is for the superior Court to determine whether application u/s 14 or u/s 5 is allowed or not.

Explanation:-

In excluding the time during which former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted.

In order to claim exclusion of time spent it is not necessary that said proceedings should be withdrawn before filing the second suit.

- Defence colony co-operative Housing Society ltd –Vs- Lt. Col. B.J.Shantharaj, AIR 1998, Karn 20
- P. Sarathy –Vs- SBI, AIR 2000 Sc 2023

➔ Court need not be civil Court. Any authority having the trappings of a Court would be a Court within the meaning of the section.

Definition- Good faith [Sec 2(f)]

"Nothing is deemed to be done in good faith unless it is done with due care and attention".

Onus of proof is on the party claiming the benefit.

He should show that the mistake or error committed by him is not the result of absence of good faith, but has been occasioned in spite of due care and attention having been devoted by him.

- Firm Bansi Dhar Baldeo Pershad –Vs- Firm Alopi Pershad sons ltd, AIR 1963 Puj 556

Computation of limitation – when cannot be excluded:-

Period from the date of return of the plaint by the Court not competent to try till the date of presentation to the proper Court cannot be excluded.

Even if the Court not competent to try the matter grants time to representation of the plaint before the proper Court, it will not save the period of limitation.

U/s 14 the Court has no power to grant time for representation of the plaint when it was presented to the Court of first instance on the last date of limitation.

- J.Venkataramana Reddy –Vs- Kanakagari Bhakthavasalaiah, 2002(6) ALD 402

Section -15:- Exclusion of time in certain other cases:-

Sec.15(1) – while computing the period of limitation for any suit or application for the execution of a decree

- the institution or execution of which has been stayed by injunction or order
- the time of the continuance of the injunction or order
- the day which it was and issued or made and the day on which it was withdrawn shall be excluded.

Sec 15(2) – For any suit of which notice has been given or for which the previous consent or sanction of the Government or any authority is required in accordance with the requirements of any law for the time being in force

- the period of such notice
- the time requisite for obtaining such consent or sanction shall be excluded.

Explanation- the date on which the application was made for obtaining the consent and the date of receipt of the order of the Government or other authority shall both be counted.

Sec 15(3):- in computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver

- appointed in proceedings for the adjudication of a person as a insolvent or

- by any liquidator or provisional liquidator appointed in proceeding for the winding up of a company,
- the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of appointment of such receiver of liquidator,
- shall be excluded.

Sec 15(4):- in computing the period of limitation for a suit for possession by a purchase at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

i.e if 'X' borrowed some amount from 'Y' and for default in payment, Y obtained the decree in his favour and purchased the property on sale and if X filed a application to set aside the sale, for computing the period of limitation for a suit for possession filed by the purchaser Y, the proceeding to set aside the sale has been prosecuted shall be excluded.

Sec 15(5) - in computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India **under the administration of the Central Government**, shall be excluded.

Scope:-

Sec 15 is confined only to an absolute stay granted by the Court.

- Mahboob Pasha –Vs- Syed Zaherrudin, AIR 1988 Kat 83

Held:- sec 15(1) did not permit the Trial Court to exclude the time because only interim order of injunction was granted.

- Commissioner, Port of Calcutta –Vs- General Trading Corporation, AIR 1964 Cal 290

➔ Where a plaintiff in a suit against the Government is required to give notice to the Government u/s 80 of CPC, he would be entitled to exclude the period of notice i.e. 2 months in computing the period of limitation prescribed for the suit.

ART 136 – limitation for execution of decree or order of any civil Court – 12 years

** It is only cases where there is an injunction or a specific order of stay – would come within the ambit of sec 15.

** Mere filing of a suit to set aside an order made either u/ Order XXI R63 of CPC or

Order XXXVIII (i.e. 38) Rule 8 of CPC would not amount to injunction or an order of stay.

** Sec 15 cannot be extended to mere pendency of claim proceedings. There should be an order of staying the execution of the decree or an order of injunction restricting the decree holder from proceedings with execution.

- Biranchi Pradhan –Vs- Daltari Pradhan, 1992 (1) P.L.J.R 191

➔ The execution of the decree was stayed for a period of about 2 years 5 months and 2 days.

➔ Held:- the said period has to be excluded for the purpose of computation of period of limitation.

- P.S.Subramanina –Vs- S.S.Venkitaadri Iyer, AIR 1965 Ker 236

➔ Partial stay restricted to the only feasible mode of execution should not avail sec 15.

- Tribent Prasad –Vs- Sita Ram Poddar, AIR 1980, Pat 235

➔ Where the execution of a decree was stayed only in respect of property which was claimed by another and not against the other property of the judgment- debtor which was sought to be proceeded against after the expiry of limitation. The decree holder was not entitled to exclude the period during which execution was stayed by taking advance of sec 15(1).

- Bishambar Dayal –Vs- Godal, AIR 1959 Raj 256

Lay down: -

(i) The words 'stayed by injunction or order' refer to orders of Court and not a disability to sue or apply.

(ii) Section applies to injunctions and orders judicially made and not administrative instructions to keep execution proceedings pending.

- Hari Moni Devi –Vs- B.Deb, AIR 1961 Orissa 44

➔ Where the execution of a decree is stayed by High Court and further Revenue Court rules that the decree was barred by time and could not be executed, the decree holder is entitled to the exclusion of the period during which the decree was stayed.

** An order or an injunction is necessary for staying suit.

- Sirajul Haq Khan –Vs- Sunni central Board of Wakfs, up, AIR 19589 SC 198

Sec 15(5) – Provision for exclusion of time during which the defendant had been outside India is mandatory.

Section does not state that it must be one continuous period.

Even if the defendant is absent not at a continuous stretch but at intervals, still it will be time during which the defendant has been absent from India, and the plaintiff would be entitled to deduct the total periods of absence of the defendant from India.

- Mohamed Sulaiman Rowthar –Vs- N.K.A. Mohd Ibrahim, (1967) 2 M.L.J 483

Period of Notice:- (Suits by or against Trustees, executors and administrators) :-

Notice u/s 80 of CPC is not necessary before filing a suit U/Order XXXI Rule 63. Therefore period of notice cannot be excluded for the purpose of limitation.

- Sawai Singai Nirmal Chand –Vs- UOI, 1961 Jab L.J. 935

Section 16:- Effect of death on or before the accrual of the right to sue:-

SEC 16(1):- Where right to institute a suit or make an application accrues only on the death of the person - limitation period shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application.

SEC 16(2):- Where person against whom, if he were living, a right to institute 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.

The sub-section (2) means that a suit can be filed against the legal representative of the deceased defendant.

SEC 16(3):- the provisions of sub-sections (1) and (2) shall not be applicable to suits to enforce right of pre-emption or to suits for the possession of immovable property or of hereditary office.

Suit for possession of immovable property – Sec 16(1) – no application:-

- Lakshmir Singh –Vs- Sucha Singh, (1991) 1 C.L.J. P586 (P & H)

Principle:-

There can be no cause of action until there is a party capable of suing and until there is a cause of action coming into operation there can be no question of law of limitation.

The same was held in *Meyappa Chetty –Vs- Subramanya Chetty, AIR 1916 PC 202

SECTION 17:- EFFECT OF FRAUD OR MISTAKE:-

Scope and applicability:-

If the plaintiff desires to invoke the aid of sec 17, he must establish that there has been fraud and that by means of such fraud, he has been kept away from the knowledge of his right to sue or of the title whereon it is founded.

Sec 17(1):- where in the case of any suit or application for which a period of limitation is prescribed by this Act,

(a) 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 concealed by the fraud of any such person as aforesaid or

(c) the suit/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
- 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.

Proviso

This section shall not 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 has 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 no 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 has 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.

Sec 17(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 (decree holder) made after the expiry of the said period extend the period for execution of the decree or order.

PROVIDED – 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.

Provisions u/s 17 embodies fundamental principles of justice and equity:-

- Pallav Sheth –Vs- Custodial, (2001) 7 S.C.C 549

➔ The provisions of Sec 17 embody fundamental principles of justice and equity, viz, that a party should not be penalized for failing to adopt legal proceedings when the facts or material necessary for him to do so have been willfully concealed from him and also that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such fraud.

Limitation for the suit or application to set aside sale on the ground of fraud:-

An application to set aside a sale which is required to be filed within 60 days of the sale under Article 127 of the limitation Act.

- has to be extended when it is alleged in the suit/ proceeding that the defendant of respondent or his agent committed fraud until the date of discovery of fraud and without adjudication in this behalf
- suit or application filed – barred by limitation is wrong.
- K.R.Athappa Chettiar –Vs- G.S.Ramasethu, 1994 (1) M.L.J. 612 at P 619 (Mad)

Section 17 provides for exclusion of time for effect of fraud /mistake.

- Veetrag Investments & Finance Co –Vs- M/s Premier Brass & Metal Works Pvt Ltd, 2002 (3) Mh.L.J. 455 at P 460

Finding of fact about fraud: benefit provided u/s 17:-

Suit based upon fraud of defendant – period of limitation shall not begin to run till the plaintiff has discovered the fraud.

- Raj Rahul Contractors –Vs- Mr.Lalit Kumar, (1991) 1 C.P.J. 576 at 581 (Delhi)

➔ The appellant made false representations to the complainant at the time of entering into agreement with him and thus obtained unjust advantage over him. Therefore respondent committed fraud upon the complainant and the latter is entitled to take benefit of the provisions of sec 17.

Burden of proof:-

Onus is on the applicant to plead and prove fraud.

Order VI Rule 4 of CPC lays down that in all cases in which the party pleading relied on fraud, particulars with date and items, if necessary, shall be stated in the pleading.

Order VII Rule 6 of CPC:-

Requires that where a suit is instituted after the expiration of period prescribed by law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

Same principle applies to an application.

- Satish Chandra –Vs- Satish Kantha Roy, AIR 1923 PC 73

Beyond reasonable doubt:-

- Smt Brajabale –Vs- Radha Kamal Das, AIR 1969 Orissa 63

Held:- fraud like any other charges of the criminal offence, whether made in civil/criminal proceedings, must be established reasonable doubt. A finding as a fraud cannot be based on suspicion or conjecture.

If fraud is established by the applicant, the onus shifted on the opposite party of defendants to prove that influence of fraud has ceased to operate or the applicant could have with reasonable diligence discover the fraud.

Computation of period of limitation u/s 17:-

When computation of period is to be made from a particular date it shall be excluded from such computation.

- Baikunth Narain Misra –Vs- Kesar Kali Kuer, AIR 1969 Pat 160

Section 18:- Effect Of Acknowledgemnet In Writing:-

SEC 18(1):- Before expiration of prescribed period

- for a suit or application in respect of any property or right
- acknowledgment of liability in writing
- signed by party against whom such property or right is claimed or
- by any person through whom he derives his right or liability

fresh period of limitation computed from the time when acknowledgment was signed.

SEC 18(2):- If the acknowledgment is undated, oral evidence may be given only to the extent of time. But u/Indian Evidence Act, 1872 oral evidence of its contents shall not be received.

Explanation:-

(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
- accompanied by a refusal to pay, deliver, perform or permit to enjoy, or
- is coupled with a claim to set-off, 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.

Essential required u/s 18(1):-

The essential requisite for valid acknowledgement under Sec 18(1) was pointed out by their Lordship of SC in

- Tilak Ram –Vs- Nathu, AIR 1967 SC 935

(1) the acknowledgement must made before the expiration of prescribed period

(2) it must be unambiguous, specially admitting liability in respect of the debt sued upon

(3) it must be signed by party or authorised agent.

- Freedom Mozda –Vs- Durga Prasad Chamarra, AIR 1961 SC 1236

Held:- (i) an acknowledgment must relate to a present subsisting liability (ii) the exact nature of liability need not be indicated in words (iii) the words used must indicate the existence of the relationship of debtor and creditor between the parties.

- Coondapur Co-operative Town Bank Ltd –Vs- Ramesh Urala, (1968) 1 Mys.L.J. 271

➔ It is not necessary that a person who makes acknowledgment should be personally liable to discharge the debt acknowledged.

➔ Though liability restricted to the assets of the deceased judgment-debtor, in the heads of legal representatives, acknowledgment made by the legal representative is good acknowledgment.

Essentials:-

There should be an acknowledgment of liability in respect of the property or right

It should be by the party against whom such property or right is claimed.

Acknowledgment – meaning:-

"An admission of the truth of one's own liability"

"An admission by the writer, that there is a debt owing by him either to the receiver of the letter or some other person on whose behalf the letter is received"

- K.Gupthan –Vs- M.C.K. Gupthan, AIR 1964 Ker 175

➔ Acknowledgment in a pleader's letter may suffice to save limitation against the client.

- K.Venkata Subbamma –Vs- Subba Rao Nuna Venkatarami Setti, AIR 1964 AP 462

Held:- Legal representative cannot be bound by any acknowledgment or payment made towards the debts, subsequent to the death of the partner, even though it may be said that the partner as the agent of the firm had implied authority u/s 47 of the Partnership Act, to acknowledge the debt.

** Heirs of Muslim dying intestate are tenants-in-common. The acknowledgment made by one cannot bind others.

- Rampur Engineering Co. Ltd –Vs- Syed Raza Ali Khan Bahadur, 1966 ALJ 385

➔ Balance sheet is an acknowledgment of a subsisting liability.

Acknowledgment to be made before the expiration of the period of limitation:-

- Umesh Chandra Chakravarthy –Vs- Union Bank of India

➔ The acknowledgement of liability was made in respect of Rs.24,604.34 after the expiration of period of limitation prescribed for the suit.

Held:- acknowledgement were of no consequence. Remedy for recovery of the old debt was barred by limitation.

Section 19:- Effect of payment on account of debtor or interest on legacy:-

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

Explanation:- for the purposes of this section –

(a) where a mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) 'Debt' does not include money payable under a decree or order of a Court.

SEC- 19:- Where payment on account of debt or of interest on legacy is made before the expiration of the prescribed period, by the person liable to pay the debt or legacy, a fresh period of limitation shall be computed from the time when the payment was made.

Eg:- 'X' received Rs.50,000/- from 'Y' on 15.01.2004 @ 2% interest per month on pro-note promises to pay the amount within a period of 4 months. The cause of action arises on 15.01.2004.When there is default in payment, a suit should be filed within period of 3 years. Therefore the last date of limitation is 15.01.2007. If on 22.09.2005, 'X' make a payment even about Rs.1,000/- a fresh limitation starts from that date. Now, limitation available to 'X' extends and expires on 22.09.2008.

Payment made by the defendant:-

Mere payment would not save limitation unless it is shown that there was an acknowledgment of the payment in handwriting of the defendant or under a writing signed by him.

Section 20:- Effect of acknowledgment or payment by another person:-

Sec 20(1):- in case of a person under disability, the expression 'agent duly authorised in this behalf' in sections 18 & 19 include

- his lawful guardian, committee or manager or
- an agent duly authorised by such guardian, committee or manager
- to sign the acknowledgement or make the payment.

Sec 20(2):- one of several contractors or partners, executors, mortgagees cannot be chargeable by reason only of written acknowledgment signed by or of a payment made by or by the agent of any other or others of them.

Sec 20(3)(a):- acknowledgment signed or payment made in respect of any liability by duly authorised agent of limited owner governed by the Hindu law shall be valid acknowledgment of payment against the reversioner succeeding to such liability.

Sec 20 (3) (b):- where liability incurred on behalf of HUF acknowledgment made or payment made by duly authorised agent of manager of family shall be deemed to have been made on behalf of the whole family.

Applicability of Sec 20:-

Essential conditions:-

(1) payment must be made within prescribed period of limitation

(2) must be acknowledged by some form of writing

** Acknowledgment by manager of family amounts to acknowledgment by all members.

Section 21:- Effect of substituting or adding new plaintiff or defendant:-

SEC 21(1):- After the institution of a suit,

- a new plaintiff of defendant is added or substituted
- as regards him
- the suit shall be deemed to have been instituted
- when he was made as a party

Proviso:-

Where the Court satisfied that

- the omission to include a new plaintiff or defendant was due to mistake made in good faith
- the Court may direct
- as regards such plaintiff or defendant
- shall be deemed to have been instituted on any earlier date.

SEC 21(2):- Sub-section (1) does not apply to a case

- where a party is added or substituted
- owing to assignment or devolution of any interest during the pendency of a suit or
- where a plaintiff is made a defendant or a defendant is made a plaintiff.

• Ramalingam Chettiar –Vs- P.K.Pattabiraman, AIR 2001 S.C. 1185

➔ In the absence of any order that the impleadment of newly-added or substituted party shall take effect from the date of institution of a suit, the period of limitation so far as the newly-added or substituted persons are concerned shall run from the date of their impleadment in the suit.

SECTION 22:- CONTINUING BREACHES AND TORTS:-

In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of time during which the breach or the tort continues.

• State –Vs- Umashankar Laxminarayan Jaiswal, AIR 1962 MP 311

➔ Continuous offence gives rise to a fresh offence such fresh offence shall give rise to a fresh starting point for limitation.

Section 23:- Suit for compensation for acts not actionable without special damage:-

In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury result.

- Kedar Nath –Vs- Har Govind, AIR 1926 All 605

Held:- section apply to suits based on torts and contracts. Act includes omission and injury includes legal injury.

Section24:-Computation of time mentioned in instruments:-

All instruments shall be deemed to be made with reference to the Gregorian calendar.

PART – IV

ACQUISITIOIN OF OWNERSHIP BY POSSESSION

SECTION 25:- ACQUISITION OF EASEMNT BY PRESCRIPTION:-

SEC 25 (1):- Access and use of light, air, water course and use of water for any building

- peaceably enjoyed as a Easementary right
- continuously without interruption
- for a period of 20 years as against individual
- shall be absolute and indefeasible.

SEC 25 (2):- the said period of 20 years shall be taken to be a period ending within two years next before the institution of the suit.

SEC 25(3):- If the property belongs to the government the period is 30 years.

Section 26:- Exclusion in favour of reversioner of servient tenement:-

Where any land or water upon any easement has been enjoyed or derived

- has been held under or by virtue of any interest for life or
- in terms of years exceeding 3 years from the granting thereof
- the time of enjoyment during the continuance of such interest or term
- shall be excluded in the computation of 20 years
- if the claim is within three years next after the determination of such interest or term
- resisted by person entitled to the said land or water after the such determination.

Applicability:-

Section 26 does not apply to a donee or transferee from the widow in virtue of her powers as representing the estate. In such case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her interest for life.

Section 27:- Extinguishment of Right to Property:-

At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

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