

CIVIL PROCEDURE CODE AND LIMITATION ACT

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**UNIT-I INTRODUCTION
CONCEPTS**

1. AFFIDAVIT,

An affidavit is a type of verified statement or showing, or in other words, it contains a verification, meaning it is under oath or penalty of perjury, and this serves as evidence to its veracity and is required for court proceedings.

The Supreme Court in *Amar Singh v. Union of India and Others*, has issued directions to the courts registry to carefully scrutinize all affidavits, petitions and applications and reject those which do not conform to the requirements of Order XIX of the Code of Civil Procedure and Order XI of the Supreme Court Rules. The Supreme Court has highlighted the importance of affidavits in this judgment and has discussed various judicial pronouncements on the aspect. The relevant extracts of the aforesaid judgment are reproduced hereinbelow;

12. The provision of Order XIX of Code of Civil Procedure, deals with affidavit. Rule 3 (1) of Order XIX which deals with matters to which the affidavit shall be confined provides as follows:

"Matters to which affidavits shall be confined. - (1) 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."

13. Order XI of the Supreme Court Rules 1966 deals with affidavits. Rule 5 of Order XI is a virtual replica of Order XIX Rule 3 (1). Order XI Rule 5 of the Supreme Court Rules is therefore set out: "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."

14. In this connection Rule 13 of Order XI of the aforesaid Rules are also relevant and is set out below:

"13. In this Order, 'affidavit' includes a petition or other document required to be sworn or verified; and 'sworn' includes affirmed. In the verification of petitions, pleadings or other proceedings, statements based on personal knowledge shall be distinguished from statements based on information and belief. In the case of statements based on information, the deponent shall disclose the source of this information."

15. The importance of affidavits strictly conforming to the requirements of Order XIX Rule 3 of the Code has been laid down by the Calcutta High Court as early as in 1910 in the case of *Padmabati Dasi v. Rasik Lal Dhar* [(1910) Indian Law Reporter 37 Calcutta 259]. An erudite Bench, comprising Chief Justice Lawrence H. Jenkins and Woodroffe, J. laid down:

"We desire to impress on those who propose to rely on affidavits that, in future, the provisions of Order XIX, Rule 3, must be strictly observed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be sage to act on the deponent's belief."

- See more at: <http://www.legalblog.in/2011/05/affidavits-under-order-xix-of-code-of.html#sthash.FNNBSXXC.dpuf>

ORDER, JUDGMENT, DECREE, PLAINT, RESTITUTION, EXECUTION. DECREEHOLDER, JUDGMENT- DEBTOR, MENSE PROFITS, WRITTEN STATEMENT.

2. DISTINCTION BETWEEN DECREE AND JUDGMENT AND BETWEEN DECREE AND ORDER

Q. 1 Explain decree and order and distinguish between them. What are the essential elements of a decree? What are the kinds of a decree? What are the consequences of appearance or non-appearance of parties. When can an ex parte decree against defendant be set aside. What is an ex parte decree? Discuss the remedies available to a defendant against whom ex parte decree has been passed. All questions regarding execution of a decree shall be determined by the court executing the decree and not by a separate suit. Explain.

Decree

In a civil suit several facts might be alleged and the court may be required to rule on several claims. In simple terms, a decree is the ruling of the court regarding the claims of the parties of the suit. For example, in a suit between A and B, A may claim that a particular property P belongs A. After hearing all the arguments, the court will rule in the favor of either A or B. The final decision of the court regarding this claim i.e. whether the property belongs to A or B, is a decree.

As per Section 2(2), a decree is 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. It can be final or preliminary.

From the above definition we can see the following essential elements of a decree -

- 1. There must be an adjudication** - Adjudication means Judicial Determination of the matter in dispute. In other words, the court must have applied its mind on the facts of the case to resolve the matter in dispute. For example, dismissing a suite because of default in appearance of the plaintiff is not a decree. But dismissing a suite on merits of the case would be a decree.
- 2. There must be a suit** - Decree can only be given in relation to a suit. Although CPC does not define what suit means, in *Hansraj vs Dehradun Mussoorie Tramways Co. Ltd.* AIR 1933, the Privy Council defined the term suit as "a civil proceeding instituted by the presentation of a plaint".
- 3. Rights of the parties** - The adjudication must be about any or all of the matters in controversy in the suit. The word right means substantive rights and not merely procedural rights. For example, an order refusing leave to sue in forma pauperis (i.e. an order rejecting the application of a poor plaintiff to waive court costs) is not a decree because it does not determine the right of the party in regards to the matters alleged in the suit.
- 4. Conclusive Determination** - The determination of the right must be conclusive. This means that the court will not entertain any argument to change the decision. I.e. as far as the court is concerned, the matter in issue stands resolved. For example, an order striking out defence of a tenant under a relevant Rent Act, or an order refusing an adjournment is not a decree as they do not determine the right of a party conclusively. On the other hand, out of several properties in issue in a suit, the court may make a conclusive determination about the ownership of a particular property. Such a conclusive determination would be a decree even though it does not dispose off the suit completely.
- 5. Formal expression** - To be a decree, the court must formally express its decision in the manner provided by law. A mere comment of the judge cannot be a decree.

Examples of decisions which are Decrees - Dismissal of appeal as time barred, Dismissal of a suit or appeal for want of evidence or proof, Order holding appeal to be not maintainable.

Examples of decisions which are not Decrees - Dismissal of appeal for default, order of remand, order granting interim relief.

Order

As per Section 2 (14), The formal expression of any decision of a civil court which is not a Decree is Order. In a suit, a court may take certain decisions on objective considerations and those decisions must contain a discussion of the matters at issue in the suit and the reasons which led the court to pass the order. However, if those decisions fall short of a decree, they are orders.

Thus, there are several common elements between an order and a decree - both related to matter in controversy, both are decisions given by the court, both are adjudications, both are formal expressions. However, there are substantial differences between them -

Decree - S. 2(2) Order S. 2(14)

Can only be passed in a suit originated by the presentation of a plaint. Can be passed in a suit originated

by the presentation of a plaint, application, or petition.

Contains Conclusive Determination of a right May or may not finally determine a right.

May be final, preliminary, or partly preliminary - partly final. Cannot be a preliminary order.

In general, there can only be one decree or at the most one preliminary and one final decree in a suit.

There can be any number of orders in a suit.

Every decree is appealable unless an appeal is expressly barred. Only those orders which are specified as appealable in the code are appealable.

A second appeal may lie against a decree to a High Court on certain grounds. There is no second appeal for orders.

Judgement

As per Section 2 (9), "judgment" means the statement given by the judge of the grounds of a decree or order. Every judgment should contain - a concise statement of the case, the points for determination, the decision thereon, the reasons for the decision. In the case of Balraj Taneja vs Sunil Madan, AIR 1999, SC held that a Judge cannot merely say "Suit decreed" or "Suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other.

As per Rule 6 A of Order 20 the last part of the judgment should precisely state the relief granted. Thus, a judgment is a state prior to the passing of a decree or an order. After pronouncement of a judgment, a decree shall follow.

Kinds of Decree

Preliminary - Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit but does not completely dispose of the suit, it is a preliminary decree. It is passed when the court needs to adjudicate upon some matters before proceeding to adjudicate upon the rest.

In Shankar vs Chandrakant SCC 1995, SC stated that a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings.

CPC provides for passing a preliminary decrees in several suits such as - suit for possession and mesne profits, administration suit, suits for pre-emption, dissolution of partnership, suits relating to mortgage. In *Narayanan vs Laxmi Narayan* AIR 1953, it was held that the list given in CPC is not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the code.

Final - When the decree disposes of the suit completely, so far as the court passing it is concerned, it is a final decree. A final decree settles all the issues and controversies in the suit.

Party preliminary and partly final - When a decree resolves some issues but leaves the rest open for further decision, such a decree is partly final and party preliminary. For example, in a suit for possession of immovable property with mesne profits, where the court decrees possession of the property and directs an enquiry into the mesne profits, the former part of the decree is final but the latter part is preliminary.

Deemed Decree - The word "deemed" usually implies a fiction whereby a thing is assumed to be something that it is ordinarily not. In this case, an adjudication that does not fulfill the requisites of S. 2 (2) cannot be said to be a decree. However, certain orders and determinations are deemed to be decrees under the code. For example, rejection of a plaint and the determination of questions under S. 144 (Restitution) are deemed decrees.

Consequences of Non appearance of parties (Order 9)

The general provisions of CPC are based on the principle that both the parties must be given an opportunity to be heard. The proceedings must not be held to the disadvantage of one party. Order 9 lays down rules regarding the appearance and the consequences of non appearance of a party in the hearing.

Rule 1 - Parties to appear on day fixed in summons for defendant to appear and answer— On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Dismissal of Suit

Rule 2 - Dismissal of suit where summons not served in consequence of plaintiffs failure to pay cost— Where on the day so fixed it is found that the summons has not been served upon the defendant 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 statements, as required by rule 9 of order VII, the Court may make an order that the suit be dismissed :

Provided that no such order shall be made, if, notwithstanding such failure the defendant attends in person (or by agent when he is allowed to appear by agent) on the day fixed for him to appear and answer.

Rule 3 - Where neither party appears, suit to be dismissed— Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Rule 4 - Plaintiff may bring fresh suit or Court may restore suit to file— Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Rule 5 - Dismissal of suit where plaintiff after summons returned unserved, fails for one month to apply for fresh summons—

(1) Where after a summons has been issued to the defendant, or to one of several defendants, and returned unserved the plaintiff fails, for a period of one month from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours 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 for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Ex parte Proceedings

Rule 6 - Procedure when only plaintiff appears—

(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

(a) When summons duly served—if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard *ex parte*.

(b) When summons not duly served—if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time—if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiffs' default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Rule 7 - Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance— Where the Court has adjourned the hearing of the suit *ex parte* and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day, fixed for his appearance.

Absence of Plaintiff

Rule 8 - Procedure where defendant only appears— Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Rule 9 - Decree against plaintiff by default bars fresh suit—

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. and shall appoint a day for proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

Multiple plaintiffs and/or Defendants

Rule 10 - Procedure in case of non-attendance of one or more of several plaintiffs— Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Rule 11 - Procedure in case of non-attendance of one or more of several defendants— Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

General Consequence of Non appearance

Rule 12 - Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person— Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively who do not appear.

This means either the suit will be dismissed or will be continued ex parte.

Ex parte Decree (Order 9)

As per Rule 6, if the defendant fails to appear before the court in spite of a proper service of the summons, the court may proceed ex-parte and may pass a decree in favor of the plaintiff. This is called an ex-parte decree. In the case of *Hochest Company vs V S Chemical Company*, SC explained that an ex parte decree is such decree in which defendant did not appear before court and the case is heard in the absence of the defendant from the very beginning.

Remedies available to the defendant against an ex parte decree

1. Application to set aside the ex parte decree - As per Order 9, Rule 13, a defendant may apply before the court that passed the decree to set it aside. If he satisfies the court that the summons was not duly served or he was prevented by any other sufficient cause from attending the hearing, the court shall make an order setting aside the decree. For example, bona fide mistake as to the date or hearing, late arrival of train, etc. are sufficient causes for absence of the defendant. Such an application for setting aside may be made within 30 days from the date of decree as per Section 123 of Limitation Act.

Setting aside decrees ex parte

Rule 13 - Setting aside decree Blex parte against defendant— In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim

Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

Rule 14 - No decree to be set aside without notice to opposite party— No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

The court may impose conditions as it may deem fit on the defendant for setting aside the decree. It may ask the defendant to pay costs.

When an ex parte decree is set aside, the court should proceed to decide the suit as it stood before the decree. The trial should commence de novo and the evidence that had been recorded in the ex parte proceeding should not be taken into account.

This remedy is specifically meant for an ex parte decree.

Execution of a Decree

As per Section 38, a decree may be executed either by the court which passed it or the court to which it is sent for execution. While executing a decree, several questions and objections may arise as to the manner of execution. It would be impractical to institute new suits to resolve such matters. Thus, Section 47 lays down the general principle that any questions that arise in relation to the execution of the decree should be resolved in execution proceeding itself and not by a separate suit. Section 47 says thus -

47. Questions to be determined by the Court executing decree -

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I. For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II. (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

The objective of this section is to provide cheap and fast remedy for the resolution of any questions arising at the time of execution. Institution of new suits would only increase the number of suits and would also be a burden on the parties.

The scope of this section is very wide. It confers exclusive jurisdiction to the court executing the decree in all the matters regarding the execution. It does not matter whether the matter has arisen before or after the execution of the decree. Thus, this section should be construed liberally.

Conditions -

1. The question must be one arising between the parties or their representatives to the suit in which the decree is passed.
2. The question must relate to the execution, discharge, or satisfaction of the decree.

As held in the case of Arokiaswamy vs Margaret AIR 1982, both the conditions must be satisfied cumulatively.

What is meant by execution, discharge and satisfaction of a decree -

This expression has not been defined in the code. However, the following questions are held to be relating to the execution, discharge and satisfaction of the decree - whether a decree is executable, whether a property is liable to be sold in execution of a decree, whether the decree is fully satisfied, whether the execution of the decree was postponed.

The following questions have been held as not related - whether the decree is fraudulent or collusive, whether the decree has become inexecutable because of a compromise between the parties, a question about the territorial or pecuniary jurisdiction of the court passing the decree.

Appeal and Revision

Earlier, determination made under Section 47 was deemed to be a decree under Section 2(2). However, after the amendment in 1976, this is not so. Any determination made under an application under Section 47 is not considered a decree and is therefore not appealable under Section 96 or Section 100. Since it is no more a decree, a revision application under Section 115 is therefore maintainable provided the conditions stipulated in Section 115 are satisfied.

JURISDICTION

1. KINDS
2. HIERARCHY OF COURTS
3. SUIT OF CIVIL NATURE- SCOPE AND LIMITS

Jurisdiction Of Civil Court Under Civil Procedure Code

Section 9 of CPC deals with the jurisdiction of civil courts in India. It says that 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 purpose 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.

Conditions

A civil court has jurisdiction to try a suit if two conditions are fulfilled:

The suit must be of a civil nature; and

The cognizance of such a suit should not have been expressly or impliedly barred.

a) suit of civil nature

i. meaning:- in order that a civil court may have jurisdiction to try a suit, the first condition which must be satisfied is that the suit must be of a civil nature? The word 'civil' has not been defined in the code. But according to the dictionary meaning, it pertains to private rights and remedies of a citizen as

distinguished from criminal, political, etc. the word 'nature' has been defined as 'the fundamental qualities of a person or thing; identity or essential character; sort, kind, character'. It is thus wider in content. The expression 'civil nature' is wider than the expression 'civil proceedings'. Thus, a suit is of a civil nature if the principal question therein relates to the determination of a civil right and enforcement thereof. It is not the status of the parties to the suit, but the subject matter of it which determines whether or not the suit is of a civil nature.

ii. Nature and scope- the expression "suit of a civil nature" will cover private rights and obligations of a citizen. Political and religious questions are not covered by that expression. A suit in which the principal question relates to caste or religion is not a suit of a civil nature. But if the principal question in a suit is of a civil nature (the right to property or to an office) and the adjudication incidentally involves the determination relating to a caste question or to religious rights and ceremonies, it does not cease to be a suit of a civil nature and the jurisdiction of a civil court is not barred. The court has jurisdiction to adjudicate upon those questions also in order to decide the principal question which is of a civil nature. Explanation II has been added by the amendment act of 1976. Before this explanation, there was a divergence of judicial opinion as to whether a suit relating to a religious office to which no fees or emoluments were attached can be said to be a suit of a civil nature. But the legal position has now been clarified by explanation II which specifically provides that a suit relating to a religious office is maintainable whether or not it carries any fees or whether or not it is attached to a particular place.

iii. Doctrine explained- explaining the concept of jurisdiction of civil courts under section 9, in PMA Metropolitan v. M.M. Marthoma, the supreme court stated:

"the extensive nature of the section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debar entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and later added in 1976, bring out clearly the legislative intention of extending operation of the section to religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basis of a civilized jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally a key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the section by use of the word 'shall' and the expression 'all suits of a civil nature unless expressly or impliedly barred'.

Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of rights. The word shall makes it mandatory. No court can refuse to entertain a suit if it is of the description mentioned in the section. That is amplified by the use of the expression. 'all suits of civil nature'. The word civil according to the dictionary means, relating to the citizen as an individual; civil rights.' In Black's legal dictionary it is defined as, 'relating to provide rights and remedies sought by civil actions as contrasted with criminal proceedings'. In law it is understood as an antonym of criminal. Historically the two broad classifications were civil and criminal. Revenue, tax and company etc. were added to it later. But they too pertain to the larger family of civil. There is thus no doubt about the width of the word civil. Its width has been stretched further by using the word nature along with it. That is even those suits are cognizable which are not only civil but are even of civil nature....

The word 'nature' has defined as 'the fundamental qualities of a person or thing; identity or essential character, sort; kind; character'. It is thus wider in content. The word 'civil nature' is wider than the word 'civil proceeding'. The section would, therefore, be available in every case where the dispute was of the characteristics of affecting one's rights which are not only civil but of civil nature."

iv. Test: 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 a question as to religious rites or ceremonies.

v. Suits of civil nature: illustrations- the following are suits of a civil nature.

1. suits relating to rights to property;
2. suits relating to rights of worship;
3. suits relating to taking out of religious procession;
4. suits relating to right to share in offerings;
5. suits for damages for civil wrongs; ETC.

4. RES SUBJUDICE AND RESJUDICATA

Q. 2 What are the objects and essential conditions of the doctrine of res judicata? Illustrate the principle of constructive res judicata. Can an ex parte decree act as constructive res judicata?

Res iudicata is the Latin term for "a matter already judged", and refers to the legal doctrine meant to bar continued litigation of cases that have already been decided between the same parties. The doctrine of res judicata is based on three maxims

- (a) Nemo debet lis vexari pro eadem causa (no man should be vexed twice for the same cause)
- (b) Interest republicae ut sit finis litium (it is in the interest of the state that there should be an end to a litigation); and
- (c) Re iudicata pro veritate occipitur (a judicial decision must be accepted as correct)

The legal concept of R) arose as a method of preventing injustice to the parties of a case supposedly finished as well as to avoid unnecessary waste of resources in the court system. Res iudicata does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, so a prevailing plaintiff could not recover damages from the defendant twice for the same injury.

Res Judicata is a rule of universal law pervading every well regulated system of jurisprudence and is based upon a practical necessity that there should be an end to litigation and the hardship to the individual if he is vexed twice for the same cause. Thus, this doctrine is a fundamental concept based on public policy and private interest. It is conceived in the larger public interest, which requires that every litigation must come to an end. It therefore, applies to all kinds of suits such as civil suits, execution proceedings, arbitration proceedings, taxation matters, writ petitions, administrative orders, interim orders, and criminal proceedings.

Res Judicata under Code Of Civil Procedure, 1908

Section 11 of CPC embodies the doctrine of res judicata or the rule of conclusiveness of a judgement, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the same parties. It enacts that once a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation. In the absence of such a rule there will be no end to litigation and the parties would be put to constant trouble, harassment and expenses.

Section 11 says thus:

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 a 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.

The doctrine has been explained by Justice Das Gupta as follows -

The principle of Res Judicata is based on the need of giving a finality to the judicial decisions. What it says is that once a case is res judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter- whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvas the matter again.

Essential Elements for Res Judicata

1. The matter in issue in a subsequent suit must directly and substantially be same as in the previous suit.
2. The former suit must have been between the same parties or between parties under whom they or any of them claim.
3. Such parties must have been litigating under the same title in the former suit.
4. The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.
5. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit.

Exceptions to application

Res iudicata does not restrict the appeals process, which is considered a linear extension of the same lawsuit as the suit travels up (and back down) the appellate court ladder. Appeals are considered the appropriate manner by which to challenge a judgment rather than trying to start a new trial. Once the appeals process is exhausted or waived, res iudicata will apply even to a judgment that is contrary to law.

The provisions of section 11 of the Code are mandatory and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of section 44 of the Indian Evidence Act which defines with precision the grounds of such evidence as fraud or collusion. It is not for the court to treat negligence or gross negligence as fraud or collusion unless fraud or collusion is the proper inference from facts.

In *Beliram & Brothers and Others v. Chaudari Mohammed Afzal and Others* it was held that where it is established that the minors suit was not brought by the guardian of the minors bona fide but was brought in collusion with the defendants and the suit was a fictitious suit, a decree obtained therein is one obtained by fraud and collusion within the meaning of section 44 of the Indian Evidence Act, and does not operate res iudicata. The principle of res iudicata in section 11 CPC is modified by section 44 of the Indian Evidence Act, and the principles will not apply if any of the three grounds mentioned in Section 44 exists.

Failure to apply

claim or issue, if a third court is faced with the same case, it will likely apply a "last in time" rule, giving effect only to the later judgment, even though the result came out differently the second time.

Constructive Res Judicata

The rule of direct res iudicata is limited to a matter actually in issue alleged by one party and denied by other either expressly or impliedly. But constructive res iudicata means that if a plea could have been taken by a party in a proceeding between him and his opponent, and if he fails to take that plea, he cannot be allowed to relitigate the same matter again upon that plea. In affect, the party impliedly gives up the right to that plea by not pleading it in the previous suit. This principle is embodied in Explanation IV of Section 11.

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.

Ex parte decree as Res Judicata

An ex parte decree, unless it is set aside, is a valid and enforceable decree. However, the real test for res iudicata is whether the case was decided on merits. The real test for deciding whether the judgment has been given on merits or not is to see whether it was merely formally passed as a matter of course, or by way of penalty for any conduct of the defendant, or is based upon a consideration of the truth or falsity of the plaintiff's claim, notwithstanding the fact that the evidence was led by him in the absence of the defendant. Thus, a decree may not act as res iudicata merely because it was passed ex parte.

It therefore acts a res iudicata.

5. FOREIGN JUDGMENT - ENFORCEMENT

6. PLACE OF SUING

7. INSTITUTION OF SUIT

Q. 3 "Every suit shall be instituted in court of lowest grade competent to try it", Explain. State principles which guide a plaintiff in determining the place of filing a suit. Explain the provisions of CPC which are applied in determining the forum for institution of a suite relating to immovable property. In India, courts are hierarchically established. The lower courts have less powers than the higher or superior courts. The Supreme Court of India is at the top of the hierarchy. There are numerous lower courts but only one High Court per State and only one Supreme Court in the Country. Thus, it is impractical to move superior courts for each and every trivial matter. Further, the subject matter of a suit can also be of several kinds. It may be related to either movable or immovable property, or it may be about marriage, or employment. Thus, speciality Courts are set up to deal with the specific nature of the suit to deal with it efficiently. Similarly, it would be inconvenient for the parties to approach a court that is too far or is in another state. All these factors are considered to determine the court in which a particular suit can be filed. CPC lays down the rules that determine whether a court has jurisdiction to hear a particular matter or not.

These rules can be categorized as follows - Pecuniary Jurisdiction, Territorial Jurisdiction, Subject matter jurisdiction, and Original Jurisdiction.

Pecuniary Jurisdiction

As per Section 15, every suit shall be instituted in the Court of the lowest grade competent to try it. This is a fundamental rule which means that if a remedy is available at a lower court, the higher court must not be approached. More specifically, this rule refers to the monetary value of the suite. Each court is deemed competent to hear matters having a monetary value of only certain extent. A matter that involves a monetary value higher than what a court is competent to hear, the parties must approach a higher court. At the same time, the parties must approach the lowest grade court which is competent to hear the suit.

However, this rule is a rule of procedure, which is meant to avoid overburdening of higher courts. It does not take away the jurisdiction of higher courts to hear matter of lesser monetary value. Thus, a decree passed by a court, which is not the lowest grade court competent to try the matter, is not a nullity. A higher court is always competent to try a matter for which a lower court is competent. This rule applies to the parties as it bars the parties to approach a higher court when a lower court is competent to hear the matter.

Territorial Jurisdiction

Territorial Jurisdiction means the territory within a Court has jurisdiction. For example, if a person A is cheated in Indore, then it makes sense to try the matter in Indore instead of Chennai. The object of this jurisdiction to organize the cases to provide convenient access to justice to the parties. To determine whether a court has territorial jurisdiction, a matter may be categorized into four types -

1. Suits in respect of immovable property

Section 16 - Suits to be instituted where subject-matter is situated — Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immovable property with or without rent or profits,
 - (b) for the partition of immovable property,
 - (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
 - (d) for the determination of any other right to or interest in immovable property,
 - (e) for compensation for wrong to immovable property,
 - (f) for the recovery of movable property actually under distraint or attachment,
- shall be instituted in the Court within the local limits of whose jurisdiction the property is situated:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant, may where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.— In this section "property" means property situated in India.

Section 17 - Suits for immovable property situated within jurisdiction of different Courts— Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Court, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situated : Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court.

Section 18 - Place of institution of suit where local limits of jurisdiction of Courts are uncertain—

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

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

(2) Where a statement has not been recorded under sub-section (1), and objection is taken before an Appellate or Revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the Appellate or Revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

2. Suits in respect of immovable property - It is said that the movables move with the person. Thus, a suit for a movable person lies in the court, the territory of which the defendant resides.

Section 19 - Suits for compensation for wrongs to person or movable— Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Illustrations

(a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

3. Suits for compensation for wrong (tort) - Section 19 applies to this as well.

4. Other suits

Section 20 - Other suits to be instituted where defendants reside or cause of action arises— Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

Explanation—A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

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

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

Objection as to Jurisdiction

Section 21 - Objections to jurisdiction— (1) No objection as to the place of suing shall be allowed by any appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.

As held in *Pathumma vs Kutty* 1981, no objection as to the place of suing will be allowed by an appellate or revisional court unless the following three conditions are satisfied -

- (i) The objection was taken in first instance. (ii) The objection was taken at the earliest possible opportunity and in cases where issues are settled at or before settlement of issues (iii) there has been a consequent failure of justice.

All the three conditions must be satisfied simultaneously.

8. PARTIES TO SUIT: JOINDER MIS- JOINDER OR NON-JOINDER OF PARTIES REPRESENTATIVE SUIT-

Joinder of Parties is joining parties in a suit. Non-Joinder means not joining parties in a suit. Mis-joinder will imply ill-joining or joining unnecessary parties in a suit. A short description of the three are as follows:

Joinder of Parties

Joining parties in a suit is called joinder of parties. This may be joining a party as plaintiff or defendant. Joining a party as plaintiff is dealt with under Order 1 Rule 1 of the Code of Civil Procedure.

Order 1 Rule 1 says that all persons may be joined as plaintiffs in one suit where a right to relief in a same transaction is alleged to exist in such persons either jointly or severally. It can also said that if such persons brought separate suits any common question of law or fact will arise. These persons can be joined in one suit.

9. FRAME OF SUIT: CAUSE OF ACTION

ORDER II : FRAME OF SUIT

1. Frame of suit

Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2. Suit to include the whole claim

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or internationally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration

A lets a house to B at a yearly of rent Rs. 1200. The rent for the whole of the, years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

3. Joinder of causes of action

(1) Save as otherwise provided, 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.

4. Only certain claims to be joined for recovery of immovable property

No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except-

- (a) claims for mesne profits or arrear of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

5. Claims by or against executor, administrator or heir

No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

[6. Power of Court to order separate trials

Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice.)

7. Objections as to misjoinder

All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

10. ALTERNATIVE DISPUTES RESOLUTION (ADR)

11. SUMMONS

ORDER V : ISSUE AND SERVICE OF SUMMONS

Issue of Summons

1. Summons

(1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified :

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim :

22[Provided further that where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons.]

(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.

(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.

2. Copy or statement annexed to summons

Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

3. Court may order defendant or plaintiff to appear in person

(1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

4. No party to be ordered to appear in person unless resident within certain limits

No party shall be ordered to appear in person unless he resides-

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

(b) without such limits but at 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.

5. Summons to be either to settle issues or for final disposal

The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly : Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

6. Fixing day for appearance of defendant

The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

7. Summons to order defendant to produce documents relied on by him

The summons to appeal and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

8. On issue of summons for final disposal, defendant to be directed to produce his witnesses

Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Service of Summons

9. Delivery or transmission of summons for service

(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

10. Mode of service

Service of the 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.

11. Service on several defendants

Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

12. Service to be on defendant on person when practicable, or on his agent

Wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

13. Service on agent by whom defendant carries on business

(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or chartered .

14. Service on agent in charge in suits for immovable property

Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

23[15. Where service may be on an adult member of defendant's family

Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on his at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation.- A servant is not a member of the family within the meaning of this rule.]

16. Person served to sign acknowledgement

Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

17. Procedure when defendant refuses to accept service, or cannot be found

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, 22[who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, 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, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person(if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service

The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

19. Examination of serving officer

Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

22[19A. Simultaneous issue of summons for service by post in addition to personal service

(1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post, acknowledgement due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgement purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for other reason, has been received by the Court within thirty days from the date of the issue of the summons].

20. Substituted services

(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house(if

any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

22[(1A) Where the Court acting under sub-rule(1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.]

(2) Effect of substituted service-Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed -Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

[20A. Service of summons by post: Repealed by the Code of Civil Procedure (Amendment) Act, w.e.f. 1st. February, 1977]

21. 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 to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

22. Service within presidency-towns of summons issued by Courts outside

Where as summons issued by any Court established beyond the limits of the towns of Calcutta, Madras [and Bombay] is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

23. Duty of Court to which summons is sent

The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

24. Service on defendant in prison

Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

25. Service where defendant resides out of India and has no agent

Where the defendant resides out of [India] and has no agent in [India] empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate :

[Provided that where any such defendant [resides in Bangladesh or Pakistan,] the summons, together with a copy thereof, may be sent for service on the defendant, to any Court in that country (not being the High Court) having jurisdiction in the place where the defendant resides :

Provided further that where any such defendant is a public officer [in Bangladesh or Pakistan (not belonging to the Bangladesh or, as the case may be, Pakistan military, naval or air forces)] or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant, to such officer or authority. in that country as the Central Government may, by notification in the Official Gazette, specify in this behalf.]

[26. Service in foreign territory through Political Agent or Court- Where

(a) in the exercise of any foreign jurisdiction vested in the Central Government, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons, issued by a Court under this Code, in any foreign territory in which the defendant actually and voluntarily resides, carries on business or personally works for gain, or

(b) the Central Government has, by notification in the Official Gazette, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service,

the summons may be sent to such Political Agent or Court, by post, or otherwise, or if so directed by the Central Government, through the Ministry of that Government dealing with foreign affairs, or in such other manner as may be specified by the Central Government for the purpose of being served upon the defendant : and, if the Political Agent or Court returns the summons with an endorsement purporting to have been made by such Political Agent or by the Judge or other officer of the Court to the effect that the summons has been served on the defendant in the manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

26A. Summonses to be sent to officer to foreign countries

Where the Central Government has, by notification in the Official Gazette, declared in respect of any foreign territory that summonses to be served on defendants actually and voluntarily residing or carrying on business or personally working for gain in that foreign territory may be sent to an officer of the Government of the foreign territory specified by the Central Government the summonses may be sent to such officer, through the Ministry of the Government of India dealing with foreign affairs or in such other manner as may be specified by the Central Government; and if such officer, any such summons with an endorsement purporting to have been made by him that the summons has been served on the defendant, such endorsement shall be deemed to be evidence of service.]

27. Service on civil public officer or on servant of railway company or local authority

Where the defendant is a public officer (not belonging to 31[the Indian] military 32[naval or air] forces33[***]), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed together with a copy to be retained by the defendant.

28. Service on soldiers, sailors or airmen

Where the defendant is a soldier, 34[sailor] 35[or airman], the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

29. Duty of person to whom summons is delivered or sent for service

(1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it if possible and to return it under his signature, with the written acknowledgement of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

30. Substitution of letter for summons

(1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

UNIT-II PLEADING

1. RULES OF PLEADING, SIGNING AND VERIFICATION

Pleading in a Suit:

Pleading is defined in the code of civil procedure in O 6, RULE 1.as given below :-

"pleading" shall mean plaint or written statement."

Order 6 Rule 2 says pleading to state material facts and not evidence.

2 (1)every pleading shall contain and contain only a statement in concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved. Basic principle of pleading is that "pleading should refer to fact alone, it should not be argumentative averment."(M/s strong construction v. state of u.p. AIR 2005 All 224), Mandatory requirements--see-- Jitu Patnaikversus Sanatan Mohakud & Others 2012 (1) U.A.D. 767 (SC).

2. ALTERNATIVE PLEADING

3. CONSTRUCTION OF PLEADINGS

4. PLAINT: PARTICULARS

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 affect;
- (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.

5. ADMISSION, RETURN AND REJECTION

6. WRITTEN STATEMENT: PARTICULARS, RULES OF EVIDENCE

WRITTEN STATEMENT(order 8 rule 1 of Cpc.)

Written statement.

The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.

Provided that where the defendant fails to file the written statement within the said period of thirty days, 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 than ninety days from the date of service of summons.]

7. SET OFF AND COUNTER CLAIM: DISTINCTION

Q. 5 What do you understand by Set Off. Distinguish between Legal and Equitable set off.

A set-off is a kind of counter-claim that operates as a defence to a claim. The doctrine of Set Off allows the defendant to put his own claim against the plaintiff before the court under certain circumstances. Technically, a set off can be defined as a discharge of reciprocal obligations to the extent of the smaller obligation. For example, A files a suit against B claiming 5000/- . B may take a

defence that A owes 3000/- to B as well. Thus, B is basically asking to set off 3000/- of A's claim and pay only 2000/-.

In *Jayanti Lal vs Abdul Aziz* AIR 1956, SC defined Set Off as the extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another.

By claiming set off, the defendant is spared from filing a separate suit against the plaintiff. Thus, it reduces the number of suits before the court.

Provisions of Set off are specified in CPC under Order VIII Rule 6

6. Particulars of set-off to be given in written statement -

(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, presents a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off—The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off : but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effect, C pays Rs. 1,000 as surety for D: then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000 C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1000. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000 B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

Essential Conditions for Set Off –

1. The suit must be of recovery of money. Example - A sues B for 20,000/-. B cannot set off the claim for damages for breach of contract for specific performance.
2. The sum of money must be ascertained. See Illustration c, d, e.
3. The sum claimed must be legally recoverable. For example, winnings in a wager cannot be claimed in a set off.
4. The sum claimed must be recoverable by all the defendants against the plaintiff if there are more than one defendants.
5. The sum claimed must be recoverable from all the plaintiffs by the defendant if there are more than one plaintiffs.
6. In the defendant's claim for set off, both the parties must fill in the same character as they fill in the plaintiff's suit. See illustrations a, b, h.

Equitable Set off

The provisions of Rule 6 given above are for Legal Set off. However, these provisions are not exhaustive. This means that a set off is still possible in certain situations even when some of the above conditions are not satisfied. For example, in a transaction where by goods are exchanged for services as well as payment, the defendant may be allowed to claim a set off for an uncertain amount for damaged goods. In a suit by a washerman for his wages, the defendant employer should be able to set off the price of the clothes lost by the plaintiff. In such a case, driving the plaintiff to file another suit would be unfair. A set off in such situations is called an Equitable Set off.

SC illustrated equitable set off in the case of Harishchandra vs Murlidhar AIR 1957 as follows - Where A sues B to recover 50,000/- under a contract, B can claim set off towards damages sustained by him due to the breach of the same contract by A.

However, there is still one condition that must be satisfied for equitable set off - the set off claim must originate from the same transaction.

Legal Set Off	Equitable Set Off
Sum must be ascertained.	Sum need not be ascertained.
Claim need not originate from the same transaction.	Claim must origination from the same transaction.
Legal set off can be claimed as a right by the defendant and the court is bound to adjudicate upon the claim.	Equitable set off cannot be claimed as a right but by court's discretion.
Court fee must be paid on set off amount.	No court fee is required.
The amount must not be time barred.	The amount may be time barred. However, if the defendant's claim is time barred, he can claim only as much amount as is given in the plaintiff's claim.

6A. Counter-claim by defendant –

(1) A defendant in a suit 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 his 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.

(2) Such counter-claim shall have 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.

(3) The plaintiff shall be at 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.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

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

6C. 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 any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

8. DISCOVERY, INSPECTION AND PRODUCTION OF DOCUMENTS

9. INTERROGATORIES

10. PRIVILEGED DOCUMENTS

11. AFFIDAVITS

UNIT-III APPEARANCE, EXAMINATION, TRIAL AND SUIT IN PARTICULAR CASES

1. APPEARANCE
 2. EX-PARTE PROCEDURE
 3. SUMMARY AND ATTENDANCE OF WITNESSES
 4. TRIAL
 5. ADJOURNMENTS
 6. INTERIM ORDERS: COMMISSION. ARREST OR ATTACHMENT BEFORE JUDGMENT, INJUNCTION AND APPOINTMENT OF RECEIVER.
 7. INTERESTS OR COSTS
 8. EXECUTION - CONCEPT GENERAL PRINCIPLES
 9. POWER FOR EXECUTION OF DECREES
 10. PROCEDURE FOR EXECUTION (SECTION 52-54)
 11. ENFORCEMENT, ARREST AND DETENTION (SS 55-56)
 12. ATTACHMENT (SS 65-64)
 13. SALE (SS 65-97)
 14. DELIVERY OF PROPERTY
 15. STAY OF EXECUTION
- SUITS IN PARTICULAR CASES –

Q. 4 State the procedure for institution of suits by and against minors or persons of unsound mind.
ORDER XXXII : SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND

1. Minor to sue by next friend

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

[Explanation-In this Order, "minor" means a person who has not attained his majority within the meaning of section 3 of the Indian Majority Act, 1875 (9 of 1875) where the suit relates to any of the matters mentioned in clauses (a) and (b) of section 2 of that Act or to any other matter.]

2. Where suit is instituted without next friend, plaint to be taken off the file

(1) Where a suit is instituted by or behalf or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any) may make such order in the matter as it thinks fit.

[2A. Security to be furnished by next friend when so ordered

(1) Where a suit has been instituted on behalf of the minor by his next friend, the Court may, at any stage of the suit, either of its own motion or on the application of any defendant, and for reasons to be recorded, order the next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant.

(2) Where such a suit is instituted by an indigent person, the security shall include the court-fees payable to the Government.

(3) The provisions of rule 2 of Order XXV shall, so far as may be, apply to a suit where the Court makes an order under this rule directing security to be furnished.]

3. Guardian for the suit to be appointed by Court for minor defendant

(1) Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) Order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, [upon notice to the father or where there is no father or mother, to other natural guardian], of the minor, or, where there is [no father, mother or other natural guardian], to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[(4A) The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.]

[(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree.

[3A. Decree against minor not to be set aside unless prejudice has been caused to his interests

(1) No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor, but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of the minor, shall be a ground for setting aside the decree.

(2) Nothing in this rule shall preclude the minor from obtaining any relief available under any law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting in prejudice to the interests of the minor.

4. Who may act as next friend or be appointed guardian for the suit

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent [in writing] be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested [or out of the property of the minor], and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

5. Representation of minor by next friend or guardian for the suit-

(1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

6. Receipt by next friend or guardian for the suit of property under decree for minor-

(1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either-

- (a) by way of compromise before decree or order, or
- (b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste. and ensure its proper application:

[Provided that the Court may, for reasons to be recorded, dispense with such security while granting leave to the next friend or guardian for the suit to receive money or other movable property under a decree or order where such next friend or guardian-

- (a) is the manager of a Hindu undivided family and the decree or order relates to the property business of the family; or
- (b) is the parent of the minor.]

7. Agreement or compromise by next friend or guardian for the suit-

(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

[(1A) An application for leave under sub-rule (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit, as the case may be, and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor :

Provided that the opinion so expressed, whether in the affidavit or in the certificate shall not preclude the Court from examining whether the agreement or compromise proposed is for the benefit of the minor.]

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

8. Retirement of next friend-

(1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed and also that he has no interest adverse to that of the minor.

9. Removal of next friend-

(1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or during the pendency of the suit, ceases to reside within 7[India], or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

10. Stay of proceedings on removal, etc., of next friend-

(1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

11. Retirement, removal or death of guardian for the suit-

(1) Where the guardian for the suit desire to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the court shall appoint a new guardian in his place.

12. Course to be followed by minor plaintiff or applicant or attaining majority-

(1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus:

"A.B., late a minor, by C. D., his next friend, but now having attained majority."

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made ex parte but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

13. Where minor co-plaintiff attaining majority desires to repudiate suit-

(1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

14. Unreasonable or improper suit-

(1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

[15. Rules 1 to 14 (except rule 2A) to apply to persons of unsound mind-

Rules 1 to 14 (except rule 2A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.]

[16. Savings-

(1) Nothing contained in this Order shall apply to the Ruler of a foreign State suing or being sued in the name of his State, or being sued by the direction of the Central Government in the name of an agent or in any other name.

(2) Nothing contained in this Order shall be construed as affecting or in any way derogating from the provisions of any local law for the time being in force, relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

Ram Chandra vs Ram Singh AIR 1968 - SC held that a decree passed against a minor or a lunatic without appointment of a guardian is a nullity and is void and not merely voidable.

1. BY OR AGAINST GOVERNMENT (SS 79-82).

Order 27 and Section 79-82.

ORDER XXVII: SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

1. Suits by or against Government

In any suit by or against [the Government], the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

2. Persons authorised to act for Government

Persons being ex officio or otherwise authorised to act for the Government in respect of any judicial proceeding shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government.

3. Plaints in suits by or against Government.

In suits by or [against the Government], instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert [the appropriate name as provided in section 79 .

4. Agent for Government to receive process

The Government pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the Government issued by such Court.]

5. Fixing of day for appearance on behalf of Government

The Court, in fixing the day for [the Government] to answer to the plaint, shall allow a reasonable time for the necessary communication with the [Government through the proper channel, and for the issue of instructions to the Government pleader] to appear and answer on behalf of [the Government] , and may extend the time at its discretion [but the time so extended shall not exceed two months in the aggregate].

[5A. Government to be joined as a party in a suit against a public officer

Where a suit is instituted against a public officer for damages or other relief in respect of any act alleged to have been done by him in his official capacity, the Government shall be joined as a party to the suit.

5B. Duty of Court in suits against the Government or a public officer to assist in arriving at a settlement.

(1) In every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently 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 under sub-rule (2) is in addition to any other power of the Court to adjourn proceedings.]

6. Attendance of person able to answer questions relating to suit against Government

The Court may also, in any case in which 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, direct the attendance of such a person.

7. Extension of time to enable public officer to make reference to Government

(1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. Procedure in suits against public officer

(1) 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.

(2) 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 :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

[8A. No security to be required from Government or a public officer in certain cases]

No such security as is mentioned in rules 5 and 6 to 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.

8B. Definitions of "Government" and "Government pleader"

In this Order [unless otherwise expressly, provided] "Government" and ["Government pleader"] mean respectively-

(a) 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 whether generally or specially for the purposes of this Order;

(c) 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 the Government pleader [as defined in clause (7) of section 2], or such other pleader as the State Government may appoint, whether generally or specially, for the purposes of this Order.]

2. BY ALIENS AND BY OR AGAINST FOREIGN RULES OR AMBASSADORS (SS 83-87-A)

3. PUBLIC NUISANCE (SS. 91-93)

4. SUITS BY OR AGAINST FIRM

5. MORTGAGE

6. INTERPLEADER SUITS

Q. Interpleader Suit –
Section 88 and Order 35

Interpleader suit : An interpleader suit is a suit in which the real dispute is between the defendants only and the defendants interplead, that is plead against each other (instead of pleading against the plaintiff as in an ordinary suit).

Illustration: P is in possession of jewel box, wherein he claims no interest himself, and is ready and willing to hand it over to the rightful owner. The box is claimed by A and B. P may file an interpleader suit against A and B.

Where goods in the possession of a railway company are claimed by two persons adversely to each other, and the company claims no interest in these goods (other than a lien thereon for wharfage,

demurrage and freight) it may institute an interpleader suit under this section: Bombay and Borada Rly. C.V. Sesson (1984) 18 Bom. 231.

Section 88:Where interpleader suit may be instituted: Where two or more persons claim adversely to one another the same debts, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or 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 all parties can properly be decided, no such suit of interpleader shall be instituted.

Scope and applicability of the Section: Where X is under liability for any debt, sum of money or other property claimed adversely by A or B or more, and X desires protection against, a wrong payment or delivery he can file a suit under this section. The only way, in fact, in which he can protect himself, is by filing, such a suit, otherwise claimant. It is necessary that the liability to someone must be admitted, and there must be no collusion and no interest in the subject matter other than for charges or costs. A suit under this section is called an interpleader suit because the plaintiff is really not interested in the matter but only the defendants interplead as to their claims. In fact, each of the defendants so interpleading is virtually in the position of a plaintiff and his claim will be governed by the rules of the Limitation Act.

Procedure - Order 35 Rule 1 - 4
7 SUITS RELATING TO PUBLIC CHARITIES
8 INDIGENT (PAUPER) SUITS
Who is an indigent person?

A person is an indigent person: (1) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject of the suit) to enable him to pay the fee prescribed by law for the plaint in the suit proposed to be instituted by him, or (2) 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. (Order XXXIII, Rule 1, Explan. I).

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. (Order XXXIII, Rule 1, Explan. II).

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. (Order XXXIII, Rule 1, Explan. III).

The benefit of Order XXXIII, C.R.C. is conferred on persons without 'sufficient means' and not without any means at all. Pauperism is not a pre-requisite for the leave. What is contemplated is not possession of property but sufficient means. Capacity to raise money and not actual possession of property alone is what the court has to look into.

Possession of sufficient means refers to possession of sufficient realisable property which will enable the plaintiff to pay the court-fee. Possession of hard cash sufficient enough to pay the court-fee is not a pre-requisite to make one a person of sufficient means within the meaning of the rule. A person entitled to sufficient property may nevertheless be not possessed of sufficient means to pay court-fee. Even one who is entitled to or possessed of property cannot be for that reason alone held to be having sufficient means. What is intended and provided is that justice shall not be denied to a person for the reason that he is not having sufficient means to pay court-fee.

What is intended is not capacity to raise funds by means whatsoever by begging, borrowing or stealing or by any other hook or crook, but by normal, and available lawful means. It is not an essentiality that one should deprive himself of the sole means of livelihood or alienate all his assets and seek justice in

penury. This itself is the object of exclusion of property exempt from attachment in execution of a decree and the subject-matter of the suit from “sufficient means”.

Assessment or “sufficient means” should not be at the expense of right to live with dignity guaranteed under the Constitution. Capacity to raise funds could only cover all forms of realisable assets which a person could in the normal circumstances convert into cash and utilise for the litigation without detriment to his normal existence.

A debt that has yet to be realised or an asset which is not within the immediate reach of the plaintiff to be converted into cash for payment of court-fee cannot be taken into account in calculating sufficient means. The approach must be practical and in a way to promote the cause of justice and at the same time cautious enough to plug mala fide avoidance of immediate payment of court fee. The words used are ‘possessed of sufficient means’ which mean that what was not possessed at the time of suit cannot be taken into account.

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. (Order XXXIII, Rule 1A).

The word ‘means’ certainly covers all realisable assets within a person’s reach, but it is doubtful whether a right to enjoy a particular property for life, by which the person entitled to enjoy the same has to take out his livelihood from the income of such property can be considered means even if an offer is made to advance funds on such right.

It cannot be equated with the equity of redemption available to a mortgagor which certainly is an asset. The right to enjoy the property is not normally a saleable or encumberable interest though persons interested might offer to purchase or take a mortgage, not necessarily to help the vendor or mortgagor, but to place the allottee in embarrassing circumstances.

A person to be entitled to sue as an indigent person has to obtain permission to sue as such by the court. The application for permission must contain the particulars required in regard to plaints and a schedule of the property, movable and immovable, belonging to the applicant, with the estimated value thereof, and it should be signed and verified as if it were a plaint.

The application should 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 authorised agent, who can answer all material questions relating to the application: provided that where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs. The applicant or his agent may then be examined by the court regarding the merits of the claim and the property of the applicant. (Order XXXIII, Rules 2-4).

Possession of a house, possession of some land and possibility of getting compensation do present a rosy picture. However, they become illusory when the compensation is yet to be received, when the petitioner has no other shelter to house his family, when the petitioner has five members to support including himself with wages of Rs. 410/- per month as an employee in a petrol pump.

The above considerations persuaded the court to reject the findings of the trial court and to permit the petitioner to sue as an indigent person. In the event of the petitioner receiving the compensation due to him in respect of one-third area of 4 acres 12 guntas of land acquired by the Government, there is always a residual liability to pay the court fee and the right to recover as far as the State is concerned. The petitioner was permitted to sue as an indigent person.

Possession of ‘sufficient means’ as indicated in cl. (a) of Explanation I of Rule 1 is not possession of property but of sufficient means and the court has to enquire into the capacity to raise money and not actual possession. The possession of ‘sufficient means’ refers to the possession of sufficient realisable property which will enable the plaintiff to pay the court-fee on the plaint.

The expression ‘possession of sufficient means’ refers to capacity to raise money and not the actual possession of property. Where the property of the party is hypothecated to a bank to secure principal

and interest, and the party is not in a position to convert the property into cash, he cannot be held to be a person possessing sufficient means to pay the court-fee.

The word 'means' is intended to cover and include all forms of realisable assets which can be converted into cash, and as such can be used for financing the litigation. A debt which is due from a third person cannot be said to be 'means' of which the applicant is possessed, and the words 'is not possessed of' must mean that the applicant has no actual control over it.

'Possessed of sufficient means' mean actual control over a thing and capacity to reduce it into his possession without having recourse to law. Where the petitioner is possessed of some property which is not cash, the test to decide whether he is a pauper is not whether in the abstract he has the power of raising money, but whether in the concrete circumstances of the case he can succeed in raising anything substantial by exercising that power.

The application to sue as indigent person should not be rejected summarily merely on the ground that it has not been signed and verified by the applicant. Even if there is an omission in the application, the application may be returned for rectification. The rule is not to be meticulously interpreted against the applicant.

A substantial compliance with the rule is sufficient. Where the applicant does not verify the contents of the petition at the foot of the petition but does so by a separate affidavit in which the statements contained in the several paragraphs in the application were said to be true, the affidavit could be treated as a part of the application.

Rejection of application:

The court shall reject an application for permission to sue as an indigent person—

- (a) Where it is not properly framed and presented in the manner prescribed by Rules 2 and 3, i.e., full particulars as detailed above are not given or where the application is not presented by the proper person; or
- (b) Where the applicant is not an indigent person; or
- (c) 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 such an application shall not be rejected if after taking into account the value of the property disposed of by the applicant, the applicant would be entitled to sue as an indigent person; or
- (d) Where his allegations do not show a cause of action; or
- (e) 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
- (f) Where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force; or
- (g) Where any other person has entered into an agreement with him to finance the litigation. (Order XXXIII, Rule 5).

This rule is intended to be exhaustive.

An application to sue as an indigent person is a composite document consisting of an unstamped plaint and an application for permission to sue in forma pauperis. If the application for permission to sue in forma pauperis is rejected, the plaint still remains and the court may, in its discretion, allow the petitioner to pay the court fee and in such a case the suit shall be deemed to have been instituted on the date of presentation of the application. After rejection of the leave, the court should consider whether the petitioner plaintiff should be given time for payment of court fee and pass appropriate orders.

Procedure:

When the court sees no reason to reject the application on any of the grounds stated above, it shall fix a day after notice to the opposite party and the Government pleader for receiving such evidence as the

applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

The court examines the witnesses produced by either party and the applicant or his agent makes a full record of their evidence and hears arguments and after such hearing may allow or refuse to allow the applicant to sue as an indigent person. Where the application is granted it is numbered and registered and deemed the plaint in the suit. The suit then proceeds in the ordinary manner except that the plaintiff is not liable to pay any court-fee, other than fee payable for service of process. (Order XXXIII, Rules 6-8).

The High Court was labouring under a mistake when it said that the enquiry into the question whether the respondent was an indigent person was exclusively a matter between him and the State Government and that the appellant was not interested in establishing that the respondent was not an indigent person.

Order XXXIII, Rule 6 provides that if the court does not reject the application under Rule 5, the court shall fix a day of which at least 10 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 pauperism and for hearing any evidence in disproof thereof.

Under Order XXXIII, Rule 9, it is open to the court on the application of the defendant to dispauper the plaintiff on the grounds specified therein, one of them being that his means are such that he ought not to continue to sue as an indigent person.

Immunity from litigation unless the requisite court fee is paid by the plaintiff is a valuable right for the defendant. And does it not follow as a corollary that the proceedings to establish that the applicant-plaintiff is an indigent person, which will take away that immunity, is a proceeding in which the defendant is vitally interested?

To what purpose does Order XXXIII, Rule 6, confer the right on the opposite party to participate in the enquiry into the pauperism and adduce evidence to establish that the applicant is an indigent person unless the opposite party is interested in the question and entitled to avail himself of all the normal procedure to establish it.

Where a person, who is permitted to sue as 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. (Order XXXIII, Rule 9A).

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 a pauper, and 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. (Ord XXXIII, Rule 10).

A suit by an indigent person or a person claiming to be an indigent person must be regarded as instituted on the date of the presentation of application for permission to sue in forma pauperis as required by Rules 2 and 3 of Order XXXIII, C.P.C. When permission to sue as an indigent person is granted by the court under Order XXXIII, Rule 7, the petition or application must be regarded as a plaint filed on the day when the application was presented to the court.

UNIT-IV APPEALS, REVIEW, REFERENCE AND REVISION

1. APPEALS FROM DECREE AND ORDER GENERAL PROVISIONS RELATING TO APPEAL

Q. 6 On what grounds does a second appeal lie?

Section 100. 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.

Section 100A - No further appeal in certain cases— Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order or such single Judge in such appeal or from any decree passed in such appeal.

Section 101 - Second appeal on no other grounds— No second appeal shall lie except on the ground mentioned in section 100.

Section 102 - No second appeal in certain suits— No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

Section 103 - Power of High Court to determine issues of fact— In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts reason of a decision on such question of law as is referred to in section 100.

Substantial question of law -

The expression substantial question of law has not been defined anywhere in the code. However, SC interpreted it in the case of Sir Chuni Lal Mehta & Sons Ltd vs Century Spg & Mfg Co Ltd (AIR 1962 SC 1314) 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 call 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."

To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law his a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

PART VIII : REFERENCE, REVIEW AND REVISION

113. Reference to High Court

Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit :

[Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court.

Explanation.- In this section, "Regulation" means any Regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897, (10 of 1897) or in the General Clauses Act of a State.]

114. Review

Subject as aforesaid, any person considering himself aggrieved-

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

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

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

115. Revision

[(1)] The High Court may call for the record of any case which has been decided 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 -

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.]

[(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.

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.]

2. TRANSFER OF CASES

3. RESTITUTION

4. CAVEAT

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.

5. INHERENT POWERS OF COURTS

6. LAW REFORM : LAW COMMISSION ON CIVIL PROCEDURE - AMENDMENTS

UNIT-V LIMITATION

1. THE CONCEPT- THE LAW ASSISTS THE VIGILANT AND NOT THOSE WHO SLEEP OVER THE RIGHTS.

2. OBJECT OF THE LAW OF LIMITATION

Q.1 Explain - Limitations bars remedy but does not extinguish the right.

Extracts from the judgment in the case of Bombay Dyeing and Mfg Co. Ltd. v. State of Bombay AIR 1958 SC 328 :

Section 27 of the Limitation Act provides that when the period limited to a person for instituting a suit for possession of any property has expired, his right to such property is extinguished. And the authorities have held-and rightly, that when the property is incapable of possession, as for example, a debt, the section has no application, and lapse of time does not extinguish the right of a person thereto.

Under Section 25(3) of the Contract Act, a barred debt is good consideration for a fresh promise to pay the amount. When a debtor makes a payment without any direction as to how it is to be appropriated, the creditor has the right to appropriate it towards a barred debt. It has also been held that a creditor is entitled to recover the debt from the surety, even though a suit on it is barred against the principal debtor. And when a creditor has a lien over goods by way of security for a loan, he can enforce the lien for obtaining satisfaction of the debt, even though an action thereon would be time-barred.

In American Jurisprudence, Vol. 34, page 314, the law is thus stated:

'A majority of the courts adhere to the view that a statute of limitations as distinguished from a statute which prescribes conditions precedent to a right of action, does not go to the substance of a right, but only to the remedy. It does not extinguish the debt or preclude its enforcement, unless the debtor chooses to avail himself of the defence and specially pleads it. An indebtedness does not lose its character as such merely because it is barred, it still affords sufficient consideration to support a promise to pay, and gives a creditor an insurable interest.'

In Corpus Juris Secundum, Vol. 53, page 922, we have the following statement of the law: 'The general rule, at least with respect to debts or money demands, is that a statute of limitation bars, or runs against, the remedy and does not discharge the debt or extinguish or impair the right, obligation or cause of action.'

The position then is that under the law a debt subsists notwithstanding that its recovery is barred by limitation.

The modes in which an obligation under a contract becomes discharged are well defined, and the bar of limitation is not one of them. The following passages in Anson's Law of Contract, 19th edition, page 383, are directly in point:

'At Common Law, lapse of time does not affect contractual rights. Such a right is of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration. But though the right possesses this permanent character, the remedies arising from its violation are withdrawn after a certain lapse of time; interest reipublicae ut si finis litium. The remedies are barred, though the right is not extinguished.'

"And if the law requires that a debtor should get a discharge before he can be compelled to pay, that requirement is not satisfied if he is merely told that in the normal course he is not likely to be exposed to action by the creditor."

The Bombay High Court in the case of J.K. Chemicals Ltd. v. CIT [1966] 62 ITR 34, again considered the question. The assessee-company, which kept its accounts on the mercantile system, debited the accounts as and when it incurred any liability on account of wages, salary or bonus due to its employees even though the amounts were not disbursed in cash to the employees, and obtained deduction of the amounts so debited in the respective years in computing its total income. Certain portion of the wages, salary and bonus, so debited, was in fact not drawn by the employees. On June 30, 1957, a sum of Rs. 5,929 which had remained undrawn but had been allowed to be deducted during the accounting years 1945 to 1953 was credited to the profit and loss account of the said year. The Department included this amount in the total income of the accounting year on the ground that the trading liability in respect of which deduction had been allowed had ceased to exist, and under section 10(2A), the amount in question should be deemed to be income.

The Bombay High Court held that, in order that an amount may be deemed to be income under section 10(2A), there must be a remission or cessation of the liability in respect of that amount. The mere fact that more than three years had elapsed since the accrual of the liability and that the debts had become unenforceable against the assessee under the general law does not constitute cessation of the trading liability within the meaning of section 10(2A). A mere entry of credit in the accounts in respect of the amount would also not bring about a remission or cessation of the liability. Section 10(2A) was not, therefore, applicable and the amount was not liable to be assessed as income of the accounting year in which the credit entry was made.

3. DISTINCTION WITH LATCHES, ACQUIESCENCE, PRESCRIPTION.

4. EXTENSION AND SUSPENSION OF LIMITATION

5. SUFFICIENT CAUSE FOR NOT FILING THE PROCEEDINGS.

6. ILLNESS.

7. MISTAKEN LEGAL ADVISE.

8. MISTAKEN VIEW OF LAW.

9. POVERTY, MINORITY AND PURDHA.

10. IMPRISONMENT

11. DEFECTIVE VAKALATNAMA

12. LEGAL LIABILITIES

13. ACKNOWLEDGEMENT- ESSENTIAL REQUISITES

14. CONTINUING TORT AND CONTINUING BREACH OF CONTRACT

15. FOREIGN RULE OF LIMITATION : CONTRACT ENTERED INTO UNDER A FOREIGN LAW

LIMITATION ACT

Q. 2 Explain Legal Disability under Limitation Act, 1963. Who can get the benefit of legal disability? How legal disability effects on the period of limitation?

Statutes of limitations are designed to aid defendants. A plaintiff, however, can prevent the dismissal of his action for untimeliness by seeking to toll the statute. When the statute is tolled, the running of the time period is suspended until some event specified by law takes place. Tolling provisions benefit a plaintiff by extending the time period in which he is permitted to bring suit.

Various events or circumstances will toll a statute of limitations. It is tolled when one of the parties is under a legal disability—the lack of legal capacity to do an act—at the time the cause of action accrues.

A child or a person with a mental illness is regarded as being incapable of initiating a legal action on her own behalf. Therefore, the time limit will be tolled until some fixed time after the disability has been removed. For example, once a child reaches the age of majority, the counting of time will be resumed. A personal disability that postpones the operation of the statute against an individual may be asserted only by that individual. If a party is under more than one disability, the statute of limitations does not begin to run until all the disabilities are removed. Once the statute begins to run, it will not be suspended by the subsequent disability of any of the parties unless specified by statute.

Mere ignorance of the existence of a cause of action generally does not toll the statute of limitations, particularly when the facts could have been learned by inquiry or diligence. In cases where a cause of action has been fraudulently concealed, the statute of limitations is tolled until the action is, or could have been, discovered through the exercise of due diligence. Ordinarily, silence or failure to disclose the existence of a cause of action does not toll the statute. The absence of the plaintiff or defendant from the jurisdiction does not suspend the running of the statute of limitations, unless the statute so provides.

The statute of limitations for a debt or obligation may be tolled by either an unconditional promise to pay the debt or an acknowledgement of the debt. The time limitation on bringing a lawsuit to enforce payment of the debt is suspended until the time for payment established under the promise or Acknowledgment has arrived. Upon that due date, the period of limitations will start again.

Section 6 - Legal disability

(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

(2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so specified.

(3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.

(4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply. (5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.

Explanation.-For the purposes of this section, 'minor' includes a child in the womb.

Q. 3 Can a court grant extension of the period of limitation? If so, in what circumstances and in what class of proceeding.

A Court may grant extension of period of limitation in the following classes of proceedings and no others:

(1) Appeals, (2) applications other than applications under Order 21, Civil Procedure Code relating to execution.

For obtaining an extension under section 5 the appellant or the applicant must satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed period.

What is a sufficient cause” has nowhere been defined in the Limitation Act except that the Explanation indicates what shall be the sufficient cause in the case of an appellant, or who was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period. But it has been held that sufficient cause must mean a cause which was beyond the control of the party invoking the aid of Section 5.

A cause for delay which by due care and attention a party could have avoided cannot be a sufficient cause. However the expression ‘sufficient’ cause’ should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant or applicant.

The extension of time cannot be obtained for filing a suit as Section 5 does not apply suits. The reason is that the period of limitation allowed in most of the suits extends from three to twelve years, whereas in appeal and applications, it does not exceed six months.

Therefore it is necessary that some concession should be made in respect of these appeals and applications, to provide for circumstances which hinder a person from filing his appeal or application within the short period of time allowed.

Q. 4 Discuss the effects of fraud, mistake, and Acknowledgement under Limitation Act, 1963. State the conditions for a valid acknowledgement.

Effect of fraud or mistake – Period of limitation starts only after fraud or mistake is discovered by affected party. [section 17(1)]. In Vidarbha Veneer Industries Ltd. v. UOI - 1992 (58) ELT 435 (Bom HC) , it was held that limitation starts from the date of knowledge of mistake of law. It may be even 100 years from date of payment.

The cardinal principle enshrined in section 17 of Limitation Act is that fraud nullifies everything. Thus, appeal against the party can be admitted beyond limitation, if party has committed fraud (in submitting non-genuine documents at adjudication in this case) – CC v. Candid Enterprises 2001(130) ELT 404 (SC 3 member bench).

Section 17 - Effect of fraud or mistake - (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act-

- (a) The suit or application is based upon the fraud of the defendant or respondent or his agent; or
- (b) The knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or
- (c) The suit or application is for relief from the consequences of a mistake; or
- (d) Where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;

The period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, has discovered it, or in the case of concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against or set aside any transaction affecting, any property which-

(i) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) In the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) In the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

Effect of acknowledgment in writing - If acknowledgment of any property is right or liability is obtained in writing duly signed by the party against whom such property, right or liability is claimed, before the expiration of period of limitation, a fresh period of limitation is computed from date of acknowledgment. [section 18(1)], Acknowledgment can be signed either personally or by an agent duly authorized in this behalf. [section 18(2)]. [That is why Banks and Financial Institutions insist on confirmation of balance every year].

Section 18 - Effect of acknowledgment in writing -

(1) Where before the expiration of the prescribed period for a suit or application in respect or any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derived his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation - For the purposes of this section, -

(a) An acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by 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 authorized 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.

As held in Subbarsadya vs Narashimha, AIR 1936 It is not necessary that an acknowledgment within Section 18 must contain a promise pay or should amount to a promise to pay.

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