PART I

1 Introduction

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1. PROCEDURAL LAW

LAWS CAN be divided into two groups: (1) Substantive law, and (2) Adjective or procedural law. Whereas substantive law determines rights and liabilities of parties, adjective or procedural law prescribes the practice, procedure and machinery for the enforcement of those rights and liabilities.[1]

In *Halsbury's Laws of England*, it has been stated, "There is at the outset a vital and essential distinction between substantive law and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. The function of procedural law is to provide the machinery or the manner in which the legal rights or status and legal duties may be enforced or recognised by a court of law or other recognised or properly constituted tribunal."[2]

Procedural laws prescribe procedure for the enforcement of rights and liabilities. The efficacy of substantive laws, to a large extent, depends upon the quality of procedural laws. Unless the procedure is simple, expeditious and inexpensive, substantive laws, however good are bound to fail in achieving their object and reaching the goal.

[1] *See also*, Glanville Williams, *Learning the Law* (1982) at pp. 19-13; Law Commission's 54th Report at p. 18.

[2] *Halsbury's Laws of England* (4th Edn.) Vol. 37 at pp. 18-19, para 10.

Procedural law is thus an adjunct or an accessory to substantive law. The two branches are complementary to each other and interdependent, and the interplay between them often conceals what is substantive law and what is procedural law. It is procedural law which puts life into substantive law by providing a remedy and implements the well-known maxim *ubi jus ibi remedium*.[3]

The Indian Contract Act, the Transfer of Property Act, the Industrial Disputes Act, the Indian Penal Code are instances of substantive law, while the Indian Evidence Act, the Limitation Act, the Code of Civil Procedure, the Code of Criminal Procedure are instances of procedural law.

The Code of Civil Procedure is an adjective law. It neither creates nor takes away any right. It is intended to regulate the procedure to be followed by civil courts.[4]

2. HISTORY OF THE CODE

Before 1859, there was no uniform Code of Civil Procedure. There were different systems of civil procedure in different parts of the country. The first uniform Code of Civil Procedure was enacted in 1859. But that Code was also not made applicable to the Supreme Courts in the Presidency Towns and to the Presidency Small Cause Courts. Some amendments were made therein and the Code was applied to the whole of British India, but there were many defects in it, and therefore, a new Code was enacted in 1877. Again, another Code was enacted in 1882, which was also amended from time to time.

In 1908, the present Code of Civil Procedure was enacted. It was amended by two important Amendment Acts of 1951 and 1956. On the whole, this Code worked satisfactorily, though there were some defects in it. The Law Commission in its various reports made many recommendations, and after carefully considering them, the Government decided to bring forward the Bill for the amendment of the Code of Civil Procedure, 1908, keeping in view, *inter alia*, the following considerations:[5]

(1) a litigant should get a fair trial in accordance with the accepted principles of natural justice;

(2) every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;

(3) the procedure should not be complicated, and should, to the utmost extent possible, ensure a fair deal to the poorer sec-

[3] *Ibid*, at p. 11, para 3.

[4] *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46 at p. 56: AIR 1984 SC 1004 at p. 1010.

[5] Statement of Objects and Reasons of Amendment Act 104 of 1976.

tions of the community who do not have the means to engage a pleader to defend their cases.

Some of the important changes made by the Amendment Act, 1976 are as under:

(*i*) The doctrine of *res judicata* is being made more effective.

(*ii*) Power to transfer proceedings from one High Court to another is given to the Supreme Court.

(*iii*) Freedom from attachment of a portion of salary to all salaried employees, is granted.

(*iv*) Provision of giving notice under Section 80 before the institution of a suit against the Government or a public officer is made less stringent.

(*v*) Restrictions are imposed on the right of appeal and revision.

(*vi*) Provisions are being made to ensure that written statements and documents were filed without delay.

(*vii*) New Order 32-A has been inserted to provide a special procedure in litigation concerning the affairs of a family.

(*viii*) The practice to pass preliminary and final decree in certain suits is abolished.

(*ix*) Scope of Summary Trials is substantially widened.

(*x*) Important changes have been made to provide relief to poorer sections of the community.

The amendments made in 1976 were not found sufficient. With a view to dispose of civil cases expeditiously, Justice Malimath Committee was appointed by the Government. In pursuance of recommendations of the Committee, the Code was amended by the Amendment Acts of 1999[6] and 2002.[7]

Important amendments made by Acts of 1999 and 2002 may be summarised thus:

(*i*) In several matters, such as issuing of summons, filing of written statement, amendment of pleadings, production of documents, examination of witnesses, pronouncement of judgments, preparation of decree, etc., a time-limit is prescribed;

(*ii*) A new provision for settlement of disputes outside the court has been introduced;

(*iii*) Number of adjournments have been restricted;

(*iv*) A provision for recording of evidence by the Court Commissioner has been made;

(*v*) Endless arguments are sought to be shortened by (*a*) empowering the court to fix a time-limit for oral arguments; and (*b*)

[6] Act 46 of 1999.

[7] Act 22 of 2002.

by permitting written arguments to be placed on record by the parties;

(*vi*) A provision is made for filing of appeal in the court which passed the decree;

(*vii*) Instituting of appeal against the judgment is allowed where the decree is not drawn up;

(*viii*) Scope of First Appeal, Second Appeal, Letters Patent Appeal and Revision has been curtailed.

3. COMMENCEMENT

The Code of Civil Procedure, 1908 (5 of 1908) came into force with effect from 1 January 1909; while the Amendment Act (104 of 1976) came into force with effect from 1 February 1977. It may be stated that the Code of Civil Procedure (Amendment) Bill, 1974 was passed by Parliament on 23 August 1976. It received the assent of the President on 9 September 1976. It became Act 104 of 1976 and came into force from 1 February 1977 (except Sections 12, 13 and 50). Sections 12 and 50 came into force on 1 May 1977 and Section 13 came into force on 1 July 1977.

The Code of Civil Procedure (Amendment) Act, 1999 received the assent of the President on 30 December 1999 and came into force from 1 July 2002. The Code of Civil Procedure (Amendment) Act, 2002 received the assent of the President on 23 May 2002 and came into force on 1 July 2002.

4. CONSOLIDATION AND CODIFICATION

The Preamble of the Code states that the object of the Code is to consolidate and amend the laws relating to the procedure of Courts of Civil Judicature. To consolidate means to collect all the laws relating to a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act is enacted.[8]

The very object of codifying a particular branch of law is that, on any point specifically dealt with, the law should thenceforth be ascertained from the language used in that enactment and not from the preceding Act.[9]

The Code of Civil Procedure is a consolidated Code as to procedure to be followed by civil courts. As observed in *Prem Lala Nahata* v. *Chandi Prasad Sikaria*[10], the Code consolidates and amends the laws

[8] *...inistrator General of Bengal* v. *Prem Lal Mullick*, (1895) 22 Cal 788 at p. 798 (PC): ILR (1894-95) 22 IA 107; *Mahant Shantha Nand* v. *Mahant Basudevanand*, AIR 1930 All 225 at p. 230 (FB).

[9] *Norendra Nath Sircar* v. *Kamal Basini Dasi*, ILR (1896) 23 Cal 563 at pp. 571-72 (PC): (1895-1896) 23 IA 18; *Gulabchand* v. *Kudilal Govindram*, AIR 1951 MB 1 (FB).

[10] (2007) 2 SCC 551: AIR 2007 SC 1247.

relating to the procedure of the Courts of Civil Judicature. No doubt it also deals with certain substantive rights. But its essential object is to consolidate the law relating to civil procedure.

5. EXTENT AND APPLICABILITY

The Code extends to the whole of India, except (*a*) the State of Jammu and Kashmir; and (*b*) the State of Nagaland and the Tribal Areas. It also extends to the Amindivi Islands and the East Godavari and Vishakhapatnam Agencies in the State of Andhra Pradesh and the Union Territory of Lakshadweep. By the Amendment Act of 1976, the application of the provisions of the Code have been extended to Schedule Areas also.[11]

6. OBJECT OF THE CODE

The object of the Code is to consolidate and amend the laws relating to the procedure of Courts of Civil Judicature. It is a consolidated Code collecting all the laws relating to the procedure to be adopted by civil courts. It is designed to facilitate justice and further its ends and is not a penal enactment for punishments and penalties, not a thing designed to trip up people.[12] Too technical a construction of sections which leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against, provided that justice is done to both the sides.[12] The provisions of the Code, therefore, should be construed liberally and technical objections should not be allowed to defeat substantial justice.[13] A "hypertechnical view"[14] should be avoided by the court.

As the Supreme Court stated, "A procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. *A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law.*"[15] (emphasis supplied)

[11] S. 1; *see also*, Ss. 157, 158.

[12] *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425 at p. 429: (1955) 2 SCR 1 at p. 5; *Chinnammal* v. *P. Arumugham*, (1990) 1 SCC 513 at p. 520: AIR 1990 SC 1828 at p. 1833.

[13] *Hukum Chand* v. *Kamalanand Singh*, ILR (1906) 33 Cal 927.

[14] *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91 at p. 96: AIR 1978 SC 484 at p. 488; *Babu Lal* v. *Hazari Lal*, (1982) 1 SCC 525 at p. 539: AIR 1982 SC 818 at p. 826.

[15] *Saiyad Mohd. Bakar* v. *Abdulhabib Hasan*, (1998) 4 SCC 343 at p. 349: AIR 1998 SC 1624 at p. 1627.

7. SCOPE: CODE NOT EXHAUSTIVE

The Code is exhaustive on matters specifically dealt with by it.[16] However, it is not exhaustive on the points not specifically dealt with therein.[16] The legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing procedure for them.[16] With regard to those matters, the court has inherent power to act according to the principles of justice, equity and good conscience.[17] The Code specifically provides that, "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."[18]

8. INTERPRETATION

Though substantive laws are very important, value and importance of procedural laws cannot be underestimated. But the procedural law must be regarded as such. The function of adjective law is to facilitate justice and further its ends.[19] The rules of procedure are intended to be a handmaid to the administration of justice and they must, therefore, be construed liberally and in such manner as to render the enforcement of substantive rights effective.[20] A "hypertechnical view" should not be adopted by the court in interpreting procedural laws.[21] A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure.[22]

[16] *Manohar Lal* v. *Seth Hiralal*, AIR 1962 SC 527 at p. 532-33: 1962 Supp (1) SCR 450; *Padam Sen* v. *State of U.P.*, AIR 1961 SC 218: (1961) 1 SCR 884.

[17] *Hukum Chand* v. *Kamalanand Singh*, ILR (1906) 33 Cal 927.

[18] S. 151. For detailed discussion *see infra*, Pt. V, Chap. 4.

[19] *Hukum Chand* v. *Kamalanand Singh*, ILR (1906) 33 Cal 927; *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425 at p. 429: (1955) 2 SCR 1 at p. 5; *Manharlal* v. *State of Maharashtra*, (1971) 2 SCC 119 at pp. 124-25: AIR 1971 SC 1511 at pp. 1515-16; *Shreenath* v. *Rajesh*, (1998) 4 SCC 543: AIR 1998 SC 182.

[20] *Jai Jai Ram Manohar* v. *National Building Material Supply*, (1969) 1 SCC 869 at p. 871: AIR 1969 SC 1267 at p. 1269; *Babu Lal* v. *Hazari Lal*, (1982) 1 SCC 525 at p. 539: AIR 1982 SC 818 at p. 826; *Deena* v. *Union of India*, (1983) 4 SCC 645 at pp. 679-80: AIR 1983 SC 1155 at p. 1180; *CST* v. *Auraiya Chamber of Commerce*, (1986) 3 SCC 50 at p. 61: AIR 1986 SC 1556; *Chinnammal* v. *P. Arumugham*, (1990) 1 SCC 513 at p. 520: AIR 1990 SC 1828 at p. 1833; *Sardar Amarjit Singh* v. *Pramod Gupta*, (2003) 3 SCC 272; *N. Balaji* v. *Virendra Singh*, (2004) 8 SCC 312; *Prem Lala Nahata* v. *Chandi Prasad Sikaria*, (2007) 2 SCC 551: AIR 2007 SC 1247.

[21] *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91 at p. 96: AIR 1978 SC 484 at p. 488; *N.T. Veluswami* v. *G. Raja Nainar*, AIR 1959 SC 422 at p. 426: 1959 Supp (1) SCR 623.

[22] *Jai Jai Ram Manohar* v. *National Building Material Supply*, (1969) 1 SCC 869 at p. 871: AIR 1969 SC 1267 at p. 1269; see also *K.C. Kapoor* v. *Radhika Devi*, (1981) 4 SCC 487 at p. 499: AIR 1981 SC 2118; *Kalipada Das* v. *Bimal Krishna*, (1983) 1 SCC 14 at p. 16-17: AIR 1983 SC 876; *Bhagwan Dass Arora* v. *ADJ*, (1983) 4 SCC 1 at p. 6: AIR 1983 SC 954 at pp.

"Rules of pleadings are intended as aids for a fair trial and for reaching a just decision. An action at law should not be equated to a game of chess. Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the Court to ascertain that principle and implement it."[23] Our laws of procedure are based on the principle that, as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities. The provisions of the Code of Civil Procedure, therefore, must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it.[24]

The principle underlying interpretation of procedural laws has been succinctly laid down by the Supreme Court in the case of *State of Punjab* v. *Shamlal Murari*[25], wherein, speaking for the Court, Krishna Iyer, J. observed:

> "We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, though procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. *After all, courts are to do justice, not to wreck this end product of technicalities.*"[26] (emphasis supplied)

956-57; *Harcharan* v. *State of Haryana*, (1982) 3 SCC 408 at pp. 411-12: AIR 1983 SC 43 at p. 45; *CST* v. *Auraiya Chamber of Commerce*, (1986) 3 SCC 50: AIR 1986 SC 1556.

[23] *Raj Narain* v. *Indira Nehru Gandhi*, (1972) 3 SCC 850 at p. 858: AIR 1972 SC 1302 at p. 1307.

[24] *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46 at p. 56: AIR 1984 SC 1004 at p. 1010.

[25] (1976) 1 SCC 719: AIR 1976 SC 1177.

[26] *Ibid*, at p. 722 (SCC): at p. 1179 (AIR); *see also*, the following opt-quoted observations of Bose, J. in *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425 at p. 429: (1955) 2 SCR 1 at p. 8: "[A] Code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it." See also *Chinnammal* v. *P. Arumugham*, (1990) 1 SCC 513 at p. 520: AIR 1990 SC 1828 at p. 1833; *Ramankutty Guptan* v. *Avara*, (1994) 2 SCC 642 at p. 646: AIR 1994 SC 1699 at p. 1701. For further discussion *see infra*, "Pleadings".

9. SCHEME OF THE CODE

The Code can be divided into two parts: (*i*) the body of the Code containing 158 sections; and (*ii*) the (First) Schedule, containing 51 Orders and Rules. The sections deal with provisions of a substantive nature, laying down the general principles of jurisdiction, while the (First) Schedule relates to the procedure and the method, manner and mode in which the jurisdiction may be exercised. The body of the Code containing sections is fundamental and cannot be amended except by the legislature. The (First) Schedule of the Code, containing Orders and Rules, on the other hand, can be amended by High Courts.[27]

Looking to the scheme of the Code as a whole, it becomes abundantly clear that the amendments made by High Courts in the Rules contained in the (First) Schedule also become part of the Code for all purposes "as if enacted in the Code".[28] The sections and the rules, therefore, must be read together and harmoniously construed,[29] but if the rules are inconsistent with the sections, the latter will prevail.[30]

10. RETROSPECTIVE OPERATION

It is a well-settled principle of interpretation of statutes that procedural laws are always retrospective in operation unless there are good reasons to the contrary.[31] Their provisions will apply to proceedings already commenced at the time of their enactment. The reason is that no one can have a vested right in forms of procedure.[32] The Code of Civil Procedure is not retrospective in operation.[33]

[27] Ss. 121, 122, 125-131; see also *Vareed Jacob* v. *Sosamma Geevarghese*, (2004) 6 SCC 378: AIR 2004 SC 3992.

[28] Ss. 2(1), 2(18), 121, 122, 127; see also *State of U.P.* v. *Pt. Chandra Bhushan*, (1980) 1 SCC 198 at pp. 199-200: AIR 1980 SC 591.

[29] *Nadella Satyanarayana* v. *Yamanoori Venkata Subbiah*, AIR 1957 AP 172 at p. 181 (FB); *State of U.P.* v. *Babu Ram*, AIR 1961 SC 751 at p. 761: (1961) 2 SCR 679; *STO* v. *H. Farid Ahmed & Sons*, (1976) 1 SCC 245: AIR 1975 SC 756.

[30] *Director of Inspection of Income Tax (Investigation)* v. *Pooran Mal & Sons*, (1975) 4 SCC 568: AIR 1975 SC 67; *State of U.P.* v. *Babu Ram Upadhya*, AIR 1961 SC 751 at p. 761: (1961) 2 SCR 679.

[31] *Nani Gopal Mitra* v. *State of Bihar*, AIR 1970 SC 1636: (1969) 2 SCR 411; *K. Kapen Chako* v. *Provident Investment Co. (P) Ltd.*, (1977) 1 SCC 593: AIR 1976 SC 2610; *Mahadeo Prasad* v. *Ram Lochan*, (1980) 4 SCC 354 at p. 361: AIR 1981 SC 416 at p. 420; Craies, *Statute Law* (1971) at p. 401; Maxwell, *Interpretation of Statutes* (1972) at p. 222; *Halsbury's Laws of England* (4th Edn.) Vol. 44 at p. 574; *Gurbachan Singh* v. *Satpal Singh*, (1990) 1 SCC 445 at p. 460: AIR 1990 SC 209 at p. 219.

[32] *Anant Gopal* v. *State of Bombay*, AIR 1958 SC 915 at p. 917: 1959 SCR 919; *Mahadeo Prasad Singh* v. *Ram Lochan, supra*; *Maxwell, supra*; *Craies, supra.*

[33] *Garikapati Veeraya* v. *N. Subbiah Chaudhry*, AIR 1957 SC 540: 1957 SCR 488; *Mahadeo Prasad Singh* v. *Ram Lochan, supra*; *Mohanlal Jain* v. *Sawai Man Singhji*, AIR 1962 SC 73: (1961) 1 SCR 702.

11. CODE AT A GLANCE

The substantive part of the Code of Civil Procedure contains 158 sections. The (First) Schedule comprises 51 Orders and Rules providing procedure. Appendices contain Model Forms of Pleadings, Processes, Decrees, Appeals, Execution proceedings, etc.

Sections 1 to 8 are preliminary in nature. Section 1 provides for commencement and applicability of the Code. Section 2 is a definition clause and a sort of statutory dictionary of important terms used in the body of the Code. Sections 3 to 8 deal with constitution of different types of courts and their jurisdiction.

Part I (Sections 9 to 35-B) and Orders 1 to 20 of the (First) Schedule deal with suits. Section 9 enacts that a civil court has jurisdiction to try all suits of a civil nature unless they are barred expressly or impliedly. Whereas Section 10 provides for stay of suit (*res sub judice*), Section 11 deals with a well-known doctrine of *res judicata*. Sections 13 and 14 relate to foreign judgments.

Sections 15 to 21-A regulate the place of suing. They lay down rules as to jurisdiction of courts and objections as to jurisdiction. Sections 22 to 25 make provisions for transfer and withdrawal of suits, appeals and other proceedings from one court to another.

Orders 1 to 4 deal with institution and frame of suits, parties to suit and recognised agents and pleaders. Order 5 contains provisions as to issue and service of summons. Order 6 deals with pleadings. Orders 7 and 8 relate to plaints, written statements, set-offs and counter-claims. Order 9 requires parties to the suit to appear before the court and enumerates consequences of non-appearance. It also provides the remedy for setting aside an order of dismissal of the suit of a plaintiff and of setting aside an *ex parte* decree against a defendant.

Order 10 enjoins the court to examine parties with a view to ascertaining matters in controversy in the suit. Orders 11 to 13 deal with discovery, inspection and production of documents and also admissions by parties. Order 14 requires the court to frame issues and Order 15 enables the court to pronounce judgment at the "first hearing" in certain cases.

Orders 16 to 18 contain provisions for summoning, attendance and examination of witnesses, and adjournments. Order 19 empowers the court to make an order or to prove facts on the basis of an affidavit of a party.

Sections 75 to 78 (Part III) and Order 26 make provisions as to issue of Commissions. Sections 94 and 95 (Part VI) and Order 38 provides for arrest of a defendant and attachment before judgment. Order 39 lays down the procedure for issuing temporary injunction and passing interlocutory orders. Order 40 deals with appointment of receivers.

Order 25 provides for security for costs. Order 23 deals with withdrawal and compromise of suits. Order 22 declares effect of death, marriage or insolvency of a party to the suit.

After the hearing is over, the court pronounces a judgment. Section 33 and Order 20 deal with judgments and decrees. Section 34 makes provision for interest. Sections 35, 35-A, 35-B and Order 20-A deal with costs.

Parts IV and V (Sections 79-93) and Orders 27 to 37 lay down procedure for suits in special cases, such as, suits by or against Government or public officers (Section 79 to 82 and Order 27); suits by or against aliens, foreign rulers, ambassadors and envoys (Sections 83 to 87-B); suits by or against soldiers, sailors and airmen (Order 28); suits by or against corporations (Order 29); suits by or against partnership firms (Order 30); suits by or against trustees, executors and administrators (Order 31); suits by or against minors, lunatics and persons of unsound mind (Order 32); suits relating to family matters (Order 32-A); suits by indigent persons (paupers) (Order 33); suits relating to mortgages (Order 34); interpleader suits (Section 88 and Order 35); friendly suits (Section 90 and Order 36); summary suits (Order 37); suits relating to public nuisances (Section 91) and suits relating to public trusts (Section 92). Section 89 as inserted from 1 July 2002 provides for settlement of disputes outside the court through arbitration, conciliation, mediation and *Lok Adalats*.

Parts VII and VIII (Sections 96 to 115) and Orders 41 to 47 contain detailed provisions for Appeals, Reference, Review and Revision. Sections 96 to 99-A and Order 41 deal with First Appeals. Sections 100 to 103 and Order 42 discuss law relating to Second Appeals. Sections 104 to 108 and Order 43 contain provisions as to Appeals from Orders. Sections 109, 112 and Order 45 provide for Appeals to the Supreme Court. Order 44 enacts special law concerning Appeals by indigent persons (paupers). Section 113 and Order 46 pertain to References to be made to a High Court by a subordinate court when a question of constitutional validity of an Act arises. Section 114 and Order 47 permit review of judgments in certain circumstances. Section 115 confers revisional jurisdiction on High Courts over subordinate courts.

Part II (Sections 36 to 74) and Order 21 cover execution proceedings. The principles governing execution of decrees and orders are dealt with in Sections 36 to 74 (substantive law) and Order 21 (procedural law). Order 21 is the longest Order covering 106 Rules.

Part X (Sections 121 to 131) enables High Courts to frame rules for regulating their own procedure and the procedure of civil courts subject to their superintendence.

Part XI (Sections 132 to 158) relates to miscellaneous proceedings. Explanation to Section 141 as added by the Amendment Act of 1976 clarifies that the expression "proceedings" would not include proceedings under Article 226 of the Constitution. Section 144 embodies the doctrine of restitution and deals with the power of the court to grant relief of restitution in case a decree is set aside or modified by a superior court.

Section 148-A as inserted by the Code of Civil Procedure (Amendment) Act, 1976 is an important provision which permits a person to lodge a caveat in a suit or proceeding instituted or about to be instituted against him. It is the duty of the court to issue notice and afford an opportunity of hearing to a caveator to appear and oppose interim relief sought by an applicant.

Sections 148 to 153-A confer inherent powers in every civil court. Section 148 enables a court to enlarge time fixed or granted by it for doing any act. Section 149 authorises a court to permit a party to make up deficiency of court fees on plaint, memorandum of appeal, etc. Section 151 is a salutary provision. It saves inherent powers in every court to secure the ends of justice and also to prevent the abuse of process of the court. Sections 152 to 153-A empower a court to amend judgments, decrees, orders and other records arising from accidental slip or omission.

Section 153-B as added by the Amendment Act of 1976 expressly declares that the place of trial shall be open to the public. The proviso, however, empowers the Presiding Judge, if he thinks fit, to order that the general public or any particular person shall not have access to the court.

PART I

2 Definitions

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1. GENERAL

IN MOST of the statutes a section provides for definition of some important expressions used in the body of the Act. A definition clause is a sort of statutory dictionary[1], a legislative device with a view to avoid making different provisions of the statute needlessly cumbersome.[2] Where a word is defined in a statute and that word is used in a provision to which that definition is applicable, the effect is that wherever the word defined is used in that provision, the definition of the word gets substituted.[3] This normal rule may be departed from if there be something in the context to show that the definition should not be applied or when the context strongly suggests its departure.[4]

2. IMPORTANT DEFINITIONS

In Section 2 of the Code of Civil Procedure, *inter alia*, the following important definitions are given:

(1) Decree[5]

(*a*) *Meaning*

The adjudications of a court of law may be divided into two classes: (*i*) decrees, and (*ii*) orders.

Section 2(2) of the Code defines the term "decree" in the following words:

> " 'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary

[1] *Carew & Co. Ltd.* v. *Union of India*, (1975) 2 SCC 791 at p. 805: AIR 1975 SC 2260 at p. 2272.

[2] *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1 at p. 96: AIR 1975 SC 2299 at p. 2357.

[3] *Ibid.* ("unless there is anything repugnant in the subject or context"; S. 2).

[4] *Carew & Co. Ltd.* v. *Union of India, supra.*

[5] *See also infra*, Pt. II, Chap. 15; *Vidyacharan Shukla* v. *Khubchand Baghel*, AIR 1964 SC 1099 at p. 1113: (1964) 6 SCR 129; *K.V. Muthu* v. *Angamuthu*, (1997) 2 SCC 53 at pp. 57-58: AIR 1997 SC 628 at p. 631; *K. Balakrishna* v. *Haji Abdulla*, (1980) 1 SCC 321: AIR 1980 SC 214; *Printers (Mysore) Ltd.* v. *CTO*, (1994) 2 SCC 434; *Chandi Prasad* v. *Jagdish Prasad*, (2004) 8 SCC 724; *Rachakonda Venkat* v. *R. Satya Bai*, (2003) 7 SCC 452; *Paramjeet Singh* v. *ICDS Ltd.*, (2006) 13 SCC 322: AIR 2007 SC 168.

or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include:

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

(*b*) any order of dismissal for default.

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

(*b*) *Essential elements*

In order that a decision of a court may be a "decree", the following elements must be present:[6]

(*i*) There must be an adjudication;

(*ii*) Such adjudication must have been done in a suit;

(*iii*) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(*iv*) Such determination must be of a conclusive nature; and

(*v*) There must be a formal expression of such adjudication.

(*i*) *Adjudication.*—For a decision of a court to be a decree, there must be an adjudication, i.e. a judicial determination of the matter in dispute. If there is no judicial determination of any matter in dispute, it is not a decree.[7] Thus, a decision on a matter of an administrative nature, or an order dismissing a suit for default of appearance of parties or dismissing an appeal for want of prosecution cannot be termed as a decree inasmuch as it does not *judicially* deal with the matter in dispute.[8] Further, such judicial determination must be by a court. Thus, an order passed by an officer who is not a court is not a decree.[9]

(*ii*) *Suit.*—The expression "suit" is not defined in the Code. But in *Hansraj Gupta* v. *Official Liquidators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*[10], Their Lordships of the Privy Council have defined the term in the following words, "The word 'suit' ordinarily means and apart from some context must be taken to mean, a civil proceeding

[6] *S. Satnam Singh* v. *Surender Kaur*, (2009) 2 SCC 562.

[7] *Madan Naik* v. *Hansubala Devi*, (1983) 3 SCC 15: AIR 1983 SC 676.

[8] *Motilal* v. *Padmaben*, AIR 1982 Guj 254: (1982) 2 Guj LR 107: 1982 Guj LH 349.

[9] *Deep Chand* v. *Land Acquisition Officer*, (1994) 4 SCC 99 at p. 102: AIR 1994 SC 1901 at p. 1903; *Diwan Bros.* v. *Central Bank of India*, (1976) 3 SCC 800: AIR 1976 SC 1503.

[10] AIR 1933 PC 63 at p. 64: (1932-33) 60 IA 13; see also *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 639: AIR 1989 SC 2240 at p. 2248; *Usmanali Khan* v. *Sagar Mal*, AIR 1965 SC 1798 at p. 1800: (1965) 3 SCR 201; *Secy. to the Govt. of Orissa* v. *Sarbeswar Rout*, (1989) 4 SCC 578 at p. 581: AIR 1989 SC 2259 at p. 2261.

instituted by the *presentation of a plaint.*" (emphasis supplied) Thus, every suit is instituted by the presentation of a plaint. It means that when there is no civil suit, there is no decree. Thus, rejection of an application for leave to sue *in forma pauperis* is not a decree, as there is no plaint till the application is granted.

It may, however, be noted that under certain enactments specific provisions have been made to treat applications as suits, e.g. proceedings under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the Arbitration Act, etc. They are statutory suits and the decisions given thereunder are, therefore, decrees. Therefore, a proceeding which does not commence with a plaint and which is not treated as a suit under any other Act, cannot be said to be a "suit" under the Code also and the decision given therein cannot be said to be a "decree" under Section 2(2) of the Code. Thus, a decision of a tribunal, even though described as "decree" under the Act, is a decree passed by a tribunal and not by a court covered by Section 2(2).[11]

(*iii*) *Rights of parties in controversy.*—The adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit. The word "rights" means substantive rights of the parties and not merely procedural rights.[12] Thus, rights of the parties *inter se* relating to status, limitation, jurisdiction, frame of suit, accounts, etc. are "rights of the parties" under this section. The rights in matters of procedure are not included in it. Thus, an order for dismissal of a suit for default of appearance, or an order dismissing an application for execution for non-prosecution, or an order refusing leave to sue *in forma pauperis*, or a mere right to sue, are not decrees as they do not determine the rights of parties.

The term "parties" means parties to the suit, i.e. the plaintiff and the defendant.[13] Thus, an order on an application by a third party, who is a stranger to the suit, is not a decree. In interpleader suits, the contesting defendants will be deemed to be parties to the suit.

The expression "matters in controversy" refers to the subject-matter of the suit with reference to which some relief is sought.[14] At the same time, however, it should not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of a party suing, to the jurisdiction of the court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into. Interlocutory orders on

[11] *Diwan Bros.* v. *Central Bank of India*, (1976) 3 SCC 800 at pp. 807-08: AIR 1976 SC 1503 at p. 1518.

[12] *Dattatraya* v. *Radhabai*, AIR 1921 Bom 220: ILR (1921) 45 Bom 627.

[13] *Kanji Hirjibhai* v. *Jivaraj Dharamshi*, AIR 1976 Guj 152: (1975) 16 Guj LR 469; *Venkata Reddy* v. *Pethi Reddy*, AIR 1963 SC 992: 1963 Supp (2) SCR 616.

[14] *Ahmed Musaji Saleji* v. *Hashim Ibrahim Saleji*, (1914-15) 42 IA 91: AIR 1915 PC 116.

matters of procedure which do not decide the substantive rights of the parties are not decrees. Similarly, the proceedings preliminary to the institution of a suit also will not be included in the definition.

(*iv*) *Conclusive determination.*—Such determination must be of a conclusive nature. In other words, the determination must be final and conclusive as regards the court which passes it.[15] Thus, an interlocutory order, which does not decide the rights of the parties finally is not a decree, e.g. an order refusing an adjournment or an order striking out defence of a tenant under the relevant Rent Act, or an order passed by the appellate court deciding some issues and remitting other issues to the trial court for determination under Order 41 Rule 23 of the Code, are not decrees because they do not decide rights of parties conclusively.

On the other hand, an order may determine conclusively the rights of the parties although it may not dispose of the suit. Thus, an order dismissing an appeal summarily under Order 41 of the Code or holding it to be not maintainable or a decision dismissing a suit for want of evidence or proof are decrees inasmuch as they decide conclusively the rights of the parties to the suit.[16]

The crucial point which requires to be decided in such a case is whether the decision is final and conclusive in essence and substance. If it is, it is a decree, if not, it is not a decree.[17]

(*v*) *Formal expression.*—There must be a formal expression of such adjudication. All the requirements of form must be complied with. The formal expression must be deliberate and given in the manner provided by law. The decree follows the judgment and must be drawn up separately.[18] Thus, if a decree is not formally drawn up in terms of the judgment, no appeal lies from that judgment. But the decree need not be in a particular form. Thus, a misdescription of a decision as an order which amounts to a decree does not make it less than a decree.

(*c*) *Test*

Whether or not an order of the court is a decree, the Court should take into account pleadings of the parties and the proceedings leading up to the passing of an order.[19]

[15] *Narayan Chandra* v. *Pratirodh Sahini*, AIR 1991 Cal 53.

[16] For detailed discussion, *see infra*, "First Appeal".

[17] *Jethanand & Sons* v. *State of U.P.*, AIR 1961 SC 794: (1961) 3 SCR 754; *Sukhdeo* v. *Govinda Hari*, AIR 1980 Bom 231; *Narayan Chandra* v. *Pratirodh Sahini*, AIR 1991 Cal 53.

[18] Or. 20 Rr. 6, 6-A, 7; see also *Shakuntala Devi* v. *Kuntal Kumari*, AIR 1969 SC 575: (1969) 1 SCR 1006.

[19] *Venkata Reddy* v. *Pethi Reddy*, AIR 1963 SC 992: 1963 Supp (2) SCR 616; *Hameed Joharan* v. *Abdul Salam*, (2001) 7 SCC 573; *Ratansingh* v. *Vijaysingh*, (2001) 1 SCC 469: AIR 2001 SC 279; *Shiv Shakti Coop. Housing Society* v. *Swaraj Developers*, (2003) 6 SCC 659: AIR 2003 SC 2434.

(*d*) *Decisions which are decrees: Illustrations*

The following decisions are held to be decrees:

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

(*e*) *Decisions which are not decrees: Illustrations*

The following decisions, on the other hand, are held not to be decrees:

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

(*f*) *Classes of decrees*

The Code recognises the following classes of decrees:

(*i*) Preliminary decree;
(*ii*) Final decree; and
(*iii*) Partly preliminary and partly final decree.

In *Shankar* v. *Chandrakant*,[20] the Supreme Court stated:

> "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. Then, as a result of the further inquiries, conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. A final decree may be said to become final in two ways:

[20] (1995) 3 SCC 413: AIR 1995 SC 1211.

(*i*) When the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the Highest Court;

(*ii*) When the time for appeal has expired without any appeal being filed against the preliminary decree the same stands completely disposed of.

It is in the latter sense that the word 'decree' is used in Section 2(2) of the CPC."[21]

(*i*) *Preliminary decree*—Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not completely dispose of the suit, it is a preliminary decree. A preliminary decree is passed in those cases in which the court has first to adjudicate upon the rights of the parties and has then to stay its hands for the time being, until it is in a position to pass a final decree in the suit. In other words, a preliminary decree is only a stage in working out the rights of the parties which are to be finally adjudicated by a final decree.[22] Till then the suit continues.[23]

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

(1)	Suits for possession and mesne profits	Order 20, R. 12
(2)	Administration suits	Order 20, R. 13
(3)	Suits for pre-emption	Order 20, R. 14
(4)	" " dissolution of partnership	Order 20, R. 15
(5)	" " accounts between principal and agent	Order 20, R. 16
(6)	" " partition and separate possession	Order 20, R. 18
(7)	" " foreclosure of a mortgage	Order 34, Rr. 2-3
(8)	" " sale of mortgaged property	Order 34, Rr. 4-5
(9)	" " redemption of a mortgage	Order 34, Rr. 7-8

The above list is, however, not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the Code.[24]

There is a conflict of opinion as to whether there can be more than one preliminary decree in the same suit. Some High Courts have tak-

[21] *Ibid*, at p. 416 (SCC): at p. 1212 (AIR); see also *Hasham Abbas* v. *Usman Abbas*, (2007) 2 SCC 355: AIR 2007 SC 1077; *Bicoba* v. *Hirabai*, (2008) 8 SCC 198.

[22] *Mool Chand* v. *Director, Consolidation*, (1995) 5 SCC 631: AIR 1995 SC 2493; *Shankar* v. *Chandrakant*, (1995) 3 SCC 413: AIR 1995 SC 1211; *Hasham Abbas* v. *Usman Abbas*, (2007) 2 SCC 355: AIR 2007 SC 1077.

[23] *Awadhendra Prasad* v. *Raghubansmani Prasad*, AIR 1979 Pat 50: 1978 BLJR 835.

[24] *Narayanan Thampi* v. *Lekshmi Narayana Iyer*, AIR 1953 TC 220 at p. 222 (FB); *Peary Mohan Mookerjee* v. *Manohar Mookerjee*, AIR 1924 Cal 160 at p. 162: 27 CWN 989; *Union of India* v. *Khetra Mohan*, AIR 1960 Cal 190 at p. 198; *Bhagwan Singh* v. *Kallo Maula Shah*, AIR 1977 MP 257: 1977 MP LJ 583: 1977 Jab LJ 576 (FB).

en the view that there can be only one preliminary decree in a suit,[25] while other High Courts have held that there can be more than one preliminary decree.[26]

As regards partition suits, the debate is concluded by the pronouncement of the Supreme Court in *Phoolchand* v. *Gopal Lal*[27], wherein it has been observed that there is nothing in the Code of Civil Procedure which prohibits passing of more than one preliminary decree, if circumstances justify the same and it may be necessary to do so. But the above observations are restricted to partition suits as the Court specifically observed, "We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which preliminary and final decrees are also passed."[28]

The question whether a decision amounts to a preliminary decree or not is one of great significance in view of the provisions of Section 97 of the Code which provides that, "Where any party aggrieved by a preliminary decree...does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."[29]

Since the passing of a preliminary decree is only a stage prior to the passing of a final decree, if an appeal preferred against a preliminary decree succeeds, the final decree automatically falls to the ground for there is no preliminary decree thereafter in support of it.[30] It is not necessary in such a case for the defendant to go to the Court passing the final decree and ask it to set aside the final decree.[30]

(*ii*) *Final decree*—A decree may be said to be final in two ways:

(*i*) when within the prescribed period no appeal is filed against the decree or the matter has been decided by the decree of the highest court; and

(*ii*) when the decree, so far as regards the court passing it, completely disposes of the suit.[31]

It is in the latter sense that the words "final decree" are used here.

[25] *Bharat Indu* v. *Yakub Hasan*, ILR (1913) 35 All 159; *Kedarnath* v. *Pattu Lal*, AIR 1915 Oudh 312; *Joti Parshad* v. *Ganeshi Lal*, AIR 1961 Punj 120.

[26] *Peary Mohan Mookerjee* v. *Manohar Mookerjee*, AIR 1924 Cal 160; *Kasi v. Ramanathan Chettiar*, (1947) 2 MLJ 523; *Parashuram Rajaram* v. *Hirabai Rajaram*, AIR 1957 Bom 59.

[27] AIR 1967 SC 1470: (1967) 3 SCR 153.

[28] *Ibid*, at p. 1473 (AIR): at p. 159 (SCR); see also *Jadu Nath* v. *Parameswar Mullick*, AIR 1940 PC 11: (1939-40) 67 IA 11.

[29] *Venkata Reddy* v. *Pethi Reddy*, AIR 1963 SC 992: 1963 Supp (2) SCR 616; *Mool Chand* v. *Director, Consolidation*, (1995) 5 SCC 631: AIR 1995 SC 2493.

[30] *Sital Parshad Saxena* v. *Kishori Lal*, AIR 1967 SC 1236 at p. 1240: (1967) 3 SCR 101.

[31] *Shankar* v. *Chandrakant*, (1995) 3 SCC 413 at p. 418: AIR 1995 SC 1211; *Hasham Abbas* v. *Usman Abbas*, (2007) 2 SCC 355: AIR 2007 SC 1077.

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

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

Ordinarily, there will be one preliminary decree and one final decree in one suit.[32]

In *Gulusam Bivi* v. *Ahamadasa Rowther*[33], the High Court of Madras, referring to Rules 12 and 18 of Order 20 of the Code, stated:

> "Neither rule contemplates more than one preliminary decree and one final decree in one suit. In fact, the Code no where contemplates more than one final decree in one suit. *To have two final decree and to call the first one a final decree will be really a misnomer as it will not be final.*" (emphasis supplied)

In *Kasi* v. *Ramanathan Chettiar*[34], the same court considered the question at considerable length. It was noted that there was divergence of opinion whether there could be more than one preliminary decree as also more than one final decree in a suit. Then considering the question in detail and describing the observations in *Ghulsam Bivi* as *obiter dicta*, the Court observed that there could be more than one preliminary decree and more than one final decree in a suit.

Patanjali Sastri, J. (as he then was) rightly concluded the matter thus:

> "(T)he question is not whether the Code allows more than one preliminary decree or one final decree to be made, but whether the Code contains a prohibition against the Court in a proper case passing more than one such decree."[35]

[32] *Babburu Basavayya* v. *Babburu Guravayya*, AIR 1951 Mad 938 (FB); *Sudarshan Dass* v. *Ramkripal Dass*, AIR 1967 Pat 131; *Nallasivam Chettiar* v. *Avudayammal*, AIR 1958 Mad 462; *Kanji Hirjibhai* v. *Jivaraj Dharamshi*, AIR 1976 Guj 152: (1975) 16 Guj LR 469; *Anandi Devi* v. *Mahendra Singh*, AIR 1997 Pat 7.

[33] AIR 1919 Mad 998 at p. 1000: (1918) 42 Mad 296: 51 IC 140.

[34] (1947) 2 MLJ 523.

[35] *Ibid*, at p. 527 (MLJ); see also *Maulvi Mohd. Abdul Majid* v. *Mohd. Abdul Aziz*, (1896-97) 24 IA 22 (PC); *Babburu Basavayya* v. *Babburu Guravayya*, *supra*; *Kanji Hirjibhai* v. *Jivaraj Dharamshi*, *supra*; *Veerappa* v. *Sengoda*, (1995) 1 Mad LJ 53; *Azizabi* v. *Fatimabi*, ILR 1977 AP 461: (1976) 2 AP LJ 397.

Finally, in *Shankar* v. *Chandrakant*[36] the Supreme Court said:

"It is settled law that more than one final decree can be passed".

(*iii*) *Partly preliminary and partly final decree*—A decree may be partly preliminary and partly final, e.g. in a suit for possession of immovable property with mesne profits, where the court:

(*a*) decrees possession of the property; and

(*b*) directs an enquiry into the mesne profits.

The former part of the decree is final, while the latter part is only preliminary because the final decree for mesne profits can be drawn only after enquiry, and the amount due is ascertained. In such a case, even though the decree is only one, it is partly preliminary and partly final.[37]

(*g*) *Deemed decree*

(*i*) *Meaning*—The term "deemed" is generally used to create a statutory fiction for the purpose of extending the meaning which it does not expressly cover.[38]

In *CIT* v. *Bombay Trust Corpn.*[39], the Privy Council stated, "(W)hen a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament or the Legislature requires him to be treated as if he were."

(*ii*) *Nature and scope*—Whenever the legislature uses the word "deemed" in any statute in relation to a person or thing, it implies that the Legislature, after due consideration, conferred a particular status on a particular person or thing.[40]

Such statutory fiction created by the legislature cannot be ignored. The effect of such legal fiction must be given. In *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*[41], Asquith, J. rightly said, "The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination

[36] (1995) 3 SCC 413 at p. 418: AIR 1995 SC 1211 at p. 1214; see also *Hasham Abbas* v. *Usman Abbas*, (2007) 2 SCC 355: AIR 2007 SC 1077. For detailed discussion and case law, see, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. IV, Or. 20 R. 18.

[37] *Lucy Kochuvareed* v. *P. Mariappa Gounder*, (1979) 3 SCC 150 at p. 159: AIR 1979 SC 1214 at p. 1220.

[38] *St. Aubyn* v. *Attorney-General*, (1951) 2 All ER 473: 1952 AC 15; *Lalji Haridas* v. *State of Maharashtra*, (1969) 2 SCC 662: AIR 1971 SC 44; *CIT* v. *Bombay Trust Corpn. Ltd.*, AIR 1930 PC 54: (1929-30) 57 IA 49; *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*, 1952 AC 109: (1951) 2 All ER 587 (HL).

[39] AIR 1930 PC 54: 57 IA 49 (*per* Viscount Dunedin).

[40] *Supra*, n. 37; see also *K. Kamaraja Nadar* v. *Kunju Thevar*, AIR 1958 SC 687: 1959 SCR 583; *M. Venugopal* v. *LIC*, (1994) 2 SCC 323: AIR 1994 SC 1343: (1994) 27 ATC 84; *State of Maharashtra* v. *Laljit Rajshi*, (2000) 2 SCC 699: AIR 2000 SC 937.

[41] 1952 AC 109: (1951) 2 All ER 587 (HL); see also *Cambay Electric Supply Industrial Co.* v. *CIT*, (1978) 2 SCC 644: AIR 1978 SC 1099.

to boggle when it comes to the inevitable corollaries of that state of affairs."

(*iii*) *Decree and deemed decree: Distinction*—An adjudication not fulfilling the requisites of Section 2(2) of the Code cannot be said to be a "decree". By a legal fiction, certain orders and determinations are deemed to be "decrees" under the Code.

(*iv*) *Deemed decrees under CPC*—The rejection of a plaint and the determination of questions under Section 144 (Restitution) are deemed decrees. Similarly, adjudications under Order 21 Rule 58, as also under Order 21 Rule 98 or 100 are deemed decrees.

(*h*) *Rejection of plaint*

Even though an order rejecting a plaint does not preclude the plaintiff from presenting a fresh plaint on the same cause of action,[42] Section 2(2) of the Code specifically provides that rejection of a plaint shall be deemed to be a decree. The rejection of a plaint must be one authorised by the Code. If it is not under the Code, the rejection will not amount to a decree.

An order returning a plaint or memorandum of appeal to be presented to the proper court is also not a decree. The reason is that such an order does not negate any rights of a plaintiff or appellant and is not a decision on the rights of parties. An order returning a plaint to be presented to the proper court is an appealable order.[43] The question whether an order is one of *rejection* or of *dismissal* of a suit or appeal must be determined with reference to the substance and not the form of the order.

(*i*) *Restitution*

The determination of any question within Section 144 of the Code is expressly included in the definition of "decree" though such determination is neither made in a suit, nor is it drawn up in the form of a decree. Section 144 deals with restitution and determination of a question under that section, and is included in the definition of "decree" for the purpose of giving a right of appeal.[44]

Every order under Section 144, however, is not a decree. It is necessary that such order must have decided the rights of parties with regard to matters in controversy in proceedings under that section. In other words, it must be a final decision either granting a relief or refusing an application. Thus, determination of a mere issue made prior to the passing of a final order or an order merely determining a point of

[42] Or. 7 R. 13; see also *Shamsher Singh* v. *Rajinder Prashad*, (1973) 2 SCC 524 at pp. 527-28: AIR 1973 SC 2384 at p. 2386.

[43] Or. 43 R. 1(*a*).

[44] *Mahijibhai Mohanbhai* v. *Patel Manibhai*, AIR 1965 SC 1477 at p. 1485: (1965) 2 SCR 436.

law arising incidentally in the course of proceedings for determining rights of parties is not a decree.

(*j*) *Execution*

Prior to the Code of Civil Procedure (Amendment) Act, 1976, the determination of any question under Section 47 was also expressly included in the definition of "decree".[45] The Joint Committee of both Houses of Parliament was of the view that this provision was mainly responsible for delay in execution of decrees. The Committee, therefore, recommended to omit the words "Section 47 or" from the definition of "decree" and as such now a decision under Section 47 is not a decree and consequently is not appealable as a decree.[46] Under the New Code, now it will not be very difficult for the decree-holder to get the fruits of a decree passed in his favour. It is, however, doubtful whether the amendment has achieved its object.

(*k*) *Dismissal for default*

The definition of "decree" does not include any order of "dismissal for default". The words "dismissal for default" include, for want of prosecution of suit or appeal, default for non-appearance or for other reasons.

(*l*) *Appealable orders*

The term "decree" expressly excludes an adjudication from which an appeal lies as an appeal from an order. Such orders are specified in Section 104 and Order 43 Rule 1 of the Code.[47] Thus, an order returning a plaint for presentation to the proper court, or an order rejecting an application for an order to set aside an *ex parte* decree, or setting aside or refusing to set aside a sale under Order 21, or an order rejecting an application for permission to sue as an indigent person, etc. are appealable orders and not decrees.

The distinction between a decree and an appealable order lies in the fact that in the case of a decree, a Second Appeal lies in some cases,[48] but no Second Appeal lies from an appealable order.[49]

[45] The Code of Civil Procedure, before the Amendment Act of 1976, defined "decree" in the following words:

" 'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include... etc."

[46] For detailed discussion *see infra*, Pt. IV, Chap. 7.

[47] *Madan Naik* v. *Hansubala Devi*, (1983) 3 SCC 15 at p. 19: AIR 1983 SC 676 at p. 679.

[48] S. 100; *see also infra*, Pt. III, Chap. 3.

[49] S. 104(2); *see also infra*, Pt. III, Chap. 4.

(*m*) *Decree and judgment: Distinction*[50]

(*n*) *Decree and order: Distinction*[51]

(*o*) *Decree and deemed decree: Distinction*[52]

(2) Judge

"Judge" means the presiding officer of a civil court.[53] The term "court" has not been defined in the Code. According to the dictionary meaning, court means "an assembly of judges or other persons acting as a tribunal in civil and criminal cases".[54] In other words, it is "a place where justice is judicially administered".[55]

When a statute provides that a particular matter will be determined by a court, the officer presiding over the said court will be deemed to exercise jurisdiction as a court and not as a *persona designata*. But by the mere fact that, under the relevant statute, some functions are to be performed by a judicial officer, it cannot be said that he is acting as a court.

(3) Judgment[56]

(*a*) *Meaning*

"Judgment" means the statement given by a judge of the grounds of a decree or order.[57]

(*b*) *Essentials*

The essential element of a judgment is that there should be a statement for the grounds of the decision.[58] Every judgment other than that of a Court of Small Causes should contain (*i*) a concise statement of the case; (*ii*) the points for determination; (*iii*) the decision thereon; and (*iv*) the reasons for such decision. A judgment of a Court of Small Causes may contain only points (*ii*) and (*iii*). Sketchy orders which are not self-contained and cannot be appreciated by an appellate or revisional court without examining all the records are, therefore, unsatisfactory and cannot be said to be judgments in that sense.

[50] *See infra*, "Judgment and decree".

[51] *See infra*, "Order and decree".

[52] *See supra*, under that head.

[53] S. 2(8).

[54] *Concise Oxford Dictionary* (1990) at p. 266; *Stroud's Judicial Dictionary* (1971) Vol. 1 at p. 632.

[55] *E.D. Sinclair* v. *L.P.D. Broughton*, (1893) 9 Cal 341 at p. 354 (PC).

[56] *See also infra*, Pt. II, Chap. 15.

[57] S. 2(9).

[58] *Vidyacharan Shukla* v. *Khubchand Baghel*, AIR 1964 SC 1099 at p. 1113: (1964) 6 SCR 129; *Swaran Lata* v. *H.K. Banerjee*, (1969) 1 SCC 709: AIR 1969 SC 1167; *State of T.N.* v. *S. Thangavel*, (1997) 2 SCC 349: AIR 1997 SC 2283; *Balraj Taneja* v. *Sunil Madan*, (1999) 8 SCC 396: AIR 1999 SC 3381.

As the Supreme Court in *Balraj Taneja* v. *Sunil Madan*[59], a judge cannot merely say "Suit decreed" or "Suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other. Even the Small Causes Court's judgments must be intelligible and must show that the judge has applied his mind. The judgment need not, however, be a decision on all the issues in a case. Thus, an order deciding a preliminary issue in a case, e.g. constitutional validity of a statute, is a judgment.

Conversely, an order passed by the Central Administrative Tribunal cannot be said to be a judgment, even if it has been described as such.[60] Similarly, the meaning of the term "judgment" under the Letters Patent is wider than the definition of "judgment" under the CPC.[61]

(c) Judgment and decree: Distinction

As stated above, "judgment" means the statement given by a judge on the grounds of a decree or order. It is not necessary for a judge to give a statement in a decree though it is necessary in a judgment. Likewise, it is not necessary that there should be a formal expression of the order in the judgment, though it is desirable to do so. Rule 6-A of Order 20 as inserted by the Amendment Act of 1976, however, enacts that the last paragraph of the judgment should state precisely the relief granted. Thus, a judgment contemplates a stage prior to the passing of a decree or an order, and, after the pronouncement of the judgment, a decree shall follow.[62]

(4) Order

(a) Meaning

"Order" means the formal expression of any decision of a civil court which is not a decree.[63] Thus, the adjudication of a court which is not a decree is an order. As a general rule, an order of a court of law is founded on objective considerations and as such the judicial order must contain a discussion of the question at issue and the reasons which prevailed with the court which led to the passing of the order.

(b) Order and decree: Similarities

As discussed above, the adjudication of a court of law may either be (*a*) a decree; or (*b*) an order; and cannot be both. There are some common elements in both of them, viz. (1) both relate to matters in controversy;

[59] (1999) 8 SCC 396 at p. 415: AIR 1999 SC 3381 at p. 3391.

[60] *State of T.N.* v. *S. Thangavel*, (1997) 2 SCC 349: AIR 1997 SC 2283.

[61] *Shah Babulal* v. *Jayaben D. Kania*, (1981) 4 SCC 8: AIR 1981 SC 1786.

[62] S. 33.

[63] S. 2(14). See also *Vidyacharan Shukla* v. *Khubchand Baghel*, AIR 1964 SC 1099 at p. 1113: (1964) 6 SCR 129.

(2) both are decisions given by a court; (3) both are adjudications of a court of law; and (4) both are "formal expressions" of a decision.

(c) Order and decree: Distinction

In spite of the above common elements, there are fundamental distinctions between the two expressions:

(*i*) A decree can only be passed in a suit which commenced by presentation of a plaint. An order may originate from a suit by presentation of a plaint or may arise from a proceeding commenced by a petition or an application.

(*ii*) A decree is an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy; an order, on the other hand, may or may not finally determine such rights.

(*iii*) A decree may be preliminary or final, or partly preliminary and partly final, but there cannot be a preliminary order.

(*iv*) Except in certain suits, where two decrees, one preliminary and the other final are passed, in every suit there can be only one decree; but in the case of a suit or proceeding, a number of orders may be passed.

(*v*) Every decree is appealable, unless otherwise expressly provided,[64] but every order is not appealable. Only those orders are appealable as specified in the Code.[65]

(*vi*) A Second Appeal lies to the High Court on certain grounds from the decree passed in First Appeal.[66] Thus, there may be two appeals; while no Second Appeal lies in case of appealable orders.[67]

(5) Decree-holder

"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.[68] From this definition, it is clear that the decree-holder need not necessarily be the plaintiff. A person who is not a party to a suit but in whose favour an order capable of execution has been passed is also a decree-holder.[69]

Thus, where a decree for specific performance is passed, such a decree is capable of execution, both by the plaintiff as well as the defendant, and, therefore, either of the parties is a decree-holder. Similarly, if a decree confers upon someone a right to execute the decree, he is

[64] S. 96. For detailed discussion, *see infra*, Pt. III, Chap. 2.

[65] S. 104, Or. 43 R. 1. For detailed discussion, *see infra*, Pt. III, Chap. 4.

[66] S. 100. For detailed discussion, *see infra*, Pt. III, Chap. 3.

[67] S. 104(2).

[68] S. 2(3).

[69] *Dhani Ram* v. *Lala Sri Ram*, (1980) 2 SCC 162 at pp. 165-66: AIR 1980 SC 157 at pp. 159-61.

a decree-holder. Conversely, if, in an eviction order, time to vacate the premises is granted to the tenant, the landlord cannot be said to be a decree-holder in the strict sense till the period is over and the decree becomes executable.

(6) Judgment-debtor

"Judgment-debtor" means any person against whom a decree has been passed, or an order capable of execution has been made.[70] Where a decree is passed against a surety, he is a judgment-debtor within the meaning of this section. On the other hand, a person who is a party to a suit, but no decree has been passed against him, is not a judgment-debtor.

(7) Foreign court

"Foreign Court" means a court situate outside India and not established or continued by the authority of the Central Government.[71] Two conditions must be satisfied in order to bring a court within the definition of a foreign court:

(1) It must be situate outside India; and
(2) It must not have been established or continued by the Central Government.

Thus, courts in England, Scotland, Ceylon, Burma, Pakistan and those of the Privy Council are foreign courts.

(8) Foreign judgment[72]

"Foreign judgment" means a judgment of a foreign court.[73] The crucial date to determine whether the judgment is of a foreign court or not is the date of the judgment and not the date when it is sought to be enforced or executed.[74]

Thus, a judgment of a court which was a foreign court at the time of its pronouncement would not cease to be a foreign judgment by reason of the fact that subsequently the foreign territory has become a part of the Union of India.[74] On the other hand, an order which was good and competent when it was made and which was passed by a tribunal which was domestic at the date of its making and which could at that

[70] S. 2(10).

[71] S. 2(5); see also *Lalji Raja & Sons* v. *Firm Hansraj Nathuram*, (1971) 1 SCC 721: AIR 1971 SC 974.

[72] *See also infra*, Pt. II, Chap. 3.

[73] S. 2(6).

[74] *Raj Rajendra Sardar Moloji Nar Singh* v. *Shankar Saran*, AIR 1962 SC 1737 at p. 1744: (1963) 2 SCR 577 at pp. 593-94.

date have been enforced by an Indian court, does not lose its efficacy by reason of the partition.[75]

(9) Legal representative

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.[76]

The expression "legal representative" is inclusive in character, its scope is very wide and, thus, over and above a person who in law represents the estate of a deceased, it includes a person who intermeddles with the estate of a deceased and also a person on whom the estate devolves on the death of the party suing or sued, where a party sues or is sued in a representative character.[77] The following persons are held to be legal representatives—executors, administrators, reversioners, Hindu coparceners, residuary legatees, etc. But a trespasser is not a legal representative as he does not intermeddle with the intention of representing the estate of the deceased. Similarly, an executor de-son Tort, a succeeding trustee, official assignee or receiver is not a legal representative.

(10) Mesne profits[78]

(a) Meaning

"Mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.[79]

(b) Object

Every person has a right to possess his property. And when he is deprived of such right by another person, he is not only entitled to restoration of possession of his property, but also damages for wrongful possession from that person. The mesne profits are thus a compensation paid to the real owner.

The object of awarding a decree for mesne profits is to compensate the person who has been kept out of possession and deprived of

[75] *Kishori Lal* v. *Shanti Devi*, AIR 1953 SC 441 at p. 442: 1953 Cri LJ 1923; *Shitole case (supra)*; *Lalji Raja & Sons* v. *Firm Hansraj Nathuram*, (1971) 1 SCC 721: AIR 1971 SC 974.

[76] S. 2(11).

[77] *BANCO National Ultramarino* v. *Nalini Bai Naique*, 1989 Supp (2) SCC 275 at pp. 277-78: AIR 1989 SC 1589; *Chiranjilal* v. *Jasjit Singh*, (1993) 2 SCC 507.

[78] *See also infra*, Pt. II, Chap. 15.

[79] S. 2(12).

enjoyment of his property even though he was entitled to possession thereof.[80]

(c) *Against whom mesne profits can be claimed*

Wrongful possession of the defendant is the essence of a claim for mesne profits and the very foundation of the defendant's liability therefor. As a rule, therefore, generally, a person in wrongful possession and enjoyment of immovable property is liable for mesne profits.[81] It is very clear that mesne profits can be claimed with regard to immovable property only.

Thus, a decree for mesne profits can be passed against a trespasser, or against a person against whom a decree for possession is passed, or against a mortgagor in possession of mortgaged property after a decree for foreclosure has been passed against him, or against a mortgagee in possession of property even after a decree for redemption is passed, or against a tenant holding over at will after a notice to quit has been served upon him.

Where the plaintiff is dispossessed by several persons, every one of them would be liable to pay mesne profits to the plaintiff even though he might not be in actual possession or the profits might not have been received by him. The Court in such cases may hold all the trespassers jointly and severally liable, leaving them to have their respective rights adjusted in a separate suit for contribution; or, may ascertain and apportion the liability of each of them.[82]

(d) *Assessment*

Mesne profits being in the nature of damages, no invariable rule governing their award and assessment in every case can be laid down and "the Court may mould it according to the justice of the case".[82] In assessing the mesne profits, usually the court will take into account what the defendant has gained or reasonably might have gained by his wrongful possession of the property.[83]

(e) *Test*

The test to ascertain mesne profits is not what the plaintiff has lost by being out of possession but what the defendant gained or might rea-

[80] *Lucy Kochuvareed* v. *P. Mariappa Gounder*, (1979) 3 SCC 150 at p. 159: AIR 1979 SC 1214 at p. 1219.

[81] *Lucy Kochuvareed* v. *P. Mariappa Gounder*, *ibid*; *Chittoori* v. *Kudappa*, AIR 1965 SC 1325: (1965) 2 SCR 661.

[82] *Ibid*, see also *Fateh Chand* v. *Balkishan Dass*, AIR 1963 SC 1405 at pp. 1412-13: (1964) 1 SCR 515; *Marshall Sons & Co. (I) Ltd.* v. *Sahi Oretrans (P) Ltd.*, (1999) 2 SCC 325: AIR 1999 SC 882.

[83] *Ibid*, see also *Harry Kempson Gray* v. *Bhagu Mian*, AIR 1930 PC 82.

sonably and with ordinary prudence have gained by such wrongful possession.[84]

(*f*) *Principles*

The following principles would ordinarily guide a court in determining the amount of mesne profits:

(*i*) no profit by a person in wrongful possession;

(*ii*) restoration of status before dispossession of decree-holder; and

(*iii*) use to which a decree-holder would have put the property if he himself was in possession.

(*g*) *Illustration*

Thus, in a suit for title and possession where the land is in the occupation of a tenant, mesne profits should be awarded on the basis of rent and not on the basis of the produce or value of the property. At the same time, however, mesne profits cannot be calculated on the basis of standard rent or maximum rent that a landlord could have received if premises were let out afresh. Though the amount of standard rent is a relevant factor for calculating mesne profits, it is not decisive.[85]

But when a person in wrongful possession plants indigo on the land and it is proved that a prudent agriculturist would have planted sugarcane, wheat or tobacco, the mesne profits should be assessed on the basis of those more profitable crops.[86]

(*h*) *Interest*

Since interest is an integral part of mesne profits, it has to be allowed in the computation of mesne profits itself.[87] The rate of interest is at the discretion of the court, subject to the limitation that the said rate shall not exceed six per cent per annum.[88] Such interest can be allowed till the date of payment.[89]

(*i*) *Deductions*

While awarding mesne profits, the court may allow deductions to be made from the gross profits of the defendant in wrongful possession of the property, such as land revenue, rent, cesses, cost of cultivation

[84] *Ibid*, see also *R.P. David* v. *M. Thiagarajan*, 1996 AIHC 1194; *Marshall Sons & Co. (I) Ltd.* v. *Sahi Oretrans (P) Ltd.*, (1999) 2 SCC 325: AIR 1999 SC 882.

[85] *Chander Kali Bai* v. *Jagdish Singh*, (1977) 4 SCC 402: AIR 1977 SC 2262; *Purificacao Fernandes* v. *Dr. Hugo Vicente de Perpetuo*, AIR 1985 Bom 202; *Ratilal Thakordas Tamkhuwala* v. *Vithaldas*, AIR 1985 Bom 134.

[86] *Harry Kempson Gray* v. *Bhagu Mian*, AIR 1930 PC 82.

[87] *Mahant Narayana Dasjee* v. *Tirumalai Tirupathi Devasthanam*, AIR 1965 SC 1231 at p. 1235; *Lucy Kochuvareed* v. *P. Mariappa Gounder*, *supra*, paras 45, at pp. 54-58.

[88] *Mahant Narayan Dasjee case*, *supra*, at p. 1236 (AIR).

[89] *Lucy* v. *Mariappa*, *supra*, paras 45, at pp. 54-58; *Mahant Narayana Dasjee* v. *Tirumalai Tirupathi Devasthanam*, AIR 1965 SC 1231 at p. 1235.

and reaping, the charges incurred for collection of rent, etc. In other words, mesne profits should be net profits.[90]

(11) Public officer

"Public officer" means a person falling under any of the following descriptions, namely:

(*a*) every judge;

(*b*) every member of an All-India Service;

(*c*) every commissioned or Gazetted Officer in the military, naval or air forces of the Union while serving under the Government;

(*d*) every officer of a court of justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge of or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve an order, in a Court, and every person especially authorised by a court of justice to perform any of such duties;

(*e*) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(*f*) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

(*g*) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of the Government, or to make, authenticate, or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and

(*h*) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty.[91]

Thus, a Minister of a State, a Receiver, a village Headman, an Officer in the Indian Army, a Sheriff of Bombay, a Bench Clerk of a civil court, an Inspector of Police, a Custodian of Evacuee Property, Provident Fund Commissioner, an Advocate engaged by the Government on day fees, an Income Tax Officer, etc., are public officers. But a retired

[90] *Dakshina* v. *Saroda*, (1892-93) 20 IA 160: (1894) 21 Cal 142 (PC).

[91] S. 2(17).

government servant, a Port Commissioner, a Liquidator under the Co-operative Societies Act, a Chairman of a Municipality, a Municipal Councillor, an officer of a Corporation, etc. are not public officers.

3. OTHER IMPORTANT TERMS

There are certain other terms. Though they are important, they have not been defined in the Code. Let us consider some of them:

(1) Affidavit

An affidavit is a declaration of facts, reduced to writing and affirmed or sworn before an officer having authority to administer oaths. It should be drawn up in the first person and contain statements and not inferences.[92]

(2) Appeal

The expression "Appeal" may be defined as "the judicial examination of the decision by a higher court of the decision of an inferior court". It is a complaint made to a higher court that the decree passed by a lower court is wrong. It is a remedy provided by law for getting the decree of a lower court set aside. The right of appeal is a creature of a statute and unless it is granted clearly and expressly it cannot be claimed by a person. Again, it is a vested right and can be taken away only by a statutory provision, either expressly or by necessary implication.[93]

(3) Cause of action

Cause of action may be described as "a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed". A cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. If a plaint does not disclose a cause of action, a court will reject such plaint.[94]

(4) Caveat

According to its dictionary meaning, a "caveat" is an official request that a court should not take a particular action without issuing notice to the party lodging the caveat and without affording an opportunity of hearing him.[95]

(5) Civil

The word "civil" pertains to rights and remedies of a citizen as distinguished from criminal, political, etc. The expression "civil proceedings"

[92] For detailed discussion, *see infra*, Pt. II, Chap. 8.
[93] For detailed discussion, *see infra*, Pt. III, Chap. 2.
[94] For detailed discussion, *see infra*, Pt. II, Chap. 7.
[95] For detailed discussion, *see infra*, Pt. V, Chap. 3.

covers all proceedings in which a party asserts civil rights conferred by a civil law.[96]

(6) Court

"Court" is a place where justice is administered. To be a court, the person constituting it must have been entrusted with judicial functions.[97]

(7) Defendant

Defendant means a person who defends or a person sued in a court of law by a plaintiff. In every suit there must be two parties, namely, the plaintiff and the defendant. A defendant is a person against whom a relief is claimed by a plaintiff.[98]

(8) Execution

Stated simply, "execution" means "the process of enforcing or giving effect to the judgment, decree or order of a Court".[99]

(9) Issue

According to the *Concise Oxford Dictionary*, "issue" means "a point in question, an important subject of debate or litigation".[100] Issues are of three kinds: (*i*) Issues of fact; (*ii*) Issues of law; and (*iii*) Mixed issues of fact and law. Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.[101]

(10) Jurisdiction

Stated simply, "jurisdiction" means authority to decide. "Jurisdiction" may be defined to be the power or authority of a court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. Jurisdiction means the extent of the authority of a court to administer justice prescribed with reference to subject-matter, pecuniary value and territorial limits. Consent can neither confer nor take away jurisdiction of a court.[102]

(11) Plaint

A "Plaint" is a statement of claim, a document, or a memorial by the presentation of which a suit is instituted. It contains the grounds on

[96] For detailed discussion, *see infra*, Pt. II, Chap. 1.
[97] For detailed discussion, *see infra*, Pt. II, Chap. 1.
[98] *Concise Oxford Dictionary* (1990) at p. 303; *Chamber's Twentieth Century Dictionary* (1976) at p. 338.
[99] For detailed discussion, *see infra*, Pt. IV "Execution".
[100] *Concise Oxford Dictionary* (1990) at p. 630.
[101] For detailed discussion, *see infra*, Pt. II, Chap. 10.
[102] For detailed discussion, *see infra*, Pt. II, Chap. 1.

which the assistance of a court is sought by a plaintiff. It is a pleading of the plaintiff.[103]

(12) Plaintiff

Plaintiff is a person who brings a suit or commences an action against a defendant. It is the plaintiff who approaches a court of law by filing a suit for reliefs claimed in the plaint.[104]

(13) Suit

The word "suit" ordinarily means a civil proceeding instituted by the presentation of a plaint. In its comprehensive sense, the word "suit" is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law permits.[105]

(14) Summons

A summons is a document issued from an office of a court of justice, calling upon the person to whom it is directed to attend before a judge or an officer of the court for a certain purpose. It is a written order that legally obligates someone to attend a court of law at a specified date.[106]

When a plaintiff files a suit, the defendant must be informed about it. The intimation which is sent to the defendant by the court is technically known as "summons". A summons can also be issued to witnesses. Service of summons can be effected in any of the modes recognised by the Code.[107]

(15) Written statement

Written statement may be defined as a reply of a defendant to the plaint filed by a plaintiff. Thus, it is a pleading of a defendant dealing with every material fact of a plaint. It may also contain new facts in favour of a defendant or legal objections against the claim of a plaintiff. It is a pleading of a defendant.[108]

[103] For detailed discussion, *see infra*, Pt. II, Chap. 5.

[104] *Concise Oxford Dictionary* (1990) at p. 910; *Chamber's Twenty-first Century Dictionary* (1997) at p. 1060.

[105] For detailed discussion, *see supra*, "Decree", *infra*, Pt. II, Chap. 2.

[106] *Concise Oxford Dictionary* (1990) at p. 1395; *Chamber's Twenty-first Century Dictionary* (1997) at p. 1414.

[107] For detailed discussion, *see infra*, Pt. II, Chap. 7.

[108] For detailed discussion, *see infra*, Pt. II, Chap. 7.

Part Two
Suits

PART II

1 Jurisdiction of Civil Courts

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1. GENERAL

THE FUNDAMENTAL principle of English Law that wherever there is a right, there is a remedy (*ubi jus ibi remedium*) has been adopted by the Indian legal system also. In fact, right and remedy are but the two sides of the same coin and they cannot be separated from each other. Accordingly, a litigant having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance

is either expressly or impliedly barred by any statute.[1] A suit for its maintainability requires no authority of law and it is enough that no statute bars it.[2]

2. JURISDICTION: MEANING

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

Stated simply, "jurisdiction" means the power or authority of a court of law to hear and determine a cause or a matter. It is the power to entertain, deal with and decide a suit, an action, petition or other proceeding.[3] In other words, by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.[4]

Thus, jurisdiction of a court means the extent of the authority of a court to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits.[5]

In *Official Trustee* v. *Sachindra Nath*[6], after referring to various decisions, the Supreme Court observed:

> "From the above discussion it is clear that before a court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. *Its jurisdiction must include the power to hear and decide the question at issue, the authority to hear and decide the particular controversy that has arisen between the parties."*[7] (emphasis supplied)

[1] *Abdul Waheed Khan* v. *Bhawani*, AIR 1966 SC 1718 at p. 1719: (1966) 3 SCR 617; *Brij Raj Singh* v. *Laxman Singh*, AIR 1961 SC 149 at p. 152: (1961) 1 SCR 616; *Most Rev. P.M.A. Metropolitan* v. *Moran Mar Marthoma*, 1995 Supp (4) SCC 286 at p. 318: AIR 1995 SC 2001 at p. 2022.

[2] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393 at p. 397: AIR 1974 SC 1126 at p. 1129; *Most Rev. P.M.A. Metropolitan* v. *Moran Mar Marthoma (ibid.)*.

[3] *Concise Oxford English Dictionary* (2002) at p. 768; P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. III at pp. 2527-30.

[4] *Official Trustee* v. *Sachindra Nath*, AIR 1969 SC 823 at p. 827: (1969) 3 SCR 92; *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621 at p. 1629: (1963) 1 SCR 778; *Raja Soap Factory* v. *S.P. Shantharaj*, AIR 1965 SC 1449: (1965) 2 SCR 800.

[5] *Raja Soap Factory* v. *S.P. Shantharaj*, AIR 1965 SC 1449: (1965) 2 SCR 800.

[6] AIR 1969 SC 823: (1969) 3 SCR 92.

[7] *Ibid*, at p. 828 (AIR); see also *Union of India* v. *Tarachand Gupta and Bros.*, (1971) 1 SCC 486: AIR 1971 SC 1558; *Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 1 All ER 208: (1969) 2 WLR 163: (1969) 2 AC 147 (HL). *See also*, the following statement of law in *Halsbury's Laws of England* (4th Edn.) Vol. 10, para 715:

"By jurisdiction is meant authority by which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way

3. JURISDICTION AND CONSENT

It is well-settled that consent cannot confer nor take away jurisdiction of a court. In the leading case of *A.R. Antulay* v. *R.S. Nayak*[8], Mukharji, J. (as he then was) stated, "This Court, by its directions, could not confer jurisdiction on the High Court of Bombay to try any case for which it did not possess... ."

It was further stated:

> "The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal."[9]

If the court has no inherent jurisdiction, neither acquiescence nor waiver nor estoppel can create it.[10] A defect of jurisdiction goes to the root of the matter and strikes at the authority of a court to pass a decree. Such a basic and fundamental defect cannot be cured by consent of parties and the judgment or order passed by a court, however precisely certain and technically correct, is null and void and the validity thereof can be challenged at any stage.[11] A decree passed without jurisdiction is non est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution

for its decision. The limits of this authority are imposed by Statute or Charter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which a particular Court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics."

[8] (1988) 2 SCC 602 at p. 650: AIR 1988 SC 1531.

[9] *Ibid*, at p. 650 (SCC).

[10] *Dhirendra Nath* v. *Sudhir Chandra*, AIR 1964 SC 1300 at p. 1304: (1964) 6 SCR 1001; *Chief Justice of A.P.* v. *L.V.A. Dixitulu*, (1979) 2 SCC 34 at p. 42: AIR 1979 SC 193 at p. 198; *Nai Bahu* v. *Lala Ramnarayan*, (1978) 1 SCC 58 at pp. 61-62: AIR 1978 SC 22 at p. 25; *Globe Transport Corpn.* v. *Triveni Engg. Works*, (1983) 4 SCC 707 at p. 709; *Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu*, AIR 1966 SC 634 at p. 636: (1966) 1 SCR 461; *Hira Lal* v. *Kali Nath*, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; *Khardah Co. Ltd.* v. *Raymon & Co. India (P) Ltd.*, AIR 1962 SC 1810 at pp. 1815-16: (1963) 3 SCR 183; *United Commercial Bank Ltd.* v. *Workmen*, AIR 1951 SC 230 at pp. 237-42: 1950 SCR 380; *Patel Roadways Ltd.* v. *Prasad Trading Co.*, (1991) 4 SCC 270: AIR 1992 SC 1514; *Chiranjilal* v. *Jasjit Singh*, (1993) 2 SCC 507.

[11] *Ibid*, see also *Vasudev Dhanjibhai Modi* v. *Rajabhai Abdul Rehman*, (1970) 1 SCC 670: AIR 1970 SC 1475; *Chandrika Misir* v. *Bhaiya Lal*, (1973) 2 SCC 474 at p. 476: AIR 1973 SC 2391 at p. 2393.

or in collateral proceedings. In short, a decree passed by a court without jurisdiction is a *coram non judice*.[12]

In the case of *Kiran Singh* v. *Chaman Paswan*[13], the Supreme Court observed:

> "It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. *A defect of jurisdiction ... strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.*"[14] (emphasis supplied)

Conversely, where a court has jurisdiction to decide a dispute, the same cannot be taken away or ousted by consent of parties. An agreement to oust *absolutely* the jurisdiction of the court would be unlawful and void, being against public policy (*ex dolo malo non oritur actio*).[15] But if two or more courts have jurisdiction to try the suit, it is open to the parties to select a particular forum and exclude the other forums. And, therefore, the parties may agree among themselves that the suit should be brought in one of those courts and not in the other, since there is no inherent lack of jurisdiction in the court. Such an agreement would be legal, valid and enforceable.[16]

4. LACK OF JURISDICTION AND IRREGULAR EXERCISE OF JURISDICTION

There is always a distinction between want of jurisdiction and irregular exercise of it. Once it is held that a court has jurisdiction to entertain and decide a matter, the correctness of the decision given cannot be said to be without jurisdiction inasmuch as the power to decide necessarily carries with it the power to decide wrongly as well as rightly.[17]

[12] *Ibid*, see also *Sushil Kumar* v. *Gobind Ram*, (1990) 1 SCC 193 at p. 205; *Isabella Johnson* v. *M.A. Susai*, (1991) 1 SCC 494 at p. 498: AIR 1991 SC 993 at p. 995; *Patel Roadways Ltd.* v. *Prasad Trading Co.*, (1991) 4 SCC 270: AIR 1992 SC 1514; *Harshad Chiman Lal* v. *DLF Universal Ltd.*, (2005) 7 SCC 791: AIR 2005 SC 4446; *Chief Engineer, Hydel Project* v. *Ravinder Nath*, (2008) 2 SCC 350.

[13] AIR 1954 SC 340: (1955) 1 SCR 117.

[14] *Ibid*, n. 10 at p. 342 (AIR); see also supra, *Sushil Kumar* v. *Gobind Ram*.

[15] *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163 at p. 170: AIR 1989 SC 1239; *Supdt. of Taxes* v. *Onkarmal Nathmal Trust*, (1976) 1 SCC 766: AIR 1975 SC 2065 at p. 2071; *Rewa Mahton* v. *Ram Kishen*, (1885-86) 13 IA 106 at p. 111 (PC).

[16] *Hakam Singh* v. *Gammon (India) Ltd.*, (1971) 1 SCC 286: AIR 1971 SC 740; *Globe Transport Corpn.* v. *Triveni Engg. Works*, (1983) 4 SCC 707 at p. 709; *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163; *R.S.D.V. Finance Co. (P) Ltd.* v. *Shree Vallabh Glass Works Ltd.*, (1993) 2 SCC 130: AIR 1993 SC 2094; *Shree Subhlaxmi Fabrics (P) Ltd.* v. *Chand Mal*, (2005) 10 SCC 704; *Laxman Prasad* v. *Prodigy Electronics Ltd.*, (2008) 1 SCC 618.

[17] *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621 at p. 1629: (1963) 1 SCR 778; *Rajendra Jha* v. *Labour Court*, 1984 Supp SCC 520 at pp. 526-27: AIR 1984 SC 1696 at pp. 1699-1700;

In the words of Lord Hobhouse,[18] "A court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed." In other words, if there is inherent lack of jurisdiction, the decree passed by a civil court is a nullity, and that nullity can be set up in any collateral proceedings.[19] However, if a court has jurisdiction but it is irregularly exercised, the defect does not go to the root of the matter, and the error, if any, in exercising the jurisdiction can be remedied in appeal or revision and when there is no such remedy or is not availed of, the decision is final.

In *Ittyavira Mathai Mathai* v. *Varkey Varkey*[20], it was contended that the decree passed by the court was a nullity since the suit was time barred. Negativing that contention, the Supreme Court observed:

> "If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well-settled that a court having jurisdiction over the subject-matter of the suit and over parties thereto though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do... . *If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.*"[21] (emphasis supplied)

The difficult question, however, is, What is the distinction between absence of jurisdiction and erroneous or irregular exercise thereof?

Ebrahim Aboobakar v. *Custodian-General of Evacuee Property*, AIR 1952 SC 319: 1952 SCR 696; *S. Govinda Menon* v. *Union of India*, AIR 1967 SC 1274: (1967) 2 SCR 566; *Ittyavira Mathai Mathai* v. *Varkey Varkey*, AIR 1964 SC 907: (1964) 1 SCR 495.

[18] *Ibid*, see also *Malkarjun* v. *Narhari*, (1900) 27 IA 216 at p. 225: (1901) 25 Bom 337 (PC); *Supdt. of Taxes* v. *Onkarmal Nathmal Trust*, (1976) 1 SCC 766: AIR 1975 SC 2065 at p. 2071.

[19] *Amrit Bhikaji Kale* v. *Kashinath Janardhan Trade*, (1983) 3 SCC 437 at p. 444: AIR 1983 SC 643 at p. 647.

[20] AIR 1964 SC 907: (1964) 1 SCR 495.

[21] *Ittyavira Mathai Mathai* v. *Varkey Varkey*, AIR 1964 SC 907 at p. 910: (1964) 1 SCR 495; see also *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621 at pp. 1629-30: (1963) 1 SCR 778; *Rajendra Jha case, supra*; *Chittoori* v. *Kudappa*, AIR 1965 SC 1325: (1965) 2 SCR 661. *See also*, the following observations of S.K. Das, J. (as he then was) in *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621 at p. 1629: (1963) 1 SCR 778:

> "Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact."

After the landmark decision in *Anisminic Ltd.* v. *Foreign Compensation Commission*[22], the legal position is considerably changed. It virtually assimilated the distinction between lack of jurisdiction and erroneous exercise thereof. As observed in *M.L. Sethi* v. *R.P. Kapur*[23], the difference between jurisdictional error and error of law within jurisdiction has been reduced almost to a vanishing point.

The following observations[24] pithily put the legal position thus:

> "After *Anisminic* every error of law is a jurisdictional error... . The distinction between jurisdictional and non-jurisdictional error is ultimately based upon a foundation of sand. Much of the superstructure has already crumbled. *What remains is likely quickly to fall away as the courts rightly insist that all administrative actions should be simply lawful whether or not jurisdictionally lawful.*"[25]
>
> (emphasis supplied)

5. BASIS TO DETERMINE JURISDICTION

It is well-settled that for deciding the jurisdiction of a civil court, the averments made in the plaint are material. To put it differently, the jurisdiction of a court should normally be decided on the basis of the case put forward by the plaintiff in his plaint and not by the defendant in his written statement.

Thus, in *Abdulla Bin Ali* v. *Galappa*[26], the plaintiff filed a suit in the civil court for declaration of title and for possession and mesne profits treating the defendants as trespassers. The defendants contended that the civil court had no jurisdiction since he was a tenant.

Negativing the contention of the defendants, the Supreme Court observed, "There is no denying the fact that the allegations made in plaint decide the forum. The jurisdiction does not depend upon the defence taken by the defendants in the written statement. On a reading of the plaint as a whole it is evident that the plaintiffs-appellants had filed the suit giving rise to the present appeal treating the defendants as trespassers as they denied the title of the plaintiffs-appellants. Now a suit against the trespasser would lie only in the civil court and not in the Revenue Court... . We are, therefore, of the considered opinion that on the allegations made in the plaint the suit was cognizable by the civil court."[27]

[22] (1969) 1 All ER 208: (1969) 2 WLR 163: (1969) 2 AC 147 (HL).

[23] (1972) 2 SCC 427 at p. 435: AIR 1972 SC 2379 at p. 2385.

[24] De Smith, *Judicial Review of Administrative Action* (5th Edn.) at p. 256.

[25] Readers interested in analytical discussion may *refer to* C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. 1 at pp. 53-60.

[26] (1985) 2 SCC 54: AIR 1985 SC 577.

[27] *Ibid*, n. 23 at pp. 56-57 (SCC): at p. 579 (AIR); see also *Bismillah* v. *Janeshwar Prasad*, (1990) 1 SCC 207 at pp. 210-11: AIR 1990 SC 540; *Sanwarmal Kejriwal* v. *Vishwa Coop.*

The plaintiff, however, cannot by drafting his plaint cleverly circumvent the provisions of law in order to invest jurisdiction in civil court which it does not possess.[28] It is also well established that in deciding the question of jurisdiction, what is important is the substance of the matter and not the form.[29]

Thus, in *Bank of Baroda* v. *Moti Bhai*[30], the plaintiff Bank lent a certain amount to the defendant in the usual course of its commercial business. By way of a collateral security, however, it obtained a hypothecation bond and a deed of mortgage from the defendant under the Tenancy Act conferring exclusive jurisdiction on the revenue court. When the suit was filed in the civil court for recovery of amount, it was contended by the defendant that the civil court had no jurisdiction to try the suit.

Negativing the contention, the Supreme Court observed that the business of the bank was to lend money. If only by way of collateral security the bank obtains a hypothecation bond or a deed of mortgage, the provisions of the Tenancy Act cannot be attracted. Primarily and basically, the suit filed by the bank was for the recovery of the amount due to it by the defendant on the basis of the promissory note executed by the defendant. The main relief sought by the bank was that the suit should be decreed for repayment of amount. The civil court had, therefore, jurisdiction to entertain the suit filed by the bank. *On the question of jurisdiction, one must always have regard to the substance of the matter and not to the form of the suit.*[31] (emphasis supplied)

Again, when a court of limited jurisdiction (Rent Controller) has jurisdiction to decide only a particular dispute (fixation of standard rent), it has jurisdiction to consider the collateral issue (title of the landlord to the property) only prima facie and the jurisdiction of a civil court to decide such issue finally is not taken away.[32]

Housing Society Ltd., (1990) 2 SCC 288 at pp. 306-07: AIR 1990 SC 1563; *Vasudev Gopal* v. *Happy Home Coop. Housing Society Ltd.*, AIR 1967 SC 369: (1964) 3 SCR 964; *Mani Nariman* v. *Phiroz N. Bhatena*, (1991) 3 SCC 141: AIR 1991 SC 1494; *Begum Sabiha* v. *Nawab Mohd. Mansur*, (2007) 4 SCC 343: AIR 2007 SC 1636.

[28] *Ram Singh* v. *Mehal Kalan Gram Panchayat*, (1986) 4 SCC 364: AIR 1986 SC 2197; *ONGC* v. *Utpal Kumar Basu*, (1994) 4 SCC 711.

[29] *Moolji Jaitha and Co.* v. *Khandesh Spg. and Wvg. Mills Co. Ltd.*, AIR 1950 FC 83 at p. 92; *Begum Sabiha* v. *Nawab Mohd. Mansur*, *supra*.

[30] (1985) 1 SCC 475: AIR 1985 SC 545.

[31] *Ibid*, at p. 478 (SCC): at p. 547 (AIR). See also *Bismillah* v. *Janeshwar Prasad* (*ibid.*); *Ram Singh* v. *Gram Panchayat Mehal Kalan*, (1986) 4 SCC 364: AIR 1986 SC 2197.

[32] *LIC* v. *India Automobiles & Co.*, (1990) 4 SCC 286: AIR 1991 SC 884.

It is submitted that the following observations of the Full Bench of the Allahabad High Court in *Ananti* v. *Chhannu*[33], and approved by the Supreme Court[34], lay down the correct law on the point:

> "The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen. If ... he frames his suit in a manner not warranted by the facts, and goes for his relief to a court which cannot grant him relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper court, for the plaint, as framed, would not justify the other kind of court to grant him the relief... . If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants are true, and that the case is not cognizable by the court, there will be two kinds of orders to be passed. *If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper court. If, on the other hand, it is found that, having regard to the nature of the suit, it is not cognizable by the class of court to which the court belongs, the plaintiff's suit will have to be dismissed in its entirety.*" [35]
>
> (emphasis supplied)

6. JURISDICTIONAL FACT

The jurisdiction of a court, tribunal or authority may depend upon fulfilment of certain conditions or upon existence of a particular fact. This is called "jurisdictional fact". The existence of such a preliminary or collateral fact is a *sine qua non* or a condition precedent to the assumption of jurisdiction by the authority. If it exists, the authority has jurisdiction and it can act. If it does not exist, there is no jurisdiction and the authority cannot act. If the authority wrongly assumes existence of such fact, a writ of *certiorari* can be issued.[36]

7. DECISION AS TO JURISDICTION

Whether a court has jurisdiction or not has to be decided with reference to the initial assumption of jurisdiction by that court. The question depends not on the truth or falsehood of the facts into which it has

[33] AIR 1930 All 193: ILR 52 All 501 (FB).

[34] *Topandas* v. *Goraklıram*, AIR 1964 SC 1348: (1964) 3 SCR 214.

[35] *Ibid*, at p. 1352 (AIR).

[36] *Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 1 All ER 208: (1969) 2 WLR 163: (1969) 2 AC 147 (HL); *Ebrahim Aboobakar* v. *Custodian-General of Evacuee Property*, AIR 1952 SC 319: 1952 SCR 696; *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621: (1963) 1 SCR 778. For detailed discussion, *see*, V.G. Ramachandran, *Law of Writs* (1993) at pp. 747-54; C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. 1 at pp. 62-64.

to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion of the inquiry".[37]

Whenever the jurisdiction of a court is challenged, that court has inherent jurisdiction to decide the said question.[38] Every court or tribunal is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within its jurisdiction or not.[39] Similarly, where a tribunal derives its jurisdiction from the statute that creates it and imposes conditions under which it can function, it goes without saying that before the tribunal assumes jurisdiction in a matter, it must be satisfied that those conditions in fact exist. Such facts are known as preliminary or jurisdictional facts.[40]

8. COURTS AND TRIBUNALS

A civil court has inherent power to decide the question whether it has jurisdiction to entertain, deal with and decide the matter which has come before it.[41]

The jurisdiction of a tribunal or any other authority stands on a different footing. Where Parliament has invested such tribunal with the power to decide and determine *finally* the preliminary facts on which its jurisdiction depends, it can decide such facts and the finding recorded by the tribunal cannot be challenged by *certiorari*. But where a statute creating or establishing a tribunal does not confer that power on a tribunal, an inferior tribunal cannot, on a wrong decision on preliminary or collateral fact, assume and confer on itself jurisdiction which it does not possess. Such an order can be challenged by *certiorari*.[42]

[37] *R.* v. *Boltan*, (1841) 1 QB 66 at p. 74: (1835-1842) All ER Rep 71; *Ujjam Bai case*, *supra*, at p. 1629.

[38] *Bhatia Coop. Housing Society Ltd.* v. *D.C. Patel*, AIR 1953 SC 16 at p. 19: 1953 SCR 185; *Athmanathaswami Devasthanam* v. *K. Gopalswami Ayyangar*, AIR 1965 SC 338 at p. 342: (1964) 3 SCR 763; *LIC* v. *India Automobiles & Co.*, (1990) 4 SCC 286 at pp. 293-94: AIR 1991 SC 884 at p. 889.

[39] *Ibid*, see also *Mohd. Hasmuddin* v. *State of Maharashtra*, (1979) 2 SCC 572 at p. 584: AIR 1979 SC 404 at p. 412.

[40] For discussion about "Jurisdictional fact", *see*, Author's *Lectures on Administrative Law* (2008) Lecture IX.

[41] *Bhatia Coop. Housing Society Ltd.* v. *D.C. Patel*, AIR 1953 SC 16 at p. 19: 1953 SCR 185; *Athmanathaswami Devasthanam* v. *K. Gopalswami Ayyangar*, AIR 1965 SC 338 at p. 342: (1964) 3 SCR 763; *Official Trustee* v. *Sachindra Nath*, AIR 1969 SC 823 at p. 828: (1969) 3 SCR 92; *LIC* v. *India Automobiles & Co.*, (1990) 4 SCC 286 at p. 293-94: AIR 1991 SC 884 at p. 889.

[42] *Ibid*, see also *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621: (1963) 1 SCR 778; *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *Addanki T.T. Desika* v. *State of A.P.*, AIR 1964 SC 807; *R.* v. *Commr. for Special Purposes of Income Tax*, (1888) 21 QB 313: 36 WR 776; *BASF Styrenics (P) Ltd.* v. *Offshore Industrial Construction (P) Ltd.*, AIR 2002 Bom 289.

9. JURISDICTION OF FOREIGN COURTS[43]

10. KINDS OF JURISDICTION

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

(1) Civil and criminal jurisdiction

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

(2) Territorial or local jurisdiction

Every court has its own local or territorial limits beyond which it cannot exercise its jurisdiction. These limits are fixed by the Government. The District Judge has to exercise jurisdiction within his district and not outside it. The High Court has jurisdiction over the territory of a State within which it is situate and not beyond it. Again, a court has no jurisdiction to try a suit for immovable property situated beyond its local limits.

(3) Pecuniary jurisdiction

The Code provides that a court will have jurisdiction only over those suits the amount or value of the subject-matter of which does not exceed the pecuniary limits of its jurisdiction.[44] Some courts have unlimited pecuniary jurisdiction, e.g. High Courts and District Courts have no pecuniary limitations. But there are other courts having jurisdiction to try suits up to a particular amount. Thus, a Presidency Small Causes Court cannot entertain a suit in which the amount claimed exceeds Rs 1000.

(4) Jurisdiction as to subject-matter

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

(5) Original and appellate jurisdiction

Original jurisdiction is jurisdiction inherent in, or conferred upon, a court of first instance. In the exercise of that jurisdiction, a court of

[43] For detailed discussion, *see infra*, Chap. 3.

[44] S. 6.

first instance decides suits, petitions or applications. Appellate jurisdiction is the power or authority conferred upon a superior court to rehear by way of appeal, revision, etc., of causes which have been tried and decided by courts of original jurisdiction.

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

(6) Exclusive and concurrent jurisdiction

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

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

(7) General and special jurisdiction

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

(8) Legal and equitable jurisdiction

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

(9) Municipal and foreign jurisdiction

Municipal or domestic jurisdiction is a jurisdiction exercised by municipal courts, i.e., courts in a country. Foreign jurisdiction means jurisdiction exercised by a court in a foreign country. A judgment rendered or decision given by a foreign court is a "foreign judgment".

(10) Expounding and expanding jurisdiction

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

11. JURISDICTION OF CIVIL COURTS

(1) Section 9

Under the Code of Civil Procedure, a civil court has jurisdiction to try all suits of a civil nature unless they are barred. Section 9 of the Code reads as under:

"The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

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

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

(2) Conditions

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

(*i*) The suit must be of a civil nature; and

(*ii*) 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. But what is a suit of a civil nature? The word "civil" has not been defined in the Code. But according to the dictionary meaning,[45] 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 proceeding".[46] 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

[45] *Concise Oxford Dictionary* (1990) at p. 206; see also *S.A.L. Narayan* v. *Ishwarlal*, AIR 1965 SC 1818 at p. 1823: (1966) 1 SCR 190; *Ramesh* v. *Gendalal*, AIR 1966 SC 1445 at p. 1447-48: (1966) 3 SCR 198; *Arbind Kumar* v. *Nand Kishore*, AIR 1968 SC 1227: (1968) 3 SCR 322.

[46] *Most Rev. P.M.A. Metropolitan* v. *Moran Mar Marthoma*, 1995 Supp (4) SCC 286 at pp. 318-19: AIR 1995 SC 2001 at pp. 2022-23.

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.[47] The court has jurisdiction to adjudicate upon those questions also in order to decide the principal question which is of a civil nature.[48] 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 *Most Rev. P.M.A. Metropolitan* v. *Moran Mar Marthoma*[49], the Supreme Court stated:

> "The expansive nature of the section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such 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 basic principle of a civilised jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally 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 right. 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 Law 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

[47] Expln. I to S. 9.

[48] *Sinha Ramanuja* v. *Ranga Ramanuja*, AIR 1961 SC 1720: (1962) 2 SCR 509.

[49] 1995 Supp (4) SCC 286: AIR 1995 SC 2001.

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 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 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 characteristic of affecting one's rights which are not only civil but of civil nature.*" [50]

(emphasis supplied)

(*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.[51]

(*v*) *Suits of civil nature: Illustrations*—The following are suits of a civil nature:

(*i*) Suits relating to rights to property;
(*ii*) Suits relating to rights of worship;
(*iii*) Suits relating to taking out of religious processions;
(*iv*) Suits relating to right to shares in offerings;
(*v*) Suits for damages for civil wrongs;
(*vi*) Suits for specific performance of contracts or for damages for breach of contracts;
(*vii*) Suits for specific reliefs;
(*viii*) Suits for restitution of conjugal rights;
(*ix*) Suits for dissolution of marriages;
(*x*) Suits for rents;
(*xi*) Suits for or on accounts;
(*xii*) Suits for rights of franchise;
(*xiii*) Suits for rights to hereditary offices;
(*xiv*) Suits for rights to *Yajmanvritis*;
(*xv*) Suits against wrongful dismissals from service and for salaries, etc.

(*vi*) *Suits not of civil nature: Illustrations*—The following are not suits of a civil nature:

(*i*) Suits involving principally caste questions;
(*ii*) Suits involving purely religious rites or ceremonies;

[50] *Ibid*, at pp. 318-19 (SCC): at pp. 2022-23 (AIR).
[51] *Sinha Ramanuja* v. *Ranga Ramanuja*, AIR 1961 SC 1720 at p. 1724: (1962) 2 SCR 509.

(*iii*) Suits for upholding mere dignity or honour;
(*iv*) Suits for recovery of voluntary payments or offerings;
(*v*) Suits against expulsions from caste, etc.

(*b*) *Cognizance not barred*

As stated above, a litigant having a grievance of a civil nature has a right to institute a civil suit unless its cognizance is barred, either expressly or impliedly.

(*i*) *Suits expressly barred*—A suit is said to be "expressly barred" when it is barred by any enactment for the time being in force.[52] It is open to a competent legislature to bar jurisdiction of civil courts with respect to a particular class of suits of a civil nature, provided that, in doing so, it keeps itself within the field of legislation conferred on it and does not contravene any provision of the Constitution.[53]

But every presumption should be made in favour of the jurisdiction of a civil court and the provision of exclusion of jurisdiction of a court must be strictly construed.[54]If there is any doubt about the ousting of jurisdiction of a civil court, the court will lean to an interpretation which would maintain the jurisdiction.[55]Thus, matters falling within the exclusive jurisdiction of Revenue Courts or under the Code of Criminal Procedure or matters dealt with by special tribunals under the relevant statutes, e.g. by Industrial Tribunal, Election Tribunal, Revenue Tribunal, Rent Tribunal, Cooperative Tribunal, Income Tax Tribunal, Motor Accidents Claims Tribunal, etc., or by domestic tribunals, e.g. Bar Council, Medical Council, University, Club, etc. are expressly barred from the cognizance of a civil court. But if the remedy provided by a statute is not adequate and all questions cannot be decided by a special tribunal, the jurisdiction of a civil court is not barred.[56] Similarly, when a court of limited jurisdiction *prima facie* and

[52] *Umrao Singh* v. *Bhagwati Singh*, AIR 1956 SC 15: 1956 SCR 62; *Mohd. Mahmood* v. *Tikam Das*, AIR 1966 SC 210 at p. 211: (1966) 1 SCR 128; *Gurucharan Singh* v. *Kamla Singh*, (1976) 2 SCC 152: AIR 1977 SC 5 at p. 12; *Bata Shoe Co. Ltd.* v. *City of Jabalpur Corpn.*, (1977) 2 SCC 472: AIR 1977 SC 955 at p. 963; *Annamreddi Bodayya* v. *Lokanarapu Ramaswamy*, 1984 Supp SCC 391: AIR 1984 SC 1726; *Sayed Mohd. Baquir* v. *State of Gujarat*, (1981) 4 SCC 383: AIR 1981 SC 2016; *CIT* v. *Parmeshwari Devi*, (1998) 3 SCC 481: AIR 1998 SC 1276. For instance, S. 170 of the Representation of the People Act, 1951 reads:

"No civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the returning officer or by any other person appointed under this Act in connection with an election."

[53] *State of Vindhya Pradesh* v. *Moradhwaj Singh*, AIR 1960 SC 796: (1960) 3 SCR 106.

[54] *Abdul Waheed Khan* v. *Bhawani*, AIR 1966 SC 1718 at p. 1719: (1966) 3 SCR 617; *Dhulabhai* v. *State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662.

[55] *Bharat Kala Bhandar (P) Ltd.* v. *Municipal Committee, Dhamangaon*, AIR 1966 SC 249 at p. 261: (1965) 3 SCR 499; *Dhulabhai* v. *State of M.P.* (*ibid.*).

[56] *State of T.N.* v. *Ramalinga Samigal*, (1985) 4 SCC 10: AIR 1986 SC 794.

incidentally states something, the jurisdiction of a civil court to finally decide the time is not ousted.[57]

(ii) Suits impliedly barred—A suit is said to be impliedly barred when it is barred by general principles of law.

Where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form than that given by the statute.[58] Where an Act creates an obligation and enforces its performance in a specified manner, that performance cannot be enforced in any other manner.[59]

Similarly, certain suits, though of a civil nature, are barred from the cognizance of a civil court on the ground of public policy.[60] "The principle underlying is that a court ought not to countenance matters which are injurious to and against the public weal."[61] Thus, no suit shall lie for recovery of costs incurred in a criminal prosecution or for enforcement of a right upon a contract hit by Section 23 of the Indian Contract Act, 1872; or against any judge for acts done in the course of his duties. Likewise, political questions belong to the domain of public administrative law and are outside the jurisdiction of civil courts. A civil court has no jurisdiction to adjudicate upon disputes of a political nature.

(3) Who may decide?

It is well-settled that a civil court has inherent power to decide its own jurisdiction.[62]

(4) .Presumption as to jurisdiction

In dealing with the question whether a civil court's jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind that every presumption should be made in favour of the jurisdiction of a civil

[57] *LIC* v. *India Automobiles & Co.*, (1990) 4 SCC 286: AIR 1991 SC 884.

[58] *Premier Automobiles* v. *Kamlekar Shantaram*, (1976) 1 SCC 496 at p. 506: AIR 1975 SC 2238 at p. 2245; *Jitendra Nath* v. *Empire India and Ceylone Tea Co.*, (1989) 3 SCC 582 at pp. 588-89: AIR 1990 SC 255 at p. 260; *Munshi Ram* v. *Municipal Committee, Chheharla*, (1979) 3 SCC 83: AIR 1979 SC 1250; *Punjab SEB* v. *Ashwani Kumar*, (1997) 5 SCC 120.

[59] *Premier Automobiles, ibid*, at pp. 505-06 (SCC): at p. 2244 (AIR). *See also*, observations of Lord Tenderden, C.J. in *Deo* v. *Bridges*, (1831) 1 B&Ad 847: 199 ER 1001:

"Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

[60] *Ibid*, see also *Indian Airlines Corpn.* v. *Sukhdeo Rai*, (1971) 2 SCC 192: AIR 1971 SC 1828; *Sitaram* v. *Pigment Cakes & Chemicals Mfg. Co.*, (1979) 4 SCC 12: AIR 1980 SC 16; Mulla, *Code of Civil Procedure* (1995) Vol. 1 at pp. 75-76.

[61] *Per* Kapur, J. in *Union of India* v. *Ram Chand*, AIR 1955 Punj 166 at p. 169; *Baboo Gunnesh* v. *Mugneeram Chowdhry*, (1872) 11 Suth WR 283 (PC).

[62] *Bhatia Coop. Housing Society Ltd.* v. *D.C. Patel*, AIR 1953 SC 16 at p. 19: 1953 SCR 185; *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 at p. 701: AIR 1988 SC 1531.

court. The exclusion of jurisdiction of a civil court to entertain civil causes should not be readily inferred unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature.[63]

(5) Burden of proof

It is well-settled that it is for the party who seeks to oust the jurisdiction of a civil court to establish it. It is equally well-settled that a statute ousting the jurisdiction of a civil court must be strictly construed.[64]Where such a contention is raised, it has to be determined in the light of the words used in the statute, the scheme of the relevant provisions and the object and purpose of the enactment. In the case of a doubt as to jurisdiction, the court should lean towards the assumption of jurisdiction.[65]A civil court has inherent power to decide the question of its own jurisdiction; although as a result of such inquiry it may turn out that it has no jurisdiction to entertain the suit.[66]

(6) Objection as to jurisdiction[67]

(7) Exclusion of jurisdiction: Limitations

A litigant having a grievance of a civil nature has, independent of any statute, a right to institute a suit in a civil court unless its cognizance is either expressly or impliedly barred. The exclusion of the jurisdiction of a civil court is not to be readily inferred and such exclusion must be clear.[68]

[63] *Firm of Illuri Subbayya Chetty & Sons* v. *State of A.P.*, AIR 1964 SC 322 at p. 324: (1964) 1 SCR 752. See also *Secy. of State* v. *Mask & Co.*, AIR 1940 PC 105 at p. 110: 67 IA 222; *Shiromani Gurdwara Parbandhak Committee* v. *Shiv Rattan*, AIR 1955 SC 576 at p. 581: (1955) 2 SCR 67; *Magiti Sasamal* v. *Pandab Bissoi*, AIR 1962 SC 547 at pp. 549-50: (1962) 3 SCR 673; *Addanki T.T. Desika* v. *State of A.P.*, AIR 1964 SC 807; *Kamala Mills Ltd.* v. *State of Bombay*, AIR 1965 SC 1942 at pp. 1950-51: (1966) 1 SCR 64; *Abdul Waheed Khan* v. *Bhawani*, AIR 1966 SC 1718 at p. 1719: (1966) 3 SCR 617; *Musamia Imam Haider* v. *Rabari Govindbhai*, AIR 1969 SC 439 at p. 446: (1969) 1 SCR 785; *Dhulabhai* v. *State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662; *State of W.B.* v. *Indian Iron & Steel Co. Ltd.*, (1970) 2 SCC 39 at pp. 43-44: AIR 1970 SC 1298 at pp. 1301-02; *Katikara Chintamani Dora* v. *Guntreddi Annamanaidu*, (1974) 1 SCC 567 at pp. 578-79: AIR 1974 SC 1069 at pp. 1076-77; *Gurbax Singh* v. *Financial Commr.*, 1991 Supp (1) SCC 167 at p. 175: AIR 1991 SC 435 at p. 439.

[64] *Ibid*, see also supra, *Abdul Waheed Khan* v. *Bhawani*, AIR 1966 SC 1718 at p. 1719; *V.L.N.S. Temple* v. *Induru Pattabhirami*, AIR 1967 SC 781 at p. 785: (1967) 1 SCR 280; *Mahant Dooj Das* v. *Udasin Panchayati Bara Akhara*, (2008) 12 SCC 181.

[65] *Kamala Mills Ltd.* v. *State of Bombay*, AIR 1965 SC 1942 at p. 1951: (1966) 1 SCR 64; *Katikara Chintamani Dora* v. *Guntreddi Annamanaidu*, *supra*.

[66] *Bhatia Coop. Housing Society Ltd.* v. *D.C. Patel*, AIR 1953 SC 16 at p. 19: 1953 SCR 185.

[67] For detailed discussion, *see infra*, Chap. 4.

[68] *Dhulabhai* v. *State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662. For detailed discussion, *see infra*, "Exclusion of jurisdiction of civil court: Principles".

Again, even when the jurisdiction of a civil court is barred, either expressly or by necessary implication, it cannot be said that the jurisdiction is altogether excluded. A court has jurisdiction to examine whether the provisions of the Act and the Rules made thereunder have or have not been complied with, or the order is contrary to law, *mala fide, ultra vires*, perverse, arbitrary, "purported", violative of the principles of natural justice, or is based on "no evidence" and so on. In all these cases, the order cannot be said to be *under the Act* but is *de hors* the Act and the jurisdiction of a civil court is not ousted.[69]

In the leading decision of *Secy. of State* v. *Mask & Co.*[70], the Privy Council rightly observed:

> "It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well established that even if jurisdiction is so excluded, the civil courts, have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."[71]

It is respectfully submitted that the following observations of Subba Rao, J. (as he then was) in the leading case of *Firm Seth Radha Kishan* v. *Administrator, Municipal Committee, Ludhiana*[72] lay down the correct legal position regarding jurisdiction of civil courts and require to be reproduced:

> "Under Section 9 of the Code of Civil Procedure the court shall have jurisdiction to try all suits of civil nature excepting suits of

[69] *Secy. of State* v. *Mask & Co.*, AIR 1940 PC 105: 67 IA 222; *Anisminic Ltd.* v. *Foreign Compensation Commission*, (1969) 1 All ER 208: (1969) 2 WLR 163; *Dharangadhra Chemical Works Ltd.* v. *State of Saurashtra*, AIR 1957 SC 264: 1957 SCR 152; *Firm Seth Radha Kishan* v. *Municipal Committee, Ludhiana, infra*; *Firm of Illuri Subbayya Chetty & Sons*, AIR 1964 SC 322: (1964) 1 SCR 752; *Bharat Kala Bhandar (P) Ltd.* v. *Municipal Committee, Dhamangaon*, AIR 1966 SC 249 at p. 261: (1965) 3 SCR 499; *Dhulabhai* v. *State of M.P.*, AIR 1969 SC 78: (1968) 3 SCR 662; *Srinivasa* v. *State of A.P.*, (1969) 3 SCC 711: AIR 1971 SC 71; *Union of India* v. *Tarachand Gupta and Bros.*, (1971) 1 SCC 486: AIR 1971 SC 1558; *Premier Automobiles* v. *Kamlekar Shantaram*, (1976) 1 SCC 496: AIR 1975 SC 2238; *Bata Shoe Co. Ltd.* v. *City of Jabalpur Corpn.*, (1977) 2 SCC 472: AIR 1977 SC 955; *Sayed Mohd. Baquir* v. *State of Gujarat*, (1981) 4 SCC 383: AIR 1981 SC 2016; *State of T.N.* v. *Ramalinga Samigal*, (1985) 4 SCC 10: AIR 1985 SC 19; *CST* v. *Auraiya Chamber of Commerce*, (1986) 3 SCC 50: AIR 1986 SC 1556; *Jitendra Nath* v. *Empire India and Ceylone Tea Co.*, (1989) 3 SCC 582 at pp. 88-89: 1989 SCC (L&S) 552; *Gurbax Singh* v. *Financial Commr.*, 1991 Supp (1) SCC 167: AIR 1991 SC 435; *Shiv Kumar* v. *MCD*, (1993) 3 SCC 161; *Krishan Lal* v. *State of J&K*, (1994) 4 SCC 422: (1994) 27 ATC 590.

[70] AIR 1940 PC 105: 67 IA 222.

[71] *Ibid*, at p. 110 (AIR) (*per* Lord Thankerton); see also supra, *Tarachand Gupta case*; *Sayed Mohd. Baquir case, supra*; *Ramalinga case, supra*.

[72] AIR 1963 SC 1547: (1964) 2 SCR 273.

which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court's jurisdiction is not completely ousted. *A suit in a civil court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.*"[73] (emphasis supplied)

(18) Exclusion of jurisdiction of civil court: Principles

From the above discussion, it is clear that the jurisdiction of civil courts is all-embracing except to the extent it is excluded by law or by clear intendment arising from such law.

In the classic decision of *Dhulabhai* v. *State of M.P.*[74], after considering a number of cases, Hidayatullah, C.J. summarised the following principles relating to the exclusion of jurisdiction of civil courts:

(*a*) Where a statute gives finality to orders of special tribunals, the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of judicial procedure.

(*b*) Where there is an express bar of jurisdiction of a court, an examination of the scheme of a particular Act to find the adequacy or sufficiency of the remedies provided may be relevant but this is not decisive for sustaining the jurisdiction of a civil court.

Where there is no express exclusion, the examination of the remedies and the scheme of a particular Act to find out the

[73] *Ibid*, at p. 1551 (AIR). *See also supra*, observations of Shelat, J. in *Tarachand Gupta case*, and of Lord Reid in *Anisminic Ltd. case, supra*; Author's *Lectures on Administrative Law* (2008) Lecture VII.

[74] AIR 1969 SC 78: (1968) 3 SCR 662.

intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if a statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(*c*) Challenge to the provisions of a particular Act as *ultra vires* cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from decisions of tribunals.

(*d*) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(*e*) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or is illegally collected, a suit lies.

(*f*) Questions of the correctness of an assessment, apart from its constitutionality, are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in a particular Act. In either case, the scheme of a particular Act must be examined because it is a relevant enquiry.

(*g*) An exclusion of jurisdiction of a civil court is not readily to be inferred unless the conditions above set down apply.[75]

The above principles enunciated are relevant in deciding the correctness or otherwise of assessment orders made under taxing statutes.[76]

In *Premier Automobiles* v. *Kamlekar Shantaram*[77], the Supreme Court laid down the following principles as applicable to the jurisdiction of a civil court in relation to industrial disputes:

(*h*) If a dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in a civil court.

(*i*) If a dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the

[75] *Ibid*, at pp. 89-90 (AIR): at pp. 682-84 (SCR). For detailed discussion, *see*, Author's *Lectures on Administrative Law* (2008) Lecture VII.

[76] For jurisdiction of civil court in connection with levy of octroi duty, see *Bata Shoe Co. Ltd.* v. *City of Jabalpur Corpn.*, (1977) 2 SCC 472: AIR 1977 SC 955.

[77] (1976) 1 SCC 496: AIR 1975 SC 2238.

Act, the jurisdiction of a civil court is alternative, leaving it to the election of a suitor or person concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(*j*) If an industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to a suitor is to get an adjudication under the Act.

(*k*) If the right which is sought to be enforced is a right created under the Act such as Chap. V-A then the remedy for its enforcement is either Section 33-C or the raising of an industrial dispute, as the case may be.[78]

Again, in *Rajasthan SRTC* v. *Krishna Kant*[79], after considering various leading decisions on the point, the Supreme Court summarised the principles applicable to industrial disputes thus:

(1) Where a dispute arises from the general law of contract, i.e., where reliefs are claimed on the basis of the general law of contract, a suit filed in a civil court cannot be said to be not maintainable, even though such a dispute may also constitute an "industrial dispute" within the meaning of Section 2(*k*) or Section 2-A of the Industrial Disputes Act, 1947.

(2) Where, however, a dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.

(3) Similarly, where a dispute involves the recognition, observance or enforcement of rights and obligations created by enactments, like the Industrial Employment (Standing Orders) Act, 1946, which can be called "sister enactments" to the Industrial Disputes Act, and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of Section 2(*k*) and Section 2-A of the Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to a civil court is open.

(4) It is not correct to say that remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to a forum depends upon a reference being made by the

[78] *Premier Automobiles* v. *Kamlekar Shantaram*, (1976) 1 SCC 496 at pp. 513-14: AIR 1975 SC 2238 at p. 2251.

[79] (1995) 5 SCC 75: AIR 1995 SC 1715: (1995) 31 ATC 110.

appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence is not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex facie. The power conferred is the power to refer and not the power to decide, though it may be that the Government is entitled to examine whether the dispute is ex facie frivolous, not meriting adjudication.

(5) Consistent with the policy of law aforesaid, we commend to Parliament and State Legislatures to make a provision enabling a workman to approach the Labour Court/Industrial Tribunal directly i.e., without the requirement of a reference by the Government, in case of industrial disputes covered by Section 2-A of the Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

(6) The certified Standing Orders framed in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon employers and employees, though they do not amount to "statutory provisions". Any violation of these Standing Orders entitles an employee to appropriate relief, either before forums created by the Industrial Disputes Act or in a civil court where recourse to a civil court is open according to the principles indicated herein.

(7) The policy of law emerging from the Industrial Disputes Act and its sister enactments is to provide an alternative dispute-resolution mechanism to workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.[80]

In *Chandrakant* v. *Municipal Corpn. of Ahmedabad*[81], the Supreme Court reiterated the principles laid down in earlier decisions and stated:

"It cannot be disputed that the procedure followed by civil courts are too lengthy and consequently, are not an efficacious forum for resolving the industrial disputes speedily. *The power*

[80] *Ibid*, at pp. 94-95 (SCC): at pp. 1725-26 (AIR) (*per* Jeevan Reddy, J.).
[81] (2002) 2 SCC 542.

of the Industrial Courts also is wide and such forums are empowered to grant adequate relief as they think just and appropriate. It is in the interest of the workmen that their disputes, including the dispute of illegal termination, are adjudicated upon by an industrial forum."[82]

(emphasis supplied)

12. GENERAL PRINCIPLES

From various decisions of the Supreme Court, the following general principles relating to jurisdiction of a civil court emerge:

(1) A civil court has jurisdiction to try all suits of a civil nature unless their cognizance is barred either expressly or impliedly.

(2) Consent can neither confer nor take away jurisdiction of a court.

(3) A decree passed by a court without jurisdiction is a nullity and the validity thereof can be challenged at any stage of the proceedings, in execution proceedings or even in collateral proceedings.

(4) There is a distinction between want of jurisdiction and irregular exercise thereof.

(5) Every court has inherent power to decide the question of its own jurisdiction.

(6) Jurisdiction of a court depends upon the averments made in a plaint and not upon the defence in a written statement.

(7) For deciding jurisdiction of a court, the substance of a matter and not its form is important.

(8) Every presumption should be made in favour of jurisdiction of a civil court.

(9) A statute ousting jurisdiction of a court must be strictly construed.

(10) Burden of proof of exclusion of jurisdiction of a court is on the party who asserts it.

(11) Even where jurisdiction of a civil court is barred, it can still decide whether the provisions of an Act have been complied with or whether an order was passed dehors the provisions of law.

[82] *Ibid*, at p. 550 (SCC) (*per* Pattanaik, J.); see also, *Church of North India* v. *Lavajibhai Ratanjibhai*, (2005) 10 SCC 760: AIR 2005 SC 2544; *State of Haryana* v. *Bikar Singh*, (2006) 9 SCC 450: AIR 2006 SC 2473; *Rajashtan SRTC* v. *Zakir Hussain*, (2005) 7 SCC 447; *Chief Engineer, Hydel Project* v. *Ravinder Nath*, (2008) 2 SCC 350.

PART II

2 Res Sub Judice and Res Judicata

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1. GENERAL

IN THIS Chapter, I intend to discuss two important doctrines: (*i*) Doctrine of *res sub judice*, Section 10; and (*ii*) Doctrine of *res judicata*, Section 11.

Section 10 deals with stay of civil suits. It provides that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties and that the court in which the previous suit is pending is competent to grant the relief claimed.

Section 11, on the other hand, relates to a matter already adjudicated upon. It bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit.

2. RES SUB JUDICE: STAY OF SUIT: SECTION 10

(1) Section 10

Section 10 reads thus:

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

(2) Nature and scope

Section 10 declares that no court should proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties and the court before which the previously instituted suit is pending is competent to grant the relief sought.[1]

The rule applies to trial of a suit and not the institution thereof. It also does not preclude a court from passing interim orders, such as, grant of injunction or stay, appointment of receiver,[2] etc.

(3) Object

The object of the rule contained in Section 10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of law is to confine a plaintiff to one litigation, thus obviating the possibility of two contradictory verdicts by one and the same court in respect of the same relief.[3] The section intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions. It also aims

[1] *Indian Bank* v. *Maharashtra State Coop. Marketing Federation Ltd.*, (1998) 5 SCC 69: AIR 1998 SC 1952; *Maharashtra State Coop. Marketing Federation Ltd.* v. *Indian Bank*, AIR 1997 Bom 186.

[2] *Indian Bank* v. *Maharashtra State Coop. Marketing Federation, supra.*

[3] *Balkishan* v. *Kishan Lal*, (1889) ILR 11 All 148 at p. 155 (FB); *Guru Prasad (Dr.)* v. *Bijoy Kumar Das*, AIR 1984 Ori 209 at p. 212; *P.V. Shetty* v. *B.S. Giridhar*, (1982) 3 SCC 403: AIR 1982 SC 83; *Gupte Cardiac Care Centre and Hospital* v. *Olympic Pharma Care (P) Ltd.*, (2004) 6 SCC 756: AIR 2004 SC 2339; *National Institute of Medical Health & Neuro Sciences* v. *C. Parameshwara*, (2005) 2 SCC 256: AIR 2005 SC 242.

to avert inconvenience to the parties and gives effect to the rule of *res judicata*.[4]

It is to be remembered that the section does not bar the institution of a suit, but only bars a trial, if certain conditions are fulfilled. The subsequent suit, therefore, cannot be dismissed by a court, but is required to be stayed.

(4) Conditions

For the application of this section, the following conditions must be satisfied:

(*i*) There must be two suits, one previously instituted and the other subsequently instituted.

(*ii*) The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.

(*iii*) Both the suits must be between the same parties or their representatives.

(*iv*) The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court in India or in any court beyond the limits of India established or continued by the Central Government or before the Supreme Court.

(*v*) The court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.

(*vi*) Such parties must be litigating under the same title in both the suits.

As soon as the above conditions are satisfied, a court cannot proceed with the subsequently instituted suit since the provisions contained in Section 10 are mandatory,[5] and no discretion is left with the court. The order staying proceedings in the subsequent suit can be made at any stage.[6]

Section 10, however, does not take away power of the court to examine the merits of the matter. If the court is satisfied that subsequent suit can be decided purely on legal point, it is open to the court to decide such suit.[7]

[4] *S.P.A. Annamalay Chetty* v. *B.A. Thornhill*, AIR 1931 PC 263; *Shri Ram Tiwary* v. *Bholi Devi*, AIR 1994 Pat 76.

[5] *Manohar Lal* v. *Seth Hiralal*, AIR 1962 SC 527 at p. 536: 1962 Supp (1) SCR 450.

[6] *Life Pharmaceuticals (P) Ltd.* v. *Bengal Medical Hall*, AIR 1971 Cal 345.

[7] *Pukhraj D. Jain* v. *G. Gopalakrishna*, (2004) 7 SCC 251: AIR 2004 SC 3504.

(5) Test

The test for applicability of Section 10 is whether the decision in a previously instituted suit would operate as *res judicata* in the subsequent suit. If it is so, the subsequent suit must be stayed.[8]

(6) Res sub judice and res judicata[9]

(7) Suit pending in foreign court

Explanation to Section 10 provides that there is no bar on the power of an Indian court to try a subsequently instituted suit if the previously instituted suit is pending in a foreign court.

(8) Inherent power to stay

Even where the provisions of Section 10 of the Code do not strictly apply, a civil court has inherent power under Section 151 to stay a suit to achieve the ends of justice.[10] Similarly, a court has inherent power to consolidate different suits between the same parties in which the matter in issue is substantially the same.[11]

(9) Consolidation of suits

Since the main purpose of Section 10 is to avoid two conflicting decisions, a court in an appropriate case can pass an order of consolidation of both the suits.[12]

(10) Contravention: Effect

A decree passed in contravention of Section 10 is not a nullity, and therefore, cannot be disregarded in execution proceedings.[13] Again, as stated above, it is only the trial and not the institution of the subsequent suit which is barred under this section. Thus, it lays down a rule of procedure, pure and simple, which can be waived by a party. Hence, if the parties waive their right and expressly ask the court to proceed

[8] *S.P.A. Annamalay Chetty* v. *B.A. Thornhill*, AIR 1931 PC 263: (1931) 61 Mad LJ 420: 36 CWN 1; *Radha Devi* v. *Deep Narayan*, (2003) 11 SCC 759; *National Institute of Medical Health* v. *Parameshwara*, *supra*.

[9] See infra, "*Res judicata*".

[10] *Jado Rai* v. *Onkar Prasad*, AIR 1975 All 413; *P.V. Shetty* v. *B.S. Giridhar*, (1982) 3 SCC 403: AIR 1982 SC 83.

[11] *P.P. Gupta* v. *East Asiatic Co.*, AIR 1960 All 184; *Bokaro & Ramgur Ltd.* v. *State of Bihar*, AIR 1973 Pat 340; *Guru Prasad Mohanty (Dr.)* v. *Bijoy Kumar Das*, AIR 1984 Ori 209.

[12] *Indian Bank* v. *Maharashtra State Coop. Marketing Federation Ltd.*, (1998) 5 SCC 69: AIR 1998 SC 1952.

[13] *Pukhraj D. Jain* v. *G. Gopalakrishna*, (2004) 7 SCC 251: AIR 2004 SC 3504; *Sheopat Rai* v. *Warak Chand*, AIR 1919 Lah 294; *Indian Express Newspapers (Bombay) Ltd.* v. *Basumati (P) Ltd.*, AIR 1969 Bom 40; *Naurati* v. *Mehma Singh*, AIR 1972 Punj 421; *Life Pharmaceuticals (P) Ltd.* v. *Bengal Medical Hall*, AIR 1971 Cal 345.

with the subsequent suit, they cannot afterwards challenge the validity of the subsequent proceedings.[14]

3. RES JUDICATA: SECTION 11

(1) General

Section 11 of the Code of Civil Procedure embodies the doctrine of *res judicata* or the rule of conclusiveness of a judgment, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the 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.[15]

This doctrine has been accepted in all civilized legal systems. Under the Roman Law, a defendant could successfully contest a suit filed by a plaintiff on the plea of *"ex captio res judicata"*. It was said, "one suit and one decision is enough for any single dispute". In the words of Spencer Bower, *res judicata* means "a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto".

The doctrine of *res judicata* has been explained in the simplest possible manner by Das Gupta, J. in the case of *Satyadhyan Ghosal* v. *Deorjin Debi*[16] in the following words:

> "The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter, whether on a question of fact or a question of law, has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again."[17]

[14] *Gangaprashad* v. *Banaspati*, AIR 1937 Nag 132; *Munilal* v. *Sarvajeet*, AIR 1984 Raj 22.

[15] *Satyadhyan Ghosal* v. *Deorjin Debi*, AIR 1960 SC 941: (1960) 3 SCR 590; *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627: AIR 1989 SC 2240; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187: AIR 1990 SC 334; *LIC* v. *India Automobiles & Co.*, (1990) 4 SCC 286: AIR 1991 SC 884; *Sushil Kumar* v. *Gobind Ram*, (1990) 1 SCC 193; *Sulochana Amma* v. *Narayanan Nair*, (1994) 2 SCC 14: AIR 1994 SC 152.

[16] AIR 1960 SC 941: (1960) 3 SCR 590.

[17] *Ibid*, at p. 943 (AIR).

(2) Section 11

Section 11 of the Code of Civil Procedure reads 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 abovereferred 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 a 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 references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding 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 in which such issue has been subsequently raised."

(3) Nature and scope

The doctrine of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than latter, come to an end.[18] The principle is also founded on justice, equity and good conscience which require that a party who has once succeeded on an issue should not be harassed by multiplicity of proceedings involving the same issue.[19] Section 11 of the Code contains in statutory form, with illuminating explanations very salutary principle of public policy.[20] It embodies the rule of conclusiveness and operates as a bar to try the same issue once again. It thereby avoids vexatious litigation.[21]

(4) Object

The doctrine of *res judicata* is based on three maxims:

(*a*) *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice for the same cause);

(*b*) *interest reipublicae ut sit finis litium* (it is in the interest of the State that there should be an end to a litigation); and

(*c*) *res judicata pro veritate occipitur* (a judicial decision must be accepted as correct).

As observed by Sir Lawrence Jenkins[22], "the rule of *res judicata*, while founded on account of precedent, is dictated by a wisdom which is for all times".

Thus, the doctrine of *res judicata* is the combined result of public policy reflected in maxims (*b*) and (*c*) and private justice expressed in maxim (*a*); and they apply to all judicial proceedings whether civil or criminal. But for this rule there would be no end to litigation and no security for any person, the rights of persons would be involved in endless confusion and great injustice done under the cover of law.[23] The principle is founded on justice, equity and good conscience.[24]

[18] *Lal Chand* v. *Radha Krishan*, (1977) 2 SCC 88: AIR 1977 SC 789.

[19] *Ibid, see also infra*, "object".

[20] *Narayan Prabhu Venkateswara* v. *Narayana Prabhu Krishna*, (1977) 2 SCC 181: AIR 1977 SC 1268.

[21] *Sulochana Amma* v. *Narayanan Nair*, (1994) 2 SCC 14: AIR 1994 SC 152; *Workmen* v. *Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119: AIR 1978 SC 1283.

[22] *Sheoparsan Singh* v. *Ramnandan Singh*, AIR 1916 PC 78: (1915-16) 43 IA 91.

[23] *Daryao* v. *State of U.P.*, AIR 1961 SC 1457 at pp. 1462: (1962) 1 SCR 574; *Satyadhyan Ghosal* v. *Deorjin Debi, supra*; *Parashuram Pottery Works Co. Ltd.* v. *ITO*, (1977) 1 SCC 408: AIR 1977 SC 429; *Radhasoami Satsang* v. *CIT*, (1992) 1 SCC 659: AIR 1992 SC 377; *Sulochana Amma* v. *Narayanan Nair, supra*; *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51: AIR 2005 SC 2392; *Kunjan Nair* v. *Narayanan Nair*, (2004) 3 SCC 277: AIR 2004 SC 1761; *State of Haryana* v. *State of Punjab*, (2004) 12 SCC 673.

[24] *Lal Chand* v. *Radha Krishan*, (1977) 2 SCC 88 at p. 98: AIR 1977 SC 789 at pp. 796.

The leading case on the doctrine of *res judicata* is the *Duchess of Kingstone case*[25], wherein Sir William de Grey made the following remarkable observations:

> "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; *firstly*, that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court; *secondly*, that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose."[26]

In *Corpus Juris*[27] also it has been stated, "*Res judicata* is a rule of universal law pervading every well-regulated system of jurisprudence and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation; the other, the hardship to the individual that he should not be vexed twice for the same cause."[28]

(5) Illustrations

Let us consider few illustrations to understand the doctrine of *res judicata*:

(1) *A* sues *B* for damages for breach of contract. The suit is dismissed. *A* subsequent suit by *A* against *B* for damages for breach of the same contract is barred. *A*'s right to claim damages from *B* for breach of contract having been decided in the previous suit, it becomes *res judicata*, and cannot therefore be tried in the subsequent suit. *B* cannot be vexed twice over for the same cause (breach of contract). Moreover, public policy also requires that there should be an end to a litigation and for that reason, the previous decision must be accepted as correct, lest every decision would be challenged on the ground that it was an erroneous decision and there would be no finality.

[25] *Smith's Leading cases* (13th Edn.) at p. 644.

[26] *Smith's Leading cases* (13th Edn.) at p. 645. See also *Daryao* v. *State of U.P.*, AIR 1961 SC 1457 at pp. 1462: (1962) 1 SCR 574; *Gulam Abbas* v. *State of U.P.*, (1982) 1 SCC 71 at pp. 90-93: AIR 1981 SC 2198 at pp. 2212-13.

[27] Vol. XXXIV, at p. 743.

[28] See also *Halsbury's Laws of England* (3rd Edn.) Vol. 15 at p. 185; *Daryao* v. *State of U.P.*, AIR 1961 SC 1457 at p. 1462: (1962) 1 SCR 574; *Gulam Abbas* v. *State of U.P.*, (1982) 1 SCC 71: AIR 1981 SC 2198.

(2) *A* sues *B* for possession of certain properties on the basis of a sale deed in his favour. *B* impugns the deed as fictitious. The plea is upheld and the suit is dismissed. A subsequent suit for some other properties on the basis of the same sale deed is barred as the issue about the fictitious nature of the sale deed was actually in issue in the former suit directly and substantially.

(3) *A* sues *B*, *C* and *D* and in order to decide the claim of *A*, the court has to interpret a will. The decision regarding the construction of the will on rival claims of the defendants will operate as *res judicata* in any subsequent suit by any of the defendants against the rest.

(4) *A* files a petition in a High Court under Article 226 of the Constitution for reinstatement in service and consequential benefits contending that an order of dismissal passed against him is illegal. The petition is dismissed. *A* cannot thereafter file a fresh petition in the Supreme Court under Article 32 of the Constitution nor can institute a suit in a civil court as such petition or suit would be barred by *res judicata*.

(5) *A* sues *B* for possession of certain property alleging that it has come to his share on partition of joint family property. *B*'s contention that the partition has not taken place is upheld by the court and the suit is dismissed. A subsequent suit by *A* against *B* for partition of joint family property is not barred.

(6) *A*, claiming himself to be the owner of the property files a suit for eviction of tenant *B* and sub-tenant *C* which is decreed *ex parte* by a Small Cause Court. *C* then files a suit in the civil court on the basis of title. *A* pleaded *res judicata* in the light of the decree passed in the former suit. The finding regarding ownership of *A* will not operate as *res judicata* inasmuch as title to the property was not directly and substantially in issue in the former suit.

(7) *A*, a partnership firm, filed a suit against *B* to recover Rs 50,000. The suit was dismissed on the ground that it was not maintainable since the partnership was not registered as required by the provisions of the Indian Partnership Act, 1932. The firm was thereafter registered and a fresh suit was filed against *B* on the same cause of action. The suit is not barred by *res judicata*.

(8) *A* files a petition in a High Court under Article 226 of the Constitution for reinstatement in service and consequential benefits contending that an order of dismissal passed against him is illegal. The petition is dismissed on the ground that

disputed questions of fact are involved in the petition and alternative remedy is available to the petitioner. A suit in a competent civil court after dismissal of the petition is not barred by *res judicata*.

(6) History

The rule of *res judicata* has a very ancient history. It was well understood by Hindu lawyers and Mohammedan jurists. It was known to ancient Hindu Law as *Purva Nyaya* (former judgment). Under the Roman Law, it was recognised that "one suit and one decision was enough for any single dispute". The doctrine was accepted in the European continent and in the Commonwealth countries.[29]

At times, the rule worked harshly on individuals. For instance, when the former decision was obviously erroneous. But its working was justified on the great principle of public policy, which required that there must be an end to every litigation. In the event of a wrong decision, "the suffering citizen must appeal to the law-giver and not to the lawyer".[30]

(7) Extent and applicability

The doctrine of *res judicata* 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 civil suits, execution proceedings, arbitration proceedings, taxation matters, industrial adjudication, writ petitions, administrative orders, interim orders, criminal proceedings, etc.[31]

(8) Res judicata and rule of law

The doctrine of *res judicata* is of universal application. In the historic decision of *Daryao* v. *State of U.P.*[32], the Supreme Court has placed the doctrine of *res judicata* on a still broader foundation. In that case, the petitioners had filed writ petitions in the High Court of Allahabad under Article 226 of the Constitution and they were dismissed. Thereafter, they filed substantive petitions in the Supreme Court under Article 32 of the Constitution for the same relief and on the same grounds. The respondents raised a preliminary objection regarding maintainability of the petition by contending that the prior decision of the High

[29] *Lachhmi* v. *Bhulli*, AIR 1927 Lah 289: ILR (1927) 8 Lah 384: 104 IC 849 (FB); *Soorjomonee Dayee* v. *Suddanund Mohapatter*, (1873) IA Supp 212 at p. 218 (PC).

[30] *Garland* v. *Carlisle*, 4 Cl&F 693 at p. 705 (HL) (*per* Coleridge, J.); see also *Sheoparsan Singh* v. *Ramnandan Singh*, AIR 1916 PC 78: (1915-16) 43 IA 91.

[31] For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. 1 at pp. 112-309.

[32] AIR 1961 SC 1457: (1962) 1 SCR 574.

Court would operate as *res judicata* to a petition under Article 32. The Supreme Court upheld the contention and dismissed the petitions.

Speaking for the Constitution Bench, Gajendragadkar, J. (as he then was) observed:

> *"The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law,* and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis."[33]
>
> (emphasis supplied)

The court, in this view of the matter, held that the rule of *res judicata* applies also to a petition filed under Article 32 of the Constitution and if a petition filed by a petitioner in the High Court under Article 226 of the Constitution is dismissed on merits, such decision would operate as *res judicata* so as to bar a similar petition in the Supreme Court under Article 32 of the Constitution.

(9) Res judicata and res sub judice[34]

The doctrine of *res judicata* differs from *res sub judice* in two aspects:

(*i*) whereas *res judicata* applies to a matter adjudicated upon (*res judicatum*), *res sub judice* applies to a matter pending trial (*sub judice*); and

(*ii*) *res judicata* bars the trial of a suit or an issue which has been decided in a former suit, *res sub judice* bars trial of a suit which is pending decision in a previously instituted suit.

(10) Res judicata and estoppel[35]

The doctrine of *res judicata* is often treated as a branch of the law of estoppel.[36] *Res judicata* is really estoppel by verdict or estoppel by judgment (record).[37] The rule of constructive *res judicata* is nothing else but

[33] *Ibid*, at p. 1462 (AIR); see also *Sarguja Transport Service* v. *STAT*, (1987) 1 SCC 5: AIR 1987 SC 88; *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 at p. 741: AIR 1990 SC 1607.

[34] For detailed discussion of *"res sub judice" see supra*, under that head .

[35] S. 115 of the Evidence Act, 1872 provides:

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

[36] *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.*, 1947 AC 46 at p. 56 (PC); *Guda Vijayalakshmi* v. *Guda Ramachandra*, (1981) 2 SCC 646 at p. 649: AIR 1981 SC 1143 at p. 1144; *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51: AIR 2005 SC 2392.

[37] *V. Rajeshwari* v. *T.C. Saravanabava*, (2004) 1 SCC 551; *Lachhmi* v. *Bhulli*, AIR 1927 Lah 289: ILR (1927) 8 Lah 384: 104 IC 849 (FB).

a rule of estoppel.[38] Even then, the doctrine of *res judicata* differs in essential particulars from the doctrine of estoppel.[39]

(*i*) Whereas *res judicata* results from a decision of the court, estoppel flows from the act of parties.

(*ii*) The rule of *res judicata* is based on public policy, viz., that there should be an end to litigation. Estoppel, on the other hand, proceeds upon the doctrine of equity, that he who, by his conduct, has induced another to alter his position to his disadvantage, cannot turn round and take advantage of such alteration of the other's position. In other words, while *res judicata* bars multiplicity of suits, estoppel prevents multiplicity of representations.

(*iii*) *Res judicata* ousts the jurisdiction of a court to try a case and precludes an enquiry in limine (at the threshold); estoppel is only a rule of evidence and shuts the mouth of a party.

(*iv*) *Res judicata* prohibits a man averring the same thing twice in successive litigations, while estoppel prevents him from saying one thing at one time and the opposite at another.

(*v*) The rule of *res judicata* presumes conclusively the truth of the decision in the former suit, while the rule of estoppel prevents a party from denying what he has once called the truth. In other words, while *res judicata* binds both the parties to a litigation, estoppel binds only that party who made the previous statement or showed the previous conduct.

(11) Res judicata and stare decisis

"Res judicata" means "a thing adjudicated"; "a case already decided"; or "a matter settled by a decision or judgment".[40] "Stare decisis" means "to stand by decided cases", "to uphold precedents", "to maintain former adjudications", or "not to disturb settled law".[41] "Those things which have been so often adjudged ought to rest in peace."[42]

Res judicata and *stare decisis* are members of the same family. Both relate to adjudication of matters. Both deal with final determination of contested questions and have the binding effect in future litigation.

[38] *Batul Begam* v. *Hem Chandar*, AIR 1960 All 519 at p. 521; *Mohan Ram* v. *T.L. Sundararamier*, AIR 1960 Mad 377 (FB).

[39] Woodroffe and Ameer Ali, *Law of Evidence in India* (1981 Edn.) Vol. 4 at p. 2936. See also *Sita Ram* v. *Amir Begam*, ILR (1886) 8 All 324 at p. 332; *Casamally* v. *Currimbhai*, (1911) 13 BLR 717 at p. 760. For detailed discussion of the doctrine of estoppel, *see*, Author's *Lectures on Administrative Law* (2008) Lecture X.

[40] *Concise Oxford English Dictionary* (2002) at p. 1218; P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. IV at pp. 4090-91.

[41] *Concise Oxford English Dictionary* (2002) at p. 1400; P.R. Aiyar, *Advanced Law Lexicon*, (2005) Vol. IV at pp. 4456.

[42] Lord Coke.

Both the doctrines are the result of decisions of a competent court of law and based on public policy.

There is, however, distinction between the two. Whereas *res judicata* is based upon conclusiveness of judgment and adjudication of prior findings, *stare decisis* rests on legal principles. *Res judicata* binds parties and privies, while stare decisis operates between strangers also and binds courts from taking a contrary view on the point of law already decided. *Res judicata* relates to a specific controversy, *stare decisis* touches legal principle. *Res judicata* presupposes judicial finding upon the same facts as involved in subsequent litigation between the same parties. *Stare decisis* applies to same principle of law to all parties.

(12) Res judicata and splitting of claims[43]

The doctrine of *res judicata* also differs from Order 2 Rule 2 of the Code; *firstly*, the former refers to a plaintiff's duty to bring forward all the grounds of attack in support of his claim, while the latter only requires a plaintiff to claim all reliefs flowing from the same cause of action. *Secondly*, while the former rule refers to both the parties, plaintiff as well as defendant, and precludes a suit as well as a defence, the latter refers only to a plaintiff and bars a suit.[44]

(13) Res judicata whether technical

No doubt, the rule of *res judicata* has some technical aspects. For instance, the rule of constructive *res judicata* is really technical in nature. Similarly, pecuniary or subjectwise competence of the earlier forum to adjudicate the subject-matter or grant reliefs sought in subsequent litigation can be said to be technical. But the principle on which the doctrine is founded rests on public policy and public interest.[45]

[43] Or. 2 R. 2 which prohibits splitting of claims reads as under:

"(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) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) 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".

[44] For detailed discussion, *see infra*, Or. 2 R. 2; see also *Inacio Martins* v. *Narayan Hari Naik*, (1993) 3 SCC 123: AIR 1993 SC 1756; *State of Maharashtra* v. *National Construction Co.*, (1996) 1 SCC 735: AIR 1996 SC 2367.

[45] *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574.

(14) Section 11 whether mandatory

Section 11 is mandatory. The plea of *res judicata* is a plea of law which touches the jurisdiction of a court to try the proceedings. A finding on that plea would oust the jurisdiction of a court. If the requirements of Section 11 are fulfilled, the doctrine of *res judicata* will apply and even a concession made by an advocate will not bind a party.[46]

(15) Section 11 whether exhaustive

It is well established that the doctrine of *res judicata* codified in Section 11 of the Code of Civil Procedure is not exhaustive.[47] Section 11 applies to civil suits. But apart from the letter of the law, the doctrine has been extended and applied since long in various other kinds of proceedings and situations by courts in England, India and other countries.[48]

In the case of *Lal Chand* v. *Radha Krishan*[49], Chandrachud, J. (as he then was) observed:

> "The fact that Section 11 of the Code of Civil Procedure cannot apply on its terms, the earlier proceeding before the competent authority not being a suit, is no answer to the extension of the principle underlying that section to the instant case. Section 11, it is long since settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law... . *The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end.*"[50] (emphasis supplied)

(16) Interpretation

The doctrine of *res judicata* should be interpreted and applied liberally. Since the rule is founded on high public policy and upon the need of giving finality to judicial decisions, a strict and technical construction

[46] *Talluri Venkata* v. *Thadikonda Kotiswara*, AIR 1937 PC 1: (1936-37) 64 IA 17; *Pandurang Dhondi* v. *Maruti Hari*, AIR 1966 SC 153: (1966) 1 SCR 102.

[47] *Narayanan Chettiar* v. *Annamalai Chettiar*, AIR 1959 SC 275 at p. 279: 1959 Supp (1) SCR 237; *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993 at p. 999: (1964) 5 SCR 946; *Gulabchand Chhotalal Parikh* v. *State of Gujarat*, AIR 1965 SC 1153: (1965) 1 SCR 547; *Union of India* v. *Nanak Singh*, AIR 1968 SC 1370 at p. 1372: (1968) 2 SCR 887; *State of Punjab* v. *Bua Das Kaushal*, (1970) 3 SCC 656 at p. 657: AIR 1971 SC 1676 at p. 1677; *Lal Chand* v. *Radha Krishan*, (1977) 2 SCC 88 at pp. 97-98: AIR 1977 SC 789 at pp. 795-96; *State of U.P.* v. *Nawab Hussain*, (1977) 2 SCC 806: AIR 1977 SC 1680; *Workmen* v. *Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119: AIR 1978 SC 1283; *Gangabai* v. *Chhabubai*, (1982) 1 SCC 4: AIR 1982 SC 20; *Gulam Abbas* v. *State of U.P.*, (1982) 1 SCC 71 at pp. 90-93: AIR 1981 SC 2198 at pp. 2212-13; *Radhasoami Satsang* v. *CIT*, (1992) 1 SCC 659: AIR 1992 SC 377.

[48] *Halsbury's Laws of England* (3rd Edn.) Vol. 15 at p. 185; *Corpus Juris*, Vol. 34 at p. 743; *Daryao case, supra*; *Gulam Abbas, supra*; *C.P. Trust case, supra*.

[49] (1977) 2 SCC 88: AIR 1977 SC 789.

[50] *Ibid*, at pp. 97-98 (SCC): at pp. 795-96 (AIR).

should not be adopted. In deciding whether the doctrine would apply, its substance and not the form should be considered.[51]

(17) Waiver

The plea of *res judicata* is not one which affects the jurisdiction of the court. The doctrine of *res judicata* belongs to the domain of procedure[52] and the party may waive the plea of *res judicata*.[53] Similarly, the court may decline to go into the question of *res judicata* on the ground that it has not been properly raised in the proceedings or in issues.[53] The plea is one which could be waived.

(18) Conditions

It is not every matter decided in a former suit that will operate as *res judicata* in a subsequent suit. To constitute a matter as *res judicata* under Section 11, the following conditions must be satisfied:[54]

(*I*) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III) or constructively (Explanation IV) in the former suit (Explanation I). (Explanation VII is to be read with this condition.)

(*II*) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. (Explanation VI is to be read with this condition.)

(*III*) Such parties must have been litigating under the same title in the former suit.

(*IV*) 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.[55] (Explanations II and VIII are to be read with this condition.)

[51] *Sheoparsan Singh* v. *Ramnandan Singh*, AIR 1916 PC 78: (1915-16) 43 IA 91; *Lachhmi* v. *Bhulli*, AIR 1927 Lah 289: ILR (1927) 8 Lah 384: 104 IC 849 (FB); *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574.

[52] *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613 at p. 617: AIR 1971 SC 2355 at p. 2375; *Sushil Kumar* v. *Gobind Ram*, (1990) 1 SCC 193; *Isabella Johnson* v. *M.A. Susai*, (1991) 1 SCC 494: AIR 1991 SC 993.

[53] *Medapati Surayya* v. *Tondapu Bala Gangadhara*, AIR 1948 PC 3 at p. 7; *Sheodan Singh* v. *Daryao Kunwar*, AIR 1966 SC 1332 at p. 1335: (1966) 3 SCR 300; *Manicka Nadar* v. *Sellathamal*, 1969 SCD 955 at p. 966: AIR 1969 SC 17; *State of Punjab* v. *Bua Das Kaushal*, (1970) 3 SCC 656 at p. 657-58: AIR 1971 SC 1676 at p. 1677-78; *LIC* v. *India Automobiles & Co.*, (1990) 4 SCC 286: AIR 1991 SC 884.

[54] *Sheodan Singh* v. *Daryao Kunwar*, AIR 1966 SC 1332 at p. 1334: (1966) 3 SCR 300; *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*, (1976) 4 SCC 780 at p. 790: AIR 1976 SC 1569 at p. 1576; *Jaswant Singh* v. *Custodian*, (1985) 3 SCC 648 at p. 655-56: AIR 1985 SC 1096 at p. 1101; *Saroja* v. *Chinnusamy*, (2007) 8 SCC 329: AIR 2007 SC 3067.

[55] By newly added Expln. VIII, this condition is now not necessary.

(*V*) 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. (Explanation V is to be read with this condition.)

I Matter in issue

(*i*) *General*

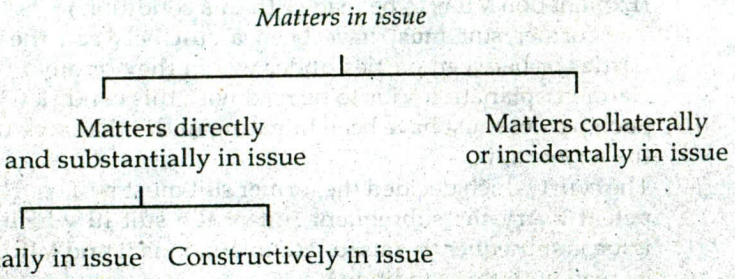
A decision of a competent court on a matter in issue may be *res judicata* in another proceeding between the same parties; the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact.

(*ii*) *Meaning*

The expression "matter in issue" means the rights litigated between the parties, i.e., the facts on which the right is claimed and the law applicable to the determination of that issue.[56] Such issue may be an issue of fact, issue of law or mixed issue of law and fact.

(*iii*) *Classification*

Matters in issue may be classified as under:



(*iv*) *Matter directly and substantially in issue: Explanation III*

A matter directly and substantially in issue in a former suit will operate as *res judicata* in a subsequent suit.

"Directly" means directly, at once, immediately, without intervention. The term has been used in contradistinction to "collaterally or incidentally". A fact cannot be said to be directly in issue if the judgment stands whether that fact exists or does not exist. No hard and fast rule can be laid down as to when a matter can be said to be directly in issue and it depends upon the facts and circumstances of each case.[57]

[56] *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613 at p. 619: AIR 1971 SC 2355 at p. 2359.

[57] *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013 at p. 1019: 1963 Supp (1) SCR 172; *Isher Singh* v. *Sarwan Singh*, AIR 1965 SC 948 at p. 949; *Lachhman* v. *Saraswati*, AIR 1959 Bom 125; *Ramadhar Shrivas* v. *Bhagwandas*, (2005) 13 SCC 1.

"Substantially" means essentially, materially or in a substantial manner. It is something short of certainty but indeed more than mere suspicion. It means "in effect though not in express terms".[58]

A matter can be said to be substantially in issue if it is of importance for the decision of a case. No rule of universal application can be laid down as to when a matter can be said to be substantial except when the parties by their conduct treated it as a substantial one.[59]

Illustrations

1. *A* sues *B* for rent due. The defence of *B* is that no rent is due. Here the claim for rent is the matter in respect of which the relief is claimed. The claim of rent is, therefore, a matter directly and substantially in issue.

2. *A* sues *B* for possession of certain properties on the basis of a sale deed in his favour. *B* impugns the deed as fictitious. The plea is upheld and the suit is dismissed. A subsequent suit for some other properties on the basis of the same sale deed is barred as the issue about the fictitious nature of the sale deed was actually in issue in the former suit directly and substantially.

The question whether or not a matter is "directly and substantially in issue" would depend upon whether a decision on such an issue would materially affect the decision of the suit. The question has to be determined with reference to the plaint, written statement, issues and judgment. No rule of universal application can be laid down and the question should be decided on the facts of each case.

When there are findings on several issues or where the court rests its decision on more than one point, the findings on all the issues or points will be *res judicata*. The Supreme Court[60] has rightly observed, "It is well-settled that if the final decision in any matter at issue between the parties is based by a court on its decisions on more than one point—each of which by itself would be sufficient for the ultimate decision—the decision on each of these points operates as *res judicata* between the parties."[61]

Illustrations

1. *A* sues *B* (*i*) for a declaration of title to certain lands; and (*ii*) for the rent of those lands. *B* denies *A*'s title to the lands and also contends that no rent is due. In this case, there are two matters in respect of which relief is claimed, viz. (*i*) the title to the lands; and (*ii*) the claim for rent. Both these matters are, therefore, directly and substantially in issue.

2. *A* sues *B* for rent for the year 1989-90 alleging that *B* was liable to pay it. *B* applied for time to file the written statement, which was refused. The only issue

[58] *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 639: AIR 1989 SC 2240 at pp. 2248-49; *Lonankutty* v. *Thomman*, (1976) 3 SCC 528 at p. 533: AIR 1976 SC 1645 at p. 1649.

[59] *Ibid*, see also *Krishna Chendra* v. *Challa Ramanna*, AIR 1932 PC 50.

[60] *Vithal Yeshwant* v. *Shikandarkhan*, AIR 1963 SC 385: (1963) 2 SCR 285.

[61] *Ibid*, at p. 388 (AIR); see also supra, *Pandurang Ramchandra* v. *Shanti Bai Ramchandra*; *Ramesh Chandra* v. *Shiv Charan Dass*, 1990 Supp SCC 633: AIR 1991 SC 264; *Junior Telecom Officers Forum* v. *Union of India*, 1993 Supp (4) SCC 693: AIR 1993 SC 787.

raised by the court was regarding the amount of rent and the suit was decreed. *A* files another suit against *B* for rent for the year 1990-91. *B* contends that he is not liable to pay rent. The question about *B*'s liability for all years was not alleged and decided in the previous suit and the point was, therefore, not directly and substantially in issue in the previous suit. The defence is, therefore, not barred by *res judicata*.

(*v*) *Matter actually in issue*

A matter is actually in issue when it is in issue directly and substantially and a competent court decides it on merits.[62]

(*vi*) *Matter constructively in issue: Explanation IV*

A matter can be said to be constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit.[63]

A matter directly and substantially in issue may again be so either actually or constructively. A matter is actually in issue when it is alleged by one party and denied or admitted by the other (Explanation III). It is constructively in issue when it *might* and *ought* to have been made a ground of attack or defence in the former suit (Explanation IV). Explanation IV to Section 11 by a deeming provision lays down that any matter which might and ought to have been made a ground of defence or attack in the former suit, but which has not been made a ground of attack or defence, shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence which were open to him. In other words, all the grounds of attack and defence must be taken in the suit. A party is bound to bring forward his *whole case* in respect of the matter in issue and cannot abstain from relying or giving up any ground which is in controversy and for consideration before a Court and afterwards make it a cause of action for a fresh suit.[64]

[62] *Lonankutty* v. *Thomman*, (1976) 3 SCC 528 at p. 533: AIR 1976 SC 1645 at p. 1649; *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613 at p. 617: AIR 1971 SC 2355 at p. 2357.

[63] *See*, Expln. IV to Section 11.

[64] *Nirmal Enem v. Jahan Ara*, (1973) 2 SCC 189 at p. 192: AIR 1973 SC 1406 at p. 1409; *Jaswant Singh* v. *Custodian*, (1985) 3 SCC 648: AIR 1985 SC 1096; *Forward Construction Co.* v. *Prabhat Mandal (Regd.)*, (1986) 1 SCC 100: AIR 1986 SC 391; *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 at p. 741: AIR 1990 SC 1607; *P.K. Vijayan* v. *Kamalakshi Amma*, (1994) 4 SCC 53: AIR 1994 SC 2145; *Ramadhar Shrivas* v. *Bhagwandas*, (2005) 13 SCC 1; *State of Karnataka* v. *All India Manufacturers Organisation*, (2006) 4 SCC 683: AIR 2006 SC 1846.

(vii) Constructive res judicata

The rule of direct *res judicata* is limited to a matter actually in issue alleged by one party and either denied or admitted by the other party expressly or impliedly. But the rule of constructive *res judicata* engrafted in Explanation IV to Section 11 of the Code is an "artificial form of *res judicata*", and provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject-matter. That clearly is opposed to considerations of public policy on which the doctrine of *res judicata* is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by courts would also be materially affected.[65] Thus, it helps in raising the bar of *res judicata* by suitably construing the general principles of subduing a cantankerous litigant. That is why this rule is called constructive *res judicata*, which, in reality, is an aspect or amplification of the general principles of *res judicata*.[66]

As rightly observed by Somervell, L.J., "I think that...it would be accurate to say that *res judicata* ... is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*"[67]

(emphasis supplied)

In the case of *Workmen* v. *Board of Trustees, Cochin Port Trust*,[68], the Supreme Court explained the principle of constructive *res judicata* in the following words:

> "If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as *res judicata* and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of *res judicata* also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of *res judicata* on that issue is directly applicable. *When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is*

[65] *Devilal Modi* v. *STO*, AIR 1965 SC 1150: (1965) 1 SCR 686.
[66] *State of U.P.* v. *Nawab Hussain*, (1977) 2 SCC 806: AIR 1977 SC 1680.
[67] *Greenhalgh* v. *Mallard*, (1947) 2 All ER 255 at p. 257.
[68] (1978) 3 SCC 119: AIR 1978 SC 1283.

deemed to have been constructively in issue and, therefore, is taken as decided."[69] (emphasis supplied)

Illustrations

1. *A* sues *B* for possession of property on the basis of ownership. The suit is dismissed. *A* cannot thereafter claim possession of property as mortgagee as that ground ought to have been taken in the previous suit as a ground of attack.

2. *A* files a suit against *B* for declaration that he is entitled to certain lands as heir of *C*. The suit is dismissed. The subsequent suit, claiming the same property on the ground of adverse possession, is barred by constructive *res judicata*.

3. *A* files a suit against *B* to recover money on a pronote. *B* contends that the promissory note was obtained from him by undue influence. The objection is overruled and suit is decreed. *B* cannot challenge the promissory note on the ground of coercion or fraud in subsequent suit, inasmuch as he ought to have taken that defence in the former suit.

4. *A* sues *B* to recover damages for a breach of contract and obtains a decree in his favour. *B* cannot afterwards sue *A* for recession of contract on the ground that it did not fully represent the agreement between the parties, since that ground ought to have been taken by him in the previous suit as a ground of defence.

5. *A* sues *B* for possession of certain property alleging that it has come to his share on partition of joint family property. *B*'s contention that the partition has not taken place is upheld by the court and the suit is dismissed. A subsequent suit by *A* against *B* for partition of joint family property is not barred.

6. As a mortgagor *A* sues *B* for redemption of certain property alleging that he has mortgaged it with possession to *B*. The mortgage is not proved and the suit is dismissed. *A* files another suit against *B* for possession of the same property claiming to be the owner thereof. The suit is not barred.

7. *A* sues *B* to recover certain property alleging that *B* was holding the property under a lease, which had expired. The lease is not proved and the suit is dismissed. A subsequent suit by *A* against *B* on the basis of general title is not barred.

8. *A* sues *B* for a declaration that he is entitled to certain property as an heir of *X*. The suit is dismissed. *A* files another suit for injunction on the ground that he had become an owner of the property by adverse possession. This ground was available to him even at the time of previous suit but was not taken at that time. The subsequent suit is barred.

9. *A* sues *B* for a declaration that he is the owner of certain property. The suit is dismissed holding that he is not the owner. At the time of the suit *A* is in adverse possession of the property but has not perfected his title. After the statutory period, *A* files another suit on the basis of his title by adverse possession. The suit is not barred.

In *State of U.P.* v. *Nawab Hussain*[70], *A*, a sub-inspector of police, was dismissed from service by the D.I.G. He challenged the order of dismissal by filing a writ petition in the High Court on the ground that he was not afforded a reasonable opportunity of being heard before the

[69] *Ibid*, at pp. 124-25 (SCC): at p. 1287 (AIR). See also *Ahmedabad Mfg. Co.* v. *Workmen*, (1981) 2 SCC 663: AIR 1981 SC 960; *Pondicherry Khadi & Village Industries Board* v. *P. Kulothangan*, (2004) 1 SCC 68: AIR 2003 SC 4701.

[70] (1977) 2 SCC 806: AIR 1977 SC 1680.

passing of the order. The contention was, however, negatived and the petition was dismissed. He then filed a suit and raised an additional ground that since he was appointed by the I.G.P., the D.I.G. had no power to dismiss him. The State contended that the suit was barred by constructive *res judicata*. The trial court, the first appellate court as well as the High Court held that the suit was not barred by *res judicata*. Allowing the appeal filed by the State, the Supreme Court held that the suit was barred by constructive *res judicata* as the plea was within the knowledge of the plaintiff and could well have been taken in the earlier writ petition. The same principle applies to pleas which were taken but not pressed at the time of hearing.[71]

Explaining the doctrine in the decision of *Forward Construction Co.* v. *Prabhat Mandal (Regd.)*[72], the Supreme Court observed:

> "An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. *The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided.* It is true that where a matter has been constructive in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided."[73]
>
> (emphasis supplied)

In the leading case of *Devilal Modi* v. *STO*[74], *A* challenged the validity of an order of assessment under Article 226. The petition was dismissed on merits. An appeal against that order was also dismissed by the Supreme Court on merits. *A* again filed another writ petition in the same High Court against the same order of assessment by taking some additional grounds. The High Court dismissed the petition on merits. On appeal, the Supreme Court held that the petition was barred by the principle of constructive *res judicata*.

Speaking for the court, Gajendragadkar, C.J. observed, "[T]hough the courts dealing with the question of the infringement of fundamental rights must consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of *res judicata* altogether in dealing with

[71] *Nirmal Enem v. Jahan Ara*, (1973) 2 SCC 189 at p. 192: AIR 1973 SC 1406 at p. 1409.
[72] (1986) 1 SCC 100: AIR 1986 SC 391.
[73] *Ibid*, at p. 112 (SCC): at pp. 397-98 (AIR).
[74] AIR 1965 SC 1150: (1965) 1 SCR 686.

writ petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgment pronounced by this Supreme Court are binding and must be regarded as final between the parties in respect of matters covered by them must receive due consideration."[75]

Dealing with the possibility of abuse of process of law, the learned Chief Justice made the following remarkable observations which are worth quoting:

> "[I]n the present case the appellants sought to raise additional points when he brought his appeal before this Court by special leave; that is to say, he did not take all the points in the writ petition and thought of taking new points in appeal. When leave was refused to him by this Court to take those points in appeal, he filed a new petition in the High Court and took those points, and finding that the High Court decided against him on the merits of those points, he has come to this Court; but that is not all. At the hearing of this appeal, he has filed another petition asking for leave from this Court to take some more additional points and that shows that if constructive *res judicata* is not applied to such proceedings a party can file as many petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which *res judicata* is based and would mean harassment and hardship to the opponent. Besides, *if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by this Court would also be materially affected.*"[76]
>
> (emphasis supplied)

(viii) Might and ought

The primary object of Explanation IV is to cut short the litigation by compelling the parties to the suit to rely upon all grounds of attack or defence which are available to them. If the plaintiff or defendant fails to take up such ground which he "might" and "ought" to have taken, it would be treated to have been raised and decided.[77]

[75] *Ibid*, at p. 1153 (AIR).

[76] *Ibid*, at p. 1153 (AIR); *see also*, the following observations of Lord Shaw in *Hoystead* v. *Commr. of Taxation*, 1926 AC 155: 1925 All ER Rep 56 at p. 62 (PC) "Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or weight of certain circumstances. *If this were permitted, litigation would have no end, except when legal ingenuity is exhausted.*" (emphasis supplied)

[77] *Nirmal Enem* v. *Jahan Ara*, (1973) 2 SCC 189: AIR 1973 SC 1406; *Devilal* v. *STO*, AIR 1965 SC 1150; *Gulabchand Chhotalal Parikh* v. *State of Gujarat*, AIR 1965 SC 1153: (1965) 1 SCR 547; *State of U.P.* v. *Nawab Hussain*, (1977) 2 SCC 806: AIR 1977 SC 1680; *Workmen*

The expression "might" and "ought" are of wide import. The word "might" presupposes the party affected had knowledge of the ground of attack or defence at the time of the previous suit. "Ought" compels the party to take such ground. The word "and" between the terms "might" and "ought" must be read as conjunctive (*and*) and not disjunctive (*or*). And unless it is proved that the matter might *and* ought to have been raised in the previous litigation, there is no constructive *res judicata*.[78]

The question whether a matter "might" have been made a ground of attack or defence in a former suit rarely presents any difficulty. Whether it "ought" to have been made a ground of attack or defence depends upon the facts of each case. No rigid rule can be laid down in this regard. One of the tests, however, is to see whether by raising the question the decree which was passed in a previous suit should have been defeated, varied or in any way affected. If the question is of such a nature, it must be deemed to be a question which ought to have been raised in the former suit.[79]

(ix) Matter collaterally or incidentally in issue

The words "directly and substantially in issue" have been used in Section 11 in contradistinction to the words "collaterally or incidentally in issue". Decisions on matters collateral or incidental to the main issues in a case will not operate as *res judicata*. A collateral or incidental issue means an issue which is ancillary to the direct and substantive issue. It refers to a matter in respect of which no relief is claimed and yet it is put in issue to enable a court to adjudicate upon the matter which is directly and substantially in issue. The expression "collaterally or incidentally in issue" implies that there is another matter which is "directly and substantially in issue".

Illustration

A sues *B* for the rent due. *B* pleads abatement of rent on the ground that the actual area of the land is less than that mentioned in the lease deed. The court, however, finds the area greater than that shown in the lease deed. The finding as to the excess area, being ancillary and incidentally to the direct and substantial issue, is not *res judicata*.

v. *Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119: AIR 1978 SC 1283; *P.K. Vijayan* v. *Kamalakshi Amma*, (1994) 4 SCC 53: AIR 1994 SC 2145.

[78] *Ibid*, see also *Govt. of the Province of Bombay* v. *Pestonji Ardeshir Wadia*, AIR 1949 PC 143: (1948-49) 76 IA 85; *Ramesh Chand* v. *Board of Revenue*, AIR 1973 All 120 (FB); *Durga Parshad* v. *Custodian of Evacuee Property*, AIR 1960 Punj 341: (1960) 2 Punj 159 (FB).

[79] Mulla, *Civil Procedure Code* (1995) Vol. 1 at pp. 118-19; *Kameswar Pershad* v. *Rajkumari Ruttun*, (1891-92) 19 IA 234: ILR (1893-94) 20 Cal 79 at p. 85 (PC); *Shrimut Rajab* v. *Katama*, (1866) 11 IA 50.

Thus, in *Gangabai* v. *Chhabubai*[80], a regular civil suit was filed by *A* against *B* for a declaration that she was the owner of the property and the so-called sale deed said to have been executed by her in favour of *B* was not real and genuine, and also for possession of property on the ground of title. *B* contended that he had become the owner of the property and the decree for arrears of rent had been previously passed by the Court of Small Causes in his favour, negativing the contention of *A* that she was the owner. She had been held to be the tenant. The subsequent suit, it was contended, was, therefore, barred by the doctrine of *res judicata*.

Negativing the contention, the Supreme Court observed:

> "It seems to us that when a finding as to title to immovable property is rendered by a Court of Small Causes, *res judicata* cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as *res judicata* the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. *A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata.*"[81] (emphasis supplied)

Accordingly, the Supreme Court held that the finding rendered by the Court of Small Causes in the suit filed by *B* that the document executed by *A* was a sale deed cannot operate as *res judicata* in the subsequent suit (suit filed by *A* against *B* on the basis of title).

(*x*) *"Matter directly and substantially in issue" and "matter collaterally or incidentally in issue": Distinction*

In order to operate *res judicata*, a matter must have been directly and substantially in issue in a former suit and not merely collaterally or incidentally in issue therein. It is, therefore, necessary to draw a distinction between a matter "directly and substantially in issue" and a matter "collaterally or incidentally in issue".

A matter is "directly and substantially in issue" if it is necessary to decide it in order to adjudicate the principal issue and if the judgment is based upon that decision.[82]

[80] (1982) 1 SCC 4: AIR 1982 SC 20.

[81] *Gangabai* v. *Chhabubai*, (1982) 1 SCC 4: AIR 1982 SC 20; see also supra, *LIC* v. *India Automobiles & Co., supra*; *Rameshwar Dayal* v. *Banda*, (1993) 1 SCC 531.

[82] *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013 at p. 1019: 1963 Supp (1) SCR 172.

A matter is "collaterally or incidentally in issue" if it is necessary to decide it in order to grant relief to a plaintiff or to a defendant and the decision on such issue either way does not affect the final judgment.[83]

Whether a matter was directly and substantially in issue or merely collaterally or incidentally in issue has to be determined with reference to plaint, written statement, issues and judgment in the suit. Such question must be decided on the facts of each case and no "cut and dried" test can be laid down.[84]

(*xi*) *Findings on several issues*

Where there are findings on several issues or where the court rests its decision on more than one point, the findings on all the issues will operate as *res judicata.*

The Supreme Court[85] has stated, "It is well-settled that if the final decision in any matter at issue between the parties is based by a court on its decision on more than one point, each of which by itself would be sufficient for the ultimate decision, the decision on each of these points operates as *res judicata* between the parties".

(*xii*) *Findings on matter not in issue*

If a finding is recorded by a court in a former suit on a question not in issue between the parties, it will not operate as *res judicata.* The same result will follow if the matter is not dealt with by the court or merely an opinion has been expressed over a question which did not directly arise in the suit.[86]

(*xiii*) *"Suit": Meaning*

The expression "suit" has not been defined in the Code, but it is a proceeding which is commenced by presentation of a plaint.[87] In *Hansraj Gupta* v. *Official Liquidators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*[88], Their Lordships of the Privy Council have defined the expression thus, "The word 'suit' ordinarily means and, apart from some context, must be taken to mean a civil proceeding instituted by the presentation of a plaint."

[83] *Ibid*, see also *Isher Singh* v. *Sarwan Singh*, AIR 1965 SC 948 at p. 950.

[84] *Ishar Singh* v. *Sarwan Singh, supra.*

[85] *Vithal Yeshwant* v. *Shikandarkhan*, AIR 1963 SC 385: (1963) 2 SCR 285; *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627: AIR 1989 SC 2240; *Junior Telecom Officers Forum* v. *Union of India*, 1993 Supp (4) SCC 693: AIR 1993 SC 787.

[86] *Bejoy Gopal* v. *Pratul Chandra*, AIR 1953 SC 153: 1953 SCR 930; *Ragho Prasad* v. *Shri Krishna*, AIR 1969 SC 316: (1969) 1 SCR 834; *Ram Nandan Prasad Narayan Singh* v. *Kapildeo Ramjee*, AIR 1951 SC 155: 1951 SCR 138.

[87] S. 26.

[88] AIR 1933 PC 63 at p. 64: (1932-33) 60 IA 13.

In *Pandurang Ramchandra* v. *Shantibai Ramchandra*[89], the Supreme Court has stated, "In its comprehensive sense the word "suit" is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between the parties in a court of justice the proceeding by which the decision of the court is sought may be a suit." Formerly, looking to the legislative background of Section 11, the expression "suit" was construed literally and grammatically including the whole of the suit and not a part thereof or a material issue arising therein. But by the Amendment Act of 1976, a more extensive meaning is given to the connotation "suit" and now the mode of a proceeding is not material. At the same time, however, if the proceeding is of a summary nature not falling within the definition of a suit, it may not be so treated for the purpose of Section 11. Again, the word "suit" in Section 11 means proceedings in a court of first instance as distinguished from proceedings in an appellate court, though the general principles of *res judicata* apply to appellate proceedings also.[90]

(xiv) Former suit: Explanation I

Section 11 provides that no court shall try any suit or issue in which the matter has been directly and substantially in issue in a *former* suit between the same parties and has been heard and finally decided. Explanation I to Section 11 provides that 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.[91] It is not the date on which the suit is filed that matters but the date on which the suit is decided; so that even if a suit was filed later, it will be a former suit within the meaning of Explanation I if it has been decided earlier.[92]

(xv) "Issue": Meaning

Section 11 bars trial of any suit as well as an issue which had been decided in a former suit. Issues are of three kinds: (*i*) Issues of fact; (*ii*) Issues of law; and (*iii*) Mixed issues of law and fact. A decision on an issue of fact, however erroneous it may be, constitutes *res judicata* between the parties to the previous suit, and cannot be reagitated in

[89] 1989 Supp (2) SCC 627 at p. 639: AIR 1989 SC 2240 at p. 2248; *Kailash Nath* v. *Pradeshiya Industrial & Investment Corpn. of U.P. Ltd.*, (2003) 4 SCC 305: AIR 2003 SC 1886.

[90] *Lachhmi* v. *Bhulli*, AIR 1927 Lah 289: ILR (1927) 8 Lah 384: 104 IC 849 (FB).

[91] *Lonankutty* v. *Thommun*, (1976) 3 SCC 528 at p. 533: AIR 1976 SC 1645 at p. 1649; *Venkatéshwara* v. *Narayana Prabhu*, (1977) 2 SCC 181 at p. 188: AIR 1977 SC 1268 at p. 1273.

[92] *Sheodan Singh* v. *Daryao Kunwar*, AIR 1966 SC 1332 at p. 1334: (1966) 3 SCR 300; *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at p. 19: (1963) 3 SCR 22.

collateral proceedings.[93] A mixed issue of law and fact also, for the same reasons, operates as *res judicata*.[94] But there were conflicting views on the question as to how far a decision on a question of law would operate as *res judicata*.[95]

But the conflict was set at rest by the powerful pronouncement of the Supreme Court in the case of *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*[96], wherein after considering the case-law on the point, the court held that generally a decision of a competent court even on a point of law operates as *res judicata*.[97] However, a pure question of law unrelated to facts which gives rise to a right does not operate as *res judicata*. Thus, when the cause of action is different, or when the law has since the earlier decision been altered by a competent authority, or when the decision relates to the jurisdiction of a Court to try the earlier proceeding, or where the earlier decision declared valid a transaction which is prohibited by law, the decision does not operate as *res judicata* in a subsequent proceeding.

A reference may be made to *Avtar Singh* v. *Jagjit Singh*[98], wherein a peculiar problem arose. In a suit filed by *A* in a civil court, a preliminary contention regarding jurisdiction of the Court was taken by *B*. The objection was upheld and the plaint was returned to the plaintiff for presentation to the Revenue Court. When *A* approached the Revenue Court, it returned the petition holding that the Revenue Court had no jurisdiction. Once again, *A* filed a civil suit in a civil court. It was contended by *B* that the suit was barred by *res judicata*. The Court, though it sympathised with the dilemma wherein the plaintiff was placed and was driven from pillar to post, dismissed the suit upholding the contention of the defendant. The Court stated, "If defendant does not appear and the Court on its own returns the plaint on the ground of lack of jurisdiction the order in a subsequent suit may not operate as *res judicata* but if the defendant appears and an issue is raised and decided then the decision on the question of jurisdiction will operate as *res judicata* in a subsequent suit although the reasons for its decisions may not be so."[99]

[93] *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy, infra*. See also *Rajendra Jha* v. *Labour Court*, 1984 Supp SCC 520 at pp. 526-27: AIR 1984 SC 1696 at p. 1699-1700.

[94] *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy, infra; Sushil Kumar* v. *Gobind Ram*, (1990) 1 SCC 193; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187: AIR 1990 SC 334.

[95] *Ibid*, see also *Mohanlal Goenka* v. *Benoy Krishna*, AIR 1953 SC 65 at p. 72-73: 1953 SCR 377; *State of W.B.* v. *Hemant Kumar*, AIR 1966 SC 1061 at p. 1066: 1963 Supp (2) SCR 542; *Avtar Singh* v. *Jagjit Singh*, (1979) 4 SCC 83.

[96] (1970) 1 SCC 613 at p. 617: AIR 1971 SC 2355 at p. 2357-58.

[97] *Ibid*, at p. 617 (SCC): at p. 2337 (AIR).

[98] (1979) 4 SCC 83: AIR 1979 SC 1911.

[99] *Ibid*, at p. 84 (SCC): at p. 1912 (AIR).

It is submitted that the view taken by the Supreme Court in *Avtar Singh*[98] is erroneous and does not lay down correct law. As stated above, a pure question of law unrelated to the facts and touching the jurisdiction of a court, does not operate as *res judicata* between the same parties in a subsequent suit. *Avtar Singh*[98] was decided by a Division Bench of two judges. Unfortunately, *Mathura Prasad*[96] which was decided earlier and that too by a Division Bench of three judges was not brought to the notice of the Court. Thus, *Avtar Singh*[98] was decided *per incurium* and cannot be said to be good law.[100]

It is submitted that the view taken by the Supreme Court in *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*[101] is correct. The following observations of Shah, J. (as he then was) lay down the correct principle of law and are, therefore, worth quoting:

> "The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, i.e., the interpretation of a statute, it will be *res judicata* in a subsequent proceeding between the same parties where the cause of action is the same, for the expression 'the matter in issue' in Section 11 of the Code of Civil Procedure means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the court or a decision of the court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a *rule of procedure cannot supersede the law of the land*."[102]
>
> (emphasis supplied)

[100] *Sushil Kumar* v. *Gobind Ram*, (1990) 1 SCC 193 at pp. 205-06; *Isabella Johnson* v. *M.A. Susai*, (1991) 1 SCC 494 at p. 496: AIR 1991 SC 993 at p. 995.

[101] (1970) 1 SCC 613: AIR 1971 SC 2355.

[102] *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613 at p. 629: AIR 1971 SC 2355 at p. 2359; *see also*, observations of Rankin, C.J. in *Tarini Charan* v. *Kedar Nath*, AIR 1928 Cal 777: ILR 56 Cal 723; *Chief Justice of A.P.* v. *L.V.A. Dixitulu*, (1979) 2 SCC 34 at p. 42: AIR 1979 SC 193 at p. 198; *Jaisingh* v. *Mamanchand*, (1980) 3 SCC 162 at p. 167-69: AIR 1980 SC 1201; *Rajendra Jha case, supra*; *Kirit Kumar* v. *Union of India*, (1981) 2 SCC 436: AIR 1981 SC 1621; *Sonepat Coop. Sugar Mills Ltd.* v. *Ajit Singh*, (2005) 3 SCC 232: AIR 2005 SC 1050.

II Same parties

(i) General

The second condition of *res judicata* is that the former suit must have been a suit between the same parties or between the parties under whom they or any of them claim. This condition recognises the general principle of law that judgments and decrees bind the parties and privies.[103] Therefore, when the parties in the subsequent suit are different from the former suit, there is no *res judicata.*

(ii) Illustrations

1. *A* sues *B* for rent. *B* contends that *A* is not the landlord, and the suit is dismissed. *A* subsequent suit either by *A* or by *X* claiming through *A* is barred by *res judicata.*

2. *A* sues *B* for rent. *B* contends that *C* and not *A* is the landlord. *A* fails to prove his title and the suit is dismissed. *A* then sues *B* and *C* for a declaration of his title to the property. The suit is not barred as the parties in both the suits are not the same.

(iii) Party: Meaning

A "party" is a person whose name appears on the record at the time of the decision. Thus, a person who has intervened in the suit is a party, but a party to the suit whose name is struck off, or who is discharged from the suit or who dies pending the suit but whose name continues on record erroneously is not a party. A party may be a plaintiff or a defendant.

(iv) Res judicata between co-defendants

As a matter may be *res judicata* between a plaintiff and a defendant, similarly, it may be *res judicata* between co-defendants and co-plaintiffs also. An adjudication will operate as *res judicata* between co-defendants if the following conditions are satisfied:

(1) There must be a conflict of interest between co-defendants;
(2) It must be necessary to decide that conflict in order to give relief to the plaintiff;
(3) The question between co-defendants must have been finally decided; and
(4) The co-defendants were necessary or proper parties in the former suit.

If these conditions are satisfied, the adjudication will operate as *res judicata* between co-defendants.[104]

[103] *"Res inter alios acta alteri nocere non debet"* (Things done between strangers bught not to injure anyone).

[104] *Munni Bibi* v. *Tirloki Nath,* AIR 1931 PC 114: (1930-31) 58 IA 158; *Iftikhar Ahmed* v. *Syed Meharban Ali,* (1974) 2 SCC 151 at p. 155: AIR 1974 SC 749 at p. 751; *Sheodan Singh* v. *Daryao Kunwar,* AIR 1966 SC 1332: (1966) 3 SCR 300; *State of Gujarat* v. *Meghji Pethraj*

Illustration

A sues *B*, *C* and *D* and in order to decide the claim of *A*, the Court has to interpret a will. The decision regarding the construction of the will on rival claims of the defendants will operate as *res judicata* in any subsequent suit by any of the defendants against the rest.

The test for *res judicata* between co-defendants has been laid down in the case of *Cottingham* v. *Earl of Shrewsbury*[105] in the following words:

> "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide the case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."[106]

In *Mahboob Sahab* v. *Syed Ismail*[107], the Supreme Court added a word of caution while applying the doctrine of *res judicata* between co-defendants by stating, "The doctrine of *res judicata* would apply even though the party against whom it is sought to be enforced, was not *eo nomine* made a party nor entered appearance nor did he contest the question. The doctrine of *res judicata* must, however, be applied to co-defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. *If a party obtains a decree from the court by practising fraud or collusion, he cannot be allowed to say that the matter is res judicata and cannot be reopened.*"[108] (emphasis supplied)

(v) Res judicata between co-plaintiffs

Just as a matter may be *res judicata* between co-defendants, so also it may be *res judicata* between co-plaintiffs. If there is a conflict of interest between plaintiffs and it is necessary to resolve the same by a court in order to give relief to a defendant, and the matter is in fact decided, it will operate as *res judicata* between co-plaintiffs in the subsequent suit.[109]

Shah Charitable Trust, (1994) 3 SCC 552; *Mahboob Sahab* v. *Syed Ismail*, (1995) 3 SCC 693: AIR 1995 SC 1205; *Makhija Construction & Engg. (P) Ltd.* v. *Indore Development Authority*, (2005) 6 SCC 304: AIR 2005 SC 2499; *Amarendra Komalam* v. *Usha Sinha*, (2005) 11 SCC 251: AIR 2005 SC 2758.

[105] (1843) 3 Hare 627; see also supra, *Mahboob Sahab*.

[106] *Ibid*, at p. 638. See also *Munni Bibi* v. *Tirloki Nath*, AIR 1931 PC 114 at p. 117: (1930-31) 58 IA 158; *Kshiroda* v. *Debendra Nath*, AIR 1957 Cal 200.

[107] (1995) 3 SCC 693: AIR 1995 SC 1205.

[108] *Ibid*, at p. 699 (SCC): at p. 1209 (AIR) (*per* K. Ramaswamy, J.); See also *Saroja* v. *Chinnusamy*, (2007) 8 SCC 329: AIR 2007 SC 3067.

[109] *Iftikhar Ahmed* v. *Syed Meharban Ali*, (1974) 2 SCC 151 at p. 155: AIR 1974 SC 749 at p. 751.

(vi) Pro forma defendant

A defendant to a suit against whom no relief is claimed is called a *pro forma* defendant. A person may be added as a *pro forma* defendant in a suit merely because his presence is necessary for a complete and final decision of the questions involved in the suit.[110] In such a case, since no relief is sought against him, a finding does not operate as *res judicata* in a subsequent suit against him.[111] On the other hand, the fact that the party is described as a *pro forma* defendant or that no relief is claimed against him is, by itself, not sufficient to avoid the bar of *res judicata* if other conditions laid down in the section are satisfied.[112]

Illustrations

1. *A* sues *B* for possession of property contending that he is a tenant of *C*. *C* is joined as *pro forma* defendant and no relief is claimed against him. The suit is dismissed as the Court finds *B* to be the owner. *C* then sues *B* for possession on the basis of title. *B*'s contention that the issue regarding ownership of property is *res judicata* must fail as the issue was decided in the former suit between *A* and *B* and not between *C* and *B* as *C* was only a *pro forma* defendant.

2. *A* sues *B* for rent claiming to be a sole shebait. *B* contends that *X* was also a co-shebait and the suit filed by *A* alone was, therefore, not maintainable. *X* was joined as *pro forma* defendant and no relief was claimed against him. A finding by the Court that *A* was the sole shebait would operate as *res judicata* in a subsequent suit between *X* and *A* on the question of co-shebaitship as the decision in the previous suit was necessary for granting relief in favour of *A*.

(vii) Interveners

An "intervener" is one "who intervenes in a suit in which he was not originally a party",[113] "an affected party who, with the court's permission, participates in a law suit after its inception by either joining with the plaintiff or uniting with the defendant."[114]

A person may intervene in a suit either on his own behalf or on behalf of the parties with the leave of the court. Such intervener is considered to be a party to the suit once he is permitted to intervene no matter at what stage of the suit he intervenes. The decision in the suit then will operate as *res judicata* in a subsequent suit by or against such person (intervener) on the point already decided.[115]

[110] Or. 1 R. 10(2).

[111] *Rahimbhoy* v. *Charles Agnew Turner*, ILR (1893) 17 Bom 341 at p. 348 (PC); *Gita Ram* v. *Prithvi Singh*, AIR 1956 Cal 129 (FB); *Pallapothu Narasimha* v. *Kidanbi Radhakrishnamacharyulu*, AIR 1978 AP 319 at p. 332 (FB).

[112] *Munni Bibi* v. *Tirloki Nath*, AIR 1931 PC 114 at p. 117: (1930-31) 58 IA 158; *Maung Sein* v. *Ma Pan Nyun*, AIR 1932 PC 161 at p. 164: (1931-32) 59 IA 247; *Kshiroda* v. *Debendra Nath*, AIR 1957 Cal 200.

[113] *Concise Oxford English Dictionary* (2002) at p. 741.

[114] P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. II at p. 2434.

[115] *Raj Lakshmi* v. *Banamali Sen*, AIR 1953 SC 33: 1953 SCR 154; For detailed discussion *see*, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. V, Chap. 2.

(viii) Minors

When a suit is filed against a minor who is duly represented by a guardian or next friend and a decree is passed in such suit, the decree binds the minor. But if the decree is obtained against a minor not represented by a guardian or there is fraud, collusion or gross negligence of the guardian, a decree passed in the suit will not operate as *res judicata* against him (minor) in a subsequent suit.[116]

(ix) Parties under whom they or any of them claim

As stated above, the doctrine of *res judicata* operates not only against parties but their privies also, i.e., persons claiming under parties to the decision. The object underlying the doctrine of *res judicata* is that if a proceeding originally instituted is proper, the decision given therein is binding on all persons on whom a right or interest may devolve.

"Parties under whom they or any of them claim" comprise two classes of persons:

(*i*) Parties actually present in the former suit;
(*ii*) Parties claiming under the parties to the suit (privies); and
(*iii*) Persons represented by a party in the former suit (Explanation VI).

Illustration

A sues *B* for a declaration of title to the property and obtains a decree. Thereafter *A* sues *C* for possession of that property. *C* contends that *B* is the owner and that he is in possession as *B*'s tenant. The defence is barred inasmuch as *C* claims through *B*.

(x) Representative suit: Explanation VI[117]

Explanation VI to Section 11 deals with representative suits, i.e., suits instituted by or against a person in his representative, as distinguished from individual capacity. This Explanation provides that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, and all persons interested in such right shall, for the purposes of Section 11, be deemed to claim under the persons so litigating.[118] Explanation VI, thus illustrates one aspect of constructive *res judicata*. Thus, where a representative suit is brought under Section 92 of the Code and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the

[116] *Gunjeshwar Kunwar* v. *Durga Prashad*, AIR 1917 PC 146; *M.K. Muhamed Pillai* v. *Pariyathu Pillai*, AIR 1956 TC 27 (FB); *Kamakshya Narain* v. *Baldeo Sahai*, AIR 1950 Pat 97 (FB); *Rattan Chand* v. *Ram Kishan Murarji*, AIR 1928 All 447; *Narayanan Nambooripad* v. *Gopalan Nair*, AIR 1960 Ker 367.

[117] For detailed discussion of representative suits, *see infra*, Chap. 5.

[118] *Ahmad Adam Sait* v. *M.E. Makhri*, AIR 1964 SC 107 at pp. 113-14: (1964) 2 SCR 647; see also *Raje Anandrao* v. *Shamrao*, AIR 1961 SC 1206 at p. 1211: (1961) 3 SCR 930 at p. 940.

said plaintiffs and, therefore, are constructively barred by *res judicata* from reagitating the matters directly and substantially in issue in the former suit.

The underlying principle is that if the very issue is litigated in the former suit and is decided, there is no good reason why the others making the same claim cannot be held to be claiming a right "in common for themselves and others" under Explanation VI. If that view is not taken, it would necessarily mean that there would be two inconsistent decrees and one of the tests in deciding whether the doctrine of *res judicata* applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied.[119]

(*xi*) *Conditions*

The following conditions must be satisfied before a decision may operate as *res judicata* under Explanation VI:

(*i*) There must be a right claimed by one or more persons in common for themselves and others not expressly named in the suit;

(*ii*) the parties not expressly named in the suit must be interested in such right;

(*iii*) the litigation must have been conducted *bona fide* and on behalf of all parties interested; and

(*iv*) if the suit is under Order 1 Rule 8, all conditions laid down therein must have been strictly complied with.

It is only when the above conditions are satisfied that a decision may operate as *res judicata* in the subsequent suit.[120] Thus, where a party claims a right for himself alone which happens to be common to him and others, it cannot be said that he was litigating on behalf of others and Explanation VI does not apply.[121] Similarly, if the earlier proceeding was not a *bona fide* public interest litigation, the subsequent proceeding would not be barred. *The possibility of litigation to foreclose any further inquiry into a matter in which an enquiry is necessary in the interest of public cannot be overlooked.*[122] (emphasis supplied)

(*xii*) *Public interest litigation*

If the object of Explanation VI of Section 11 is considered, there is no good reason why it cannot apply to a *bona fide* public interest litigation. If the previous litigation was a *bona fide* public interest litigation

[119] *Narayana Prabhu Venkateswara Prabhu* v. *Narayana Prabhu Krishna Prabhu*, (1977) 2 SCC 181 at pp. 188-89: AIR 1977 SC 1268 at p. 1274.

[120] *Forward Construction Co.* v. *Prabhat Mandal (Regd.)*, (1986) 1 SCC 100: AIR 1986 SC 391.

[121] *Sadagopa Chariar* v. *Krishnamoorthy Rao*, ILR (1907) 30 Mad 185 at p. 190 (PC).

[122] *Forward Construction Co. case, supra*, at pp. 112-13 (SCC): at p. 398 (AIR). For "Public Interest Litigation", *see*, Author's *Lectures on Administrative Law* (2008) Lecture X.

in respect of a right which was common and was agitated in common with others, the decision in previous litigation would operate as *res judicata* in a subsequent litigation. But if the earlier proceeding was not a *bona fide* public interest litigation, the subsequent proceeding would not be barred.[123]

III Same Title

(i) General

The third condition of *res judicata* is that the parties to the subsequent suit must have litigated under the same title as in the former suit.

(ii) Meaning

Same title means same capacity.[124] Title refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his own interest or for himself as representing the interest of another or as representing the interest of others along with himself and it has nothing to do with the particular cause of action on which he sues or is sued. Litigating under the same title means that the demand should be of the same quality in the second suit as was in the first suit. It has nothing to do with the cause of action on which he sues or is sued.

(iii) Illustrations

1 *A* sues *B* for title to the property as an heir of *C* under the customary law. The suit is dismissed. The subsequent suit for title to the property as an heir of *C* under the personal law is barred.
2 *A* sues *B* for possession of property as an owner basing his claim on title. The suit is dismissed. A subsequent suit for possession of property on the ground of adverse possession is barred.
3 *A* sues *B* for possession of property as an owner basing his claim on title. The suit is dismissed. *A* subsequent suit by *A* against *B* for possession of the same property as mortgagor is not barred.
4 *A* sues for possession of math property as an heir of Mahant. The suit is dismissed. A subsequent suit by *A* against *B* as the manager of the math is not barred.

[123] For detailed discussion of "Public Interest Litigation", *see*, C.K. Thakker, *Administrative Law* (1996) at pp. 587-607; V.G. Ramachandran, *Law of Writs* (2006) Vol. I, Pt. II, Chap. 13.

[124] *Per* Broomfield, J. in *Mahadevappa Somappa* v. *Dharmappa Sanna*, AIR 1942 Bom 322 at p. 326: 44 Bom LR 710.

(iv) Test

The test for *res judicata* is the identity of title in the two litigations and not the identity of the subject-matter involved in the two cases.[125] The crucial test for determining whether the parties are litigating in a suit under the same title as in the previous suit is of the capacity in which they sued or were sued. The term "same title" has nothing to do either with the cause of action or with the subject-matter of two suits. Where the right claimed in both the suits is the same, the subsequent suit will be barred even though the right in the subsequent suit is sought to be established on a ground different from the one in the former suit.[126]

IV Competent court

(i) General

The fourth condition of *res judicata* is that the court which decided the former suit must have been a court competent to try the subsequent suit.[127] Thus, the decision in a previous suit by a court, not competent to try the subsequent suit, will not operate as *res judicata*.[128]

(ii) Object

The principle behind this condition is sound one, namely, that the decision of the court of limited jurisdiction ought not to be final and binding on a court of unlimited jurisdiction.[129]

(iii) Competent court: Meaning: Explanation VIII

The expression "competent to try" means "competent to try the subsequent suit if brought at the time the first suit was brought".[130] In other words, the relevant point of time for deciding the question of competence of the court is the date when the former suit was brought and not the date when the subsequent suit was filed.[131]

[125] *Ram Gobinda* v. *Bhaktabala*, (1971) 1 SCC 387 at p. 394: AIR 1971 SC 664 at p. 670; *Kushal Pal* v. *Mohan Lal*, (1976) 1 SCC 449 at pp. 456-57: AIR 1976 SC 688 at p. 693.

[126] *Sunderabai* v. *Devaji Shankar Deshpande*, AIR 1954 SC 82 at p. 84; *Union of India* v. *Pramod Gupta*, (2005) 12 SCC 1.

[127] *Raj Lakshmi* v. *Banamali Sen*, AIR 1953 SC 33 at p. 40: 1953 SCR 154; *Jeevantha* v. *Hanumantha*, AIR 1954 SC 9 at p. 10; *Sheodan Singh* v. *Daryao Kunwar*, AIR 1966 SC 1332 at p. 1335: (1966) 3 SCR 300.

[128] *Pandurang Mahadeo* v. *Annaji Balwant*, (1971) 3 SCC 530: AIR 1971 SC 2228; *Chief Justice of A.P.* v. *L.V.A. Dixitulu*, (1979) 2 SCC 34 at p. 42: AIR 1979 SC 193 at p. 198; *Raj Lakshmi* v. *Banamali Sen*, AIR 1953 SC 33: 1953 SCR 154.

[129] Law Commission's 54th Report at p. 21.

[130] *Devendra Kumar* v. *Pramuda Kanta*, AIR 1933 Cal 879: (1993) 37 CWN 810.

[131] *Jeevantha* v. *Hanumantha*, AIR 1954 SC 9; *Pandurang Mahadeo* v. *Annaji Balwant*, (1971) 3 SCC 530: AIR 1971 SC 2228; *Sheodan Singh* v. *Daryao Kunwar*, AIR 1966 SC 1332: (1966) 3 SCR 300.

(iv) Types of courts

In order that a decision in a former suit may operate as *res judicata*, the court which decided that suit must have been either:

(*a*) a court of exclusive jurisdiction; or
(*b*) a court of limited jurisdiction; or
(*c*) a court of concurrent jurisdiction.

(A) Court of exclusive jurisdiction

A plea of *res judicata* can successfully be taken in respect of judgments of courts of exclusive jurisdiction, like Revenue Courts, Land Acquisition Courts, Administration Courts, etc. If a matter directly and substantially in issue in a former suit has been adjudicated upon by a court of exclusive jurisdiction, such adjudication will bar the trial of the same matter in a subsequent suit in an ordinary civil court.[132]

(B) Court of limited jurisdiction

A decision on an issue heard and finally decided by a court of limited jurisdiction will also operate as *res judicata* in a subsequent suit irrespective of the fact that such court of limited jurisdiction was not competent to try the subsequent suit.[133]

The expression "court of limited jurisdiction" has been interpreted differently by different High Courts. In *Nabin Majhi* v. *Tela Majhi*[134], the High Court of Calcutta held that courts of limited jurisdiction are courts other than ordinary civil courts, such as Revenue Courts, Land Acquisition Courts, Insolvency Courts, etc. A court of limited pecuniary jurisdiction cannot be said to be a court of limited jurisdiction. Reading Explanation VIII along with Section 11, it is clear that if the former court is unable to try the subsequent suit as beyond its pecuniary jurisdiction, the decision of the former court will not operate as *res judicata* in the subsequent suit.

On the other hand, in *P.V.N. Devoki Amma* v. *P.V.N.Kunhi Raman*[135], the High Court of Kerala did not agree with the Calcutta view in *Nabin Majhi case*[134] and observed that the term "a court of limited jurisdiction" is wide enough to include a court whose jurisdiction is subject to a pecuniary jurisdiction and it will not be right to interpret the said expression as connoting only courts other than ordinary civil courts. *Such a narrow and restricted interpretation is not warranted by the words used by Parliament.* (emphasis supplied)

[132] *Raj Lakshmi* v. *Banamali Sen*, AIR 1953 SC 33 at p. 40: 1953 SCR 154; *Bhagwan Dayal* v. *Reoti Devi*, AIR 1962 SC 287 at pp. 293-94: (1962) 3 SCR 440.

[133] *P.V.N. Devoki Amma* v. *P.V.N. Kunhi Raman*, AIR 1980 Ker 230; *Biro* v. *Banta Singh*, AIR 1980 Punj 164.

[134] AIR 1978 Cal 440: 82 CWN 1097: (1978) 2 Cal LJ 150; see also *Promode Ranjan* v. *Nirapada Mondal*, AIR 1980 Cal 181: 82 CWN 1097.

[135] AIR 1980 Ker 230 (233): 1980 Ker LT 690.

It is submitted that the view taken by the High Court of Kerala in *Devoki Amma*[135] is correct and preferable to the one taken by the High Court of Calcutta in *Nabin Majhi*[134]. The point is, however, concluded by a decision of the Supreme Court in *Sulochana Amma* v. *Narayanan Nair*[136].

(C) Court of concurrent jurisdiction

Where the court which decided the former suit was a court of concurrent jurisdiction having competence to try the subsequent suit, the decision given by it would operate as *res judicata* in a subsequent suit.[137] Concurrent jurisdiction means concurrent as regards the pecuniary limit as well as the subject-matter of the suit. "Competency" in Section 11 has no reference to territorial jurisdiction of the court.[138]

As seen above, the ambit and scope of Explanation VIII has been interpreted differently by different High Courts. In *Nabin Majhi* v. *Tela Majhi*[139], it was contended that a court of Munsif by reason of its limited pecuniary jurisdiction can be said to be a court of limited jurisdiction and hence, its decision would operate as *res judicata* in a subsequent suit instituted in the court of a subordinate judge.

Negativing the contention and interpreting Explanation VIII in the light of the substantive provision (Section 11), the Court observed:

> "[O]ne of the conditions for the applicability of Section 11 is that the Court in which the former suit was instituted must be competent to try the subsequent suit. If the former Court is unable to try the subsequent suit as it is beyond its pecuniary jurisdiction, the decision of the former court will not be *res judicata* in the subsequent suit. If the legislature had really intended to remove the condition retaining to the competency of the former Court, in that case it would have removed the same from the section itself. *In the face of the provision of Section 11, retaining the said condition for the applicability of res judicata, that the former Court must be competent to try the subsequent suit, it is difficult for us to accept the interpretation of Explanation VIII as suggested on behalf of the appellant.*"[140]
>
> (emphasis supplied)

The High Court of Kerala, however, took a contrary view in *P.V.N. Devoki Amma* v. *P.V.N. Kunhi Raman*[141]. Disagreeing with the ratio laid down in *Nabin Majhi* and keeping in mind the object of enacting Explanation VIII, the Court concluded:

[136] (1994) 2 SCC 14: AIR 1994 SC 152.
[137] *Pandurang Mahadeo* v. *Annaji Balwant*, (1971) 3 SCC 530: AIR 1971 SC 2228.
[138] *Maqbul* v. *Amir Hasan*, AIR 1916 PC 136.
[139] AIR 1978 Cal 440: 82 CWN 1097: (1978) 2 CLJ 150.
[140] *Ibid*, at p. 442 (AIR).
[141] AIR 1980 Ker 230: 1980 Ker LT 690.

"In our opinion, the expression 'a Court of limited jurisdiction' is wide enough to include a Court whose jurisdiction is subject to a pecuniary limitation and it will not be right to interpret the said expression as connoting only Courts other than ordinary civil courts. Such a narrow and restricted interpretation is not warranted by the words used by Parliament. The Statement of Objects and Reasons for the Bill which was subsequently enacted as Amending Act 104 of 1976 and the report of the Joint Select Committee, which effected some substantial changes in the Bill as originally drafted, make it abundantly clear that the intention underlying the introduction of Explanation VIII was that the decisions of the Courts of limited jurisdiction should operate as *res judicata* in a subsequent suit although the Court of limited jurisdiction may not be competent to try such subsequent suit... . *"In our opinion the object and purpose underlying the introduction of Explanation VIII was much wider, namely, to render the principle of res judicata fully effective so that issues heard and finally decided between the parties to an action by any Court competent to decide such issues should not be allowed to be reagitated by such parties or persons claiming through them in a subsequent litigation."*[142] (emphasis supplied)

It is submitted that the above observations in *Devoki Amma* lay down the correct proposition of law. The underlying object of the amendment and insertion of Explanation VIII is to avoid multiplicity of suits. It is, no doubt, true that Parliament has not deleted from Section 11 the words "in a court competent to try such subsequent suit or the suit in which such issue has subsequently been raised", but the section and the explanation must be read harmoniously. If it is not so read, the primary object of enacting Explanation VIII would be defeated, inasmuch as a party by adding some property or increasing the value thereof from time to time may go on instituting suits after suits, deliberately and successfully avoiding the decision against him to operate as *res judicata*. It would encourage endless litigation.

It is further submitted that it would have been better had Parliament, in view of insertion of Explanation VIII by the Amendment Act of 1976, deleted the words "a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised". But it is settled law that an explanation to a section in a given case, instead of serving the traditional purpose of explaining a section, may work as an independent provision. Ultimately it is the intention of the legislature which is paramount and the mere use of a label cannot control or deflect such intention.

[142] AIR 1980 Ker 230 at p. 233: 1980 Ker LT 690.

Moreover, such a construction would result in an anomalous situation. If a matter is decided by a court of limited jurisdiction, Explanation VIII would apply and such decision would operate as *res judicata* in a subsequent suit. But if it is decided by a court of limited pecuniary jurisdiction, the decision would not attract Section 11. This is really absurd. Further, such an interpretation would be against the basic principle underlying the doctrine of *res judicata* which is reflected in the well-known maxim that "larger public interest requires that all litigation must, sooner than later, come to an end".

Finally, it may result in conflicting decisions by the same officer. For instance, a decree passed by a Rent Controller will operate as *res judicata* but a decree passed by a Civil judge or a Munsif will not be barred by that doctrine though the same officer might have decided both the cases.

A special reference may be made to a decision of the Supreme Court in *Sulochana Amma* v. *Narayanan Nair*[143]. In that case, *A* by a deed of settlement gave life estate to *B*, and the remainder to *C*. After the death of *A*, *B* alienated the property to *D*. *C* filed a suit against *B* in the Munsif's court restraining *B* from alienating the property and committing acts of waste. During the pendency of the suit, *D* sold the property to *E*. *C*'s suit against *B* was decreed and it was held that *B* had no right to alienate property and permanent injunction was also granted. *B*'s appeal was also dismissed. *D*, who was not a party to the earlier suit was committing acts of waste. *C*, therefore, filed another suit against *B* and *D* for permanent injunction. That suit was also decreed. But the question of *D*'s title was left open. *C* filed a third suit against *E* in the court of the Subordinate judge for declaration of his title which was decreed. It was confirmed up to the High Court. *E* approached the Supreme Court.

Considering the purpose of the amendment and insertion of Explanation VIII, the Supreme Court stated, "No doubt main body of Section 11 was not amended, yet the expression 'the court of limited jurisdiction' in Explanation VIII is wide enough to include a court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. Therefore, Section 11 is to be read in combination and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent court or tribunal, though of limited special jurisdiction, which includes pecuniary jurisdiction, will operate as *res judicata* in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent court to try

[143] (1994) 2 SCC 14: AIR 1994 SC 152.

the subsequent suit... . The technical aspect, for instance, pecuniary or subject-wise competence of the earlier forum to adjudicate the subject-matter or to grant reliefs sought in the subsequent litigation, should be immaterial when the general doctrine of *res judicata* is to be invoked. *Explanation VIII, inserted by the Amending Act of 1976, was intended to serve this purpose and to clarify this purpose and to clarify this position.*"[144] (emphasis supplied)

Overruling the "very narrow view" of the High Court of Calcutta[145] and approving the "broader view" of the High Courts of Kerala,[146] Orissa[147] and Madras,[148] the Court went on to observe:

> "[I]f the scope of Explanation VIII is confined to the order and decree of an insolvency court, the scope of enlarging Explanation VIII would be defeated and the decree of civil courts of limited pecuniary jurisdiction shall stand excluded, while that of the former would be attracted. Such an anomalous situation must be avoided. The Tribunal whose decisions were not operating as *res judicata*, would be brought within the ambit of Section 11, while the decree of the civil court of limited pecuniary jurisdiction which is accustomed to the doctrine of *res judicata*, shall stand excluded from its operation. Take for instance, now the decree of a Rent Controller shall operate as *res judicata*, but a decree of a District Munsif (Civil judge), Junior Division, according to the stand of the appellant, will not operate as *res judicata*, though the same officer might have decided both the cases. To keep the litigation unending, successive suits could be filed in the first instance in the court of limited pecuniary jurisdiction and later in a court of higher jurisdiction, and the same issue shall be subject of trial again, leading to conflict of decisions. *It is obvious from the objects underlying Explanation VIII, that by operation of the non-obstante clause finality is attached to a decree of civil court of limited pecuniary jurisdiction also to put an end to the vexatious litigation and to conclusiveness to the issue tried by a competent court, when the same issue is directly and substantially in issue in a later suit between the same parties or their privies by operation of Section 11. The parties are precluded from raising once over the same issue for trial.*"[149] (emphasis supplied)

[144] *Sulochana Amma* v. *Narayanan Nair*, (1994) 2 SCC 14: AIR 1994 SC 152 at pp. 155-56.

[145] *Nabin Majhi* v. *Tela Majhi*, AIR 1978 Cal 440; *Promode Ranjan* v. *Nirapada Mondal*, AIR 1980 Cal 181: 82 CWN 1097.

[146] *P.V.N. Devoki Amma* v. *P.V.N. Kunhi Raman*, AIR 1980 Ker 230.

[147] *Kumarmonisa* v. *Himachal Sahu*, AIR 1981 Ori 177.

[148] *C. Arumugathan* v. *S. Muthusami*, (1991) 2 Mad LJ 538.

[149] *Sulochana Amma* v. *Narayanan Nair*, (1994) 2 SCC 14: AIR 1994 SC 152 at p. 156.

In *Church of South India Trust Assn.* v. *Telugu Church Council*[150], it was contended that lack of territorial jurisdiction goes to the root of the competence of a court trying a suit and a decision rendered by a court lacking territorial jurisdiction would not operate as *res judicata* in a subsequent suit.

Negativing the contention and referring to leading decisions on the point, the Supreme Court stated, "We are, therefore, of the opinion that Section 11 of the present Code (excluding Explanation VIII) envisages that the judgment in a former suit would operate as a *res judicata*, if the court which decided the said suit was competent to try the same by virtue of its pecuniary jurisdiction and the subject-matter to try the subsequent suit and that it is not necessary that the said court should have had territorial jurisdiction to decide the subsequent suit."[151]

(*v*) *Test*

The test in such case is whether the second suit could have been decided by the first court? If the answer to the question is in affirmative, the decision will operate as *res judicata*. But if the reply is in the negative, *res judicata* has no application.

(*vi*) *Right of appeal: Explanation II*

(*A*) *Position prior to Explanation II*—Under the Code of 1882, it was held by the High Courts of Bombay, Madras and Punjab that a prior decision in which no second appeal lay, such as suits of a nature cognizable by a Court of Small Causes when the amount of subject-matter does not exceed five hundred rupees, could not operate as *res judicata* in a subsequent suit in which such appeal was maintainable. The High Court of Calcutta, on the other hand, had taken a contrary view and held that such decision would operate as *res judicata*, notwithstanding that no second appeal was allowed by law in the former suit. Explanation II as inserted in the present Code affirms the Calcutta view and clarifies that the competence of a court does not depend on the right of appeal from a decision from such Court.[152] The fact that no second appeal lay in the previous suit is no longer a valid ground for holding that the decision in the previous suit would not operate as *res judicata*.

(*B*) *Position after Explanation II*—Explanation II to Section 11 makes it clear that for the purpose of *res judicata*, the competence of the court shall be determined irrespective of any provision as to a right of appeal from the decision of such court. No doubt, one of the tests for application of the doctrine of *res judicata* is to ascertain whether a party aggrieved could challenge the finding by filing an appeal. But the

[150] (1996) 2 SCC 520: AIR 1996 SC 987.

[151] *Ibid*, at p. 535 (SCC): 995 (AIR).

[152] *Narayan Prablu Venkateswara* v. *Narayana Prablu Krishna*, (1977) 2 SCC 181: AIR 1977 SC 1268; *Lonankutty* v. *Thomman*, (1976) 3 SCC 528: AIR 1976 SC 1645.

question whether there is a bar of *res judicata* does not depend on the existence of a right of appeal but on the question whether the same issue, under the circumstances mentioned in Section 11 of the Code, has been heard and finally decided.[153] Though the Law Commission recommended to confer a right of appeal to a successful party against whom a finding has been recorded, the recommendation has not been accepted and a party cannot file an appeal against a finding recorded against him by a court if the decree is in his favour.[154]

V Heard and finally decided

(i) General

The fifth and the final condition of *res judicata* is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by a court in the former suit.[155] In the words of Lord Romilly[156], "*Res judicata* by its very words means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly."

The section requires that there should be a final decision on which the court must have exercised its judicial mind.[157] In other words, the expression "heard and finally decided" means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. *It is essential that it should have been heard and finally decided.*[158] (emphasis supplied)

(ii) Nature and scope

A matter can be said to have been heard and finally decided notwithstanding that the former suit was disposed of (*i*) *ex parte*; or (*ii*) by failure to produce evidence (Order 17 Rule 3); or (*iii*) by a decree on an award; or (*iv*) by oath tendered under the Indian Oaths Act, 1873. But

[153] *Ramesh Chandra* v. *Shiv Charan Dass*, 1990 Supp SCC 633 at p. 635: AIR 1991 SC 264 at p. 265; *Premier Tyres Ltd.* v. *Kerala SRTC*, 1993 Supp (2) SCC 146: AIR 1993 SC 1202.

[154] Law Commission's 54th Report, at pp. 26-27.

[155] *Kewal Singh* v. *Lajwanti*, (1980) 1 SCC 290 at p. 296: AIR 1980 SC 161 at p. 164; *Ram Gobinda* v. *Bhaktabala*, (1971) 1 SCC 387 at p. 395: AIR 1971 SC 664 at p. 671; *Kushal Pal* v. *Mohan Lal*, (1976) 1 SCC 449 at p. 456-57: AIR 1976 SC 688 at p. 693; *Narayan Prabhu case, supra*; *Gurbax Rai* v. *Punjab National Bank*, (1984) 3 SCC 96: AIR 1984 SC 1012 at p. 1014; *Ferro Alloys Co. Ltd.* v. *Union of India*, (1999) 4 SCC 149 at p. 161: AIR 1999 SC 1236 at p. 1243.

[156] *Jenkins* v. *Robertson*, (1867) LR 1 Sc & Div 117, HL.

[157] *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 640: AIR 1989 SC 2240 at p. 2249.

[158] *Kushal Pal* v. *Mohan Lal*, (1976) 1 SCC 449 at pp. 456-57: AIR 1976 SC 688 at p. 693.

if the suit is dismissed on a technical ground, such as non-joinder of necessary party, it would not operate as *res judicata*.[159]

(iii) Decision on merits

In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on merits.[160] Thus, if the former suit was dismissed by a court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder or misjoinder of parties, or on the ground that the suit was not properly framed, or that it was premature, or that there was a technical defect, the decision not being on merits, would not operate as *res judicata* in a subsequent suit.[161]

Illustration

A, a partnership firm, filed a suit against *B* to recover Rs 50,000. The suit was dismissed on the ground that it was not maintainable since the partnership firm was not registered as required by the provisions of the Indian Partnership Act, 1932. Thereafter, the firm was registered and the subsequent suit was filed on the same cause of action. The suit is not barred by *res judicata*.

(iv) Necessity of decision

In order to operate as *res judicata*, a finding of a court must have been necessary for the determination of a suit. If a finding is not necessary, it will not operate as *res judicata*. "It is fairly settled that the finding on an issue in the earlier suit to operate as *res judicata* should not have been only directly and substantially in issue but it should have been necessary to be decided as well."[162] What operates as *res judicata* is the *ratio* of what is fundamental to the decision. It cannot, however, be ramified or expanded by logical extension.[163] And a finding on an issue cannot be said to be necessary to the decision of a suit unless the decision was based upon such finding.[164] Again, a decision cannot be said to have been based upon a finding unless an appeal can lie against

[159] *State of Maharashtra* v. *National Construction Co.*, (1996) 1 SCC 735: AIR 1996 SC 2367.

[160] *Sheodan Singh* v. *Daryao Kunwar*, AIR 1966 SC 1332 at p. 1336: (1966) 3 SCR 300; *Tilokchand H.B. Motichand* v. *H.B. Munshi*, (1969) 1 SCC 110 at p. 121: AIR 1970 SC 898 at p. 906 (*per* Bachawat, J.).

[161] *Shivashankar Prasad* v. *Baikunth Nath*, (1969) 1 SCC 718 at p. 721: AIR 1969 SC 971 at pp. 973-74; *Pujari Bai* v. *Madan Gopal*, (1989) 3 SCC 433: AIR 1989 SC 1764 at pp. 768-69; *Pandurang Ramchandra* v. *Shanti Bai Ramchandra, supra*; *Krishan Lal* v. *State of J&K*, (1994) 4 SCC 422; *State of Maharashtra* v. *National Construction Co., supra*.

[162] *Most Rev. P.M.A. Metropolitan* v. *Moran Mar Marthoma*, 1995 Supp (4) SCC 286 at p. 336: AIR 1995 SC 2001 at p. 2034.

[163] *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 640: AIR 1989 SC 2240 at p. 2249; *Ramesh Chandra* v. *Shiv Charan Dass*, 1990 Supp SCC 633 at p. 635: AIR 1991 SC 264 at p. 265.

[164] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126; *Shankarlal* v. *Hiralal*, AIR 1950 PC 80; *Hayatuddin* v. *Abdul Gani*, AIR 1976 Bom 23 at p. 25.

such finding. The underlying principle is that "everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*".[165] It is the right of appeal which indicates whether the finding was necessary or merely incidental.[166]

(*v*) *Finding on more than one issue*

When a finding is recorded by a court on more than one issue, the legal position is as under:

(*A*) *When suit is dismissed*—If the plaintiff's suit is wholly dismissed, no issue decided against the defendant can operate as *res judicata* against him in a subsequent suit, for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the plaintiff may operate as *res judicata* against him in a subsequent suit, for he can appeal from a finding on such issue, the decree being against him.

(*B*) *When suit is decreed*—If the plaintiff's suit is wholly decreed, no issue decided against him can operate as *res judicata* for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. But every issue decided against the defendant is *res judicata* for he can appeal from a finding on such issue, the decree being against him.

(*C*) *Appeal against finding*—No appeal lies against a mere finding, for the simple reason that the Code does not provide for filing of any such appeal.[167] It may, however, be stated that a person aggrieved by a finding in the judgment may file cross-objections, even though the decree might have been passed in his favour.[168]

(*vi*) *Right of appeal*

A decision cannot be said to have been based upon a finding unless an appeal lies against such finding. As a general rule, "everything that should have authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally, an appeal is not competent on any point not having the authority of *res judicata*.[169] It is the right of appeal which indicates whether the finding was necessary or merely incidental.[170] The position is, however, substantially changed by the Amendment Act of 1976.

[165] *Narain Das* v. *Faiz Shah*, (1889) PR No. 157 (FB).

[166] This position is also, now, substantially changed by the Amendment Act of 1976. *See*, Mulla, *Code of Civil Procedure* (1995) Vol. 1 at pp. 171-74.

[167] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126.

[168] Explanation to R. 22, Or. 41.

[169] *Sobhag Singh* v. *Jai Singh*, AIR 1968 SC 1328 at p. 1332: (1968) 3 SCR 848; *Tara Singh* v. *Shakuntala*, AIR 1974 Raj 21.

[170] For detailed discussion *see supra*, "Condition IV".

(vii) Relief claimed but not granted: Explanation V

Explanation V to Section 11 provides that if a relief is claimed in a suit, but is not expressly granted in the decree, it will be deemed to have been refused and the matter in respect of which the relief is claimed will be *res judicata*.[171] But this explanation applies only when the relief claimed is (*i*) substantial relief; and (*ii*) the court is bound to grant it.

(19) Execution proceedings: Explanation VII

Prior to the addition of Explanation VII to Section 11 by the Amendment Act of 1976 in the Code of Civil Procedure, 1908, the provisions thereof did not, in terms apply to execution proceedings, but the general principles of *res judicata* were held to be applicable even to execution proceedings.[172]

Section 11 has now been amended by Act 104 of 1976. Explanation VII specifically provides that the provisions of Section 11 will directly apply to execution proceedings also.

(20) Industrial adjudication

Though Section 11 of the Code speaks about civil suits only, the general principles underlying the doctrine of *res judicata* apply even to an industrial adjudication.[173] Thus, an award pronounced by the Industrial Tribunal operates as *res judicata* between the same parties and the Payment of Wages Authority has no jurisdiction to entertain the said claim again. Similarly, if in an earlier case, the Labour Court had decided that *A* was not a "workman" under the Industrial Disputes Act, 1947, the said finding operates as *res judicata* in subsequent proceedings also. And there are good reasons why this principle should be extended and applied to industrial adjudication also. Legislation regulating the relation between capital and labour has two objects in view. It seeks to ensure to the workmen, who have not the capacity

[171] *Mysore SRTC* v. *Babajan Conductor*, (1977) 2 SCC 355 at p. 360: AIR 1977 SC 1112 at p. 1116.

[172] *Mohanlal Goenka* v. *Benoy Krishna*, AIR 1953 SC 65 at pp. 72-73: 1953 SCR 377; *Jai Narain* v. *Kedar Nath*, AIR 1956 SC 359: 1956 SCR 62; *Maqbool Alam* v. *Khodaija*, AIR 1966 SC 1194: (1966) 3 SCR 479; *Kani Ram* v. *Kazani*, (1972) 2 SCC 192: AIR 1972 SC 1427; *Prem Lata* v. *Lakshman Prasad*, (1970) 3 SCC 440: AIR 1970 SC 1525.

[173] *Burn & Co.* v. *Employees*, AIR 1957 SC 38 at p. 43: 1956 SCR 781; *Bombay Gas Co. Ltd.* v. *Shridhar Bhau Parab*, AIR 1961 SC 1196 at p. 1197-98: (1961) 2 LLJ 629; *Bombay Gas Co. Ltd.* v. *Jagannath Pandurang*, (1975) 4 SCC 690; *Punjab Coop. Bank Ltd.* v. *R. S. Bhatia*, (1975) 4 SCC 696 at p. 698: AIR 1975 SC 1898 at p. 1899; *Workmen* v. *Straw Board Mfg. Co. Ltd.*, (1974) 4 SCC 681 at pp. 692-93: AIR 1974 SC 1132 at p. 1140-41; *Workmen* v. *Hindustan Lever Ltd.*, (1984) 1 SCC 728 at p. 744-48: AIR 1984 SC 516 at p. 526-28; *Bharat Barrel & Drum Mfg. Co. (P) Ltd.* v. *Employees Union*, (1987) 2 SCC 591: AIR 1987 SC 1415; *Ghanshyam Jaiswal Dr.* v. *Kamal Singh*, (1996) 3 SCC 54; *Singhai Lal Chand* v. *Rashtriya Swayamsewak Sangh*, (1996) 3 SCC 149: AIR 1996 SC 1211; *Pondicherry Khadi & Village Industries Board* v. *P. Kulothangan*, (2004) 1 SCC 68: AIR 2003 SC 4701.

to combat capital on equal terms, fair returns for their labour. It also seeks to prevent disputes between employers and employees, so that production might not be adversely affected and the larger interests of society might not suffer. Thus, where an award was passed in earlier proceedings, it was held that the said award was binding on the parties and the subsequent proceedings initiated by the employees were barred.

In *Bombay Gas Co. Ltd.* v. *Jagannath Pandurang*[174], the Supreme Court observed:

> *"The doctrine of res judicata is wholesome one which is applicable not merely to matters governed by the provisions of the Code of Civil Procedure but to all litigations.* It proceeds on the principle that there should be no unnecessary litigation and whatever claims and defences are open to parties should all be put forward at the same time provided no confusion is likely to arise by so putting forward all such claims."[175] (emphasis supplied)

In other words, the principle underlying Section 11, expressed in the maxim *"interest reipublicae ut sit finis litium"* (it is in the interest of the State that there should be an end to litigation) is founded on sound public policy and is of universal application, otherwise great injustice might be done under colour and pretence of law.[176] The rule of *res judicata* is dictated by a wisdom which is for all times.[177]

However, the technical rule of *res judicata* cannot apply to industrial adjudication, since it is meant and suited for ordinary civil litigation.[178] Principles analogous to *res judicata* can be availed of to scuttle any attempt at raising industrial disputes repeatedly in defiance of operative settlements and awards. But this highly-technical concept of civil justice must be kept within precise, confined limits in the field of industrial adjudication which must as far as possible be kept free from such technicalities which thwart resolution of industrial disputes.

[174] (1975) 4 SCC 690: (1975) 2 LLJ 345.

[175] *Ibid*, at pp. 695-96 (SCC).

[176] *Per* Lord Coke, quoted in *Sheoparsan Singh* v. *Ramnandan Singh*, AIR 1916 PC 78: (1915-16) 43 IA 91.

[177] *Per* Jenkins, C.J. in *Sheoparsan Singh* v. *Ramnandan Singh* (*ibid.*).

[178] *Guest, Keen, Williams (P) Ltd.* v. *P.J. Sterling*, AIR 1959 SC 1279 at p. 1284: (1960) 1 SCR 348; *India General Navigation and Railway Co. Ltd.* v. *Workmen*, AIR 1960 SC 1286 at p. 1287: (1960) 1 LLJ 561; *Workmen* v. *Balmer Lawrie & Co. Ltd.*, AIR 1964 SC 728 at p. 731: (1964) 5 SCR 344; *Staff Union* v. *Associated Cement Co. Ltd.*, AIR 1964 SC 914 at p. 917: (1964) 1 LLJ 12; *Shahadara (Delhi) Saharanpur Light Rly. Co. Ltd.* v. *S.S. Rly. Workers' Union*, AIR 1969 SC 513 at pp. 521-22: (1969) 2 SCR 131; *Agra Electric Supply Co. Ltd.* v. *Alladdin*, (1969) 2 SCC 598 at pp. 605-06: AIR 1970 SC 512 at pp. 517-18; *Mumbai Kamgar Sabha* v. *Abdulbhai*, (1976) 3 SCC 832 at pp. 851-52: AIR 1976 SC 1455 at pp. 1469-70; *Workmen* v. *Hindustan Lever Ltd.*, (1984) 1 SCC 728 at pp. 744-48: AIR 1984 SC 516 at pp. 526-28.

Therefore, the principle of *res judicata* should be applied with caution to industrial adjudication. Thus, even where conditions of service had been changed only a few years before, industrial adjudication has allowed fresh changes when convinced of the necessity and justification for the same. Similarly, wage structure, revision of pay scales, etc., can be examined on the merits of each individual case and technical considerations of *res judicata* should not be allowed to hamper the discretion of industrial adjudication.

It is submitted that the following observations of Gajendragadkar, J. (as he then was) in the case of *Trichinopoly Mills Ltd.* v. *National Cotton Textile Mill Workers' Union*[179] lay down correct law on the point and require to be quoted:

> "It is not denied that the principles of *res judicata* cannot be strictly invoked in the decisions of such points though it is equally true that industrial tribunals would not be justified in changing the amounts of rehabilitation from year to year without sufficient cause."[180]

(21) Taxation matters

The liability to pay tax from year to year is a separate, distinct and independent liability. Each year of assessment is, therefore, a separate unit and does not apply to subsequent assessments. Consequently, the doctrine of *res judicata* has no application in such cases.[181]

A distinction, however, must be made between a question of fact and pure question of law. Each assessment year, being an independent unit, a decision for one year may not operate as *res judicata* in another year. But if a pure question of law, e.g. constitutional validity of a statute is decided, "it may not be easy to hold that the decision on this basic and material issue would not operate as *res judicata* against the assessee for a subsequent year".[182]

[179] AIR 1960 SC 1003: (1960) 2 LLJ 46.

[180] *Ibid*, at p. 1004 (AIR). *See also*, Author's *Lectures on Administrative Law* (2008) Lecture VII.

[181] *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council*, 1925 All ER 672: 1926 AC 94; *Maharana Mills (P) Ltd.* v. *ITO*, AIR 1959 SC 881: 1959 Supp (2) SCR 547; *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013 at p. 1019: 1963 Supp (1) SCR 172; *Udayan Chinubhai* v. *CIT*, AIR 1967 SC 762: (1967) 1 SCR 913; *M.M. Ipoh* v. *CIT*, AIR 1968 SC 317: (1968) 1 SCR 65; *Radhasoami Satsang* v. *CIT*, (1992) 1 SCC 659: AIR 1992 SC 377.

[182] *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013: 1963 Supp (1) SCR 172; *Radhasoami Satsang* v. *CIT*, (1992) 1 SCC 659: AIR 1992 SC 377.

(22) Public interest litigation

Since the primary object of *res judicata* is to bring an end to litigation, there is no reason not to extend the doctrine to public interest litigation. In *Forward Construction Co.* v. *Prabhat Mandal (Regd.)*[183], the Supreme Court was directly called upon to decide the question. The Apex Court held that the principle would apply to public interest litigation provided it was a *bona fide* litigation. In another case,[184] it was observed, "It is a repetitive litigation on the very same issue coming up before the courts again and again in the garb of public interest litigation. *It is high time to put an end to the same.*"[185] (emphasis supplied)

(23) Criminal proceedings

The doctrine of *res judicata* is of universal application. It is a fundamental concept in the organisation to every jural society. The rule, therefore, should apply even to criminal proceedings.[186]

Once a person is acquitted or convicted by a competent criminal court, he cannot, once again, be tried for the same offence. As held by the Supreme Court,[187] the principle of *res judicata* is applicable to criminal proceedings also.

In *Sambasivam* v. *Public Prosecutor, Federation of Malaya*[188], Lord MacDermott rightly stated that the maxim *'res judicata pro veritate accipitur'* is no less applicable to criminal than to civil proceedings.

(24) Writ petitions

(*a*) *General*—It has been settled since long that though Section 11 of the Code does not, in terms, apply to writ petitions, there is no good ground to preclude decisions in matters in controversy in writ proceedings under Article 32 or Article 226 of the Constitution from operating as *res judicata* in subsequent petitions or regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of finality of decision after full contest.[189]

[183] (1986) 1 SCC 100: AIR 1986 SC 391.

[184] *Ramdas* v. *Union of India*, AIR 1995 Bom 235.

[185] *Ramdas* v. *Union of India*, AIR 1995 Bom 235.

[186] *Center of Indian Trade Unions* v. *Union of India*, AIR 1997 Bom 79: (1997) 1 Mah LR 1: (1997) 2 Bom CR 531. For further discussion, *see supra*, "Same parties".

[187] *Bhagat Ram* v. *State of Rajasthan*, (1972) 2 SCC 466: AIR 1972 SC 1502; see also *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *Ramekbal Tiwary* v. *Madan Mohan Tiwary*, AIR 1967 SC 1156: (1967) 2 SCR 368.

[188] 1950 AC 458 at p. 463: 66 TLR 254.

[189] *M.S.M. Sharma* v. *Dr. Shree Krishna*, AIR 1960 SC 1186 at p. 1190: (1961) 1 SCR 96; *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *Raja Jagannath Baksh* v. *State of U.P.*, AIR 1962 SC 1563 at p. 1566; *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013 at p. 1017-20: 1963 Supp (1) SCR 172; *Devilal Modi* v. *STO*, AIR 1965 SC 1150: (1965) 1 SCR 686; *Gulabchand Chhotalal Parikh* v. *State of Gujarat*, AIR 1965 SC 1153: (1965) 1 SCR 547; *Virdhunagar Steel Rolling Mills Ltd.* v. *Govt. of Madras*, AIR 1968 SC 1196

(*b*) *Doctrine explained.*—In *M.S.M. Sharma* v. *Dr. Shree Krishna*[190], for the first time, the Supreme Court held that the general principle of *res judicata* applies even to writ petitions filed under Article 32 of the Constitution of India. Thus, if once the petition filed under Article 32 of the Constitution is dismissed by the court, subsequent petition is barred. Similarly, if a writ petition filed by a party under Article 226 is considered *on merits* as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed in appeal or in other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and again move the High Court under Article 226 or the Supreme Court under Article 32 on the same facts and for obtaining the same or similar orders or writs.[191]

In the leading case of *Daryao* v. *State of U.P.*[192], the Supreme Court has placed the doctrine of *res judicata* on a higher footing, considering and treating the binding character of judgments pronounced by competent courts as an essential part of the rule of law. Gajendragadkar, J. (as he then was) rightly observed:

> "It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32."[193]

Again, there is no good reason to preclude the decisions on matters in controversy in writ proceedings under Article 226 or 32 of the Constitution from operating as *res judicata* in subsequent regular suits

at p. 1198: (1968) 2 SCR 740; *Union of India* v. *Nanak Singh*, AIR 1968 SC 1370 at p. 1372: (1968) 2 SCR 887; *State of Punjab* v. *Bua Das Kaushal*, (1970) 3 SCC 656 at p. 657: AIR 1971 SC 1676 at p. 1677; *Har Swarup* v. *Central Rly.*, (1975) 3 SCC 621 at pp. 627-28: AIR 1975 SC 202 at pp. 206-07; *Workmen* v. *Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119 at pp. 124-27: AIR 1978 SC 1283 at pp. 1287-88; *Maqbool Raza* v. *Hasan Raza*, (1977) 3 SCC 578 at p. 580: AIR 1978 SC 1398 at p. 1399; *Sarguja Transport Service* v. *STAT*, (1987) 1 SCC 5: AIR 1987 SC 88; *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 at p. 741; *Avinash Nagra* v. *Navodaya Vidyalaya Samiti*, (1997) 2 SCC 534; *Durg Rajnandgaon Grameen Bank* v. *Suresh Kumar Shukla*, (1999) 1 SCC 243. *See also*, Explanation to S. 141 as added by the Amendment Act of 1976.

[190] AIR 1960 SC 1186: (1961) 1 SCR 96; *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013: 1963 Supp (1) SCR 172.

[191] *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574.

[192] AIR 1961 SC 1457: (1962) 1 SCR 574.

[193] *Ibid*, at p. 1462 (AIR); see also *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 at p. 741.

on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest.

In *Gulabchand Chhotalal Parikh* v. *State of Gujarat*[194], the Supreme Court observed:

> "We are of opinion that the provisions of Section 11, CPC are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. *The nature of the former proceeding is immaterial.*"[195] (emphasis supplied)

(*c*) *Summary dismissal.*—Sometimes a peculiar situation arises. A petition may be dismissed by the court *in limine* without admitting it for final hearing. The question may arise whether such a dismissal of a petition operates as *res judicata*. No hard and fast rule can be laid down, and whether or not such an order of dismissal would constitute a bar would depend upon the facts and circumstances of each case and upon the nature of the order. If the order is on merits, it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not.[196]

If the petition is dismissed *in limine* without passing a speaking order then such dismissal cannot be treated as creating a bar of *res judicata*. It is true that, *prima facie*, dismissal *in limine* even without passing a speaking order in that behalf may strongly suggest that the court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata*.

Summary dismissal does not affect the jurisdiction of the court to entertain fresh petition. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in

[194] AIR 1965 SC 1153: (1965) 1 SCR 547.

[195] *Ibid*, at p. 1167 (AIR).

[196] *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *B. Prabhakar Rao* v. *State of A.P.*, 1985 Supp SCC 432: 1985 Lab IC 1545.

such a case there has been no decision on merits by the court.[197] The reason is simple. The order of a court has to be read as it is. If the court intended to dismiss the petition at the threshold, it could have said so explicitly. In the absence of any indication in the order itself, it would not be proper to enter into the arena of conjecture and to come to a conclusion on the basis of extraneous evidence that the court, in fact, intended to dismiss the petition on merits.[198] If a non-speaking order of dismissal of a petition cannot operate as *res judicata*, obviously, an order permitting the withdrawal of the petition for the same reasons cannot also operate as *res judicata*. At the same time, however, if a petitioner withdraws the petition without permission to file a fresh petition on the same cause of action, a subsequent petition is not maintainable.[199]

(*d*) *Constructive res judicata.*—A question sometimes arises as to whether the rule of constructive *res judicata* can be applied to writ petitions. This question arose for the first time before the Supreme Court in the case of *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*[200]. In that case, the earlier notices issued by the respondent Sabha against the companies calling upon them to pay tax were challenged on certain grounds. At the time of hearing of the petitions, an additional ground was also taken and the authority of the Sabha to increase the rate of tax was challenged. However, since there was no pleading, the said point was not allowed to be argued and the petitions were dismissed. The said decision was upheld even by the Supreme Court.[201] Thereafter, once again when the notices were issued in respect of the different period, they were challenged on that additional ground, which was not permitted to be argued in the previous litigation. The High Court dismissed the petitions holding that they were barred by *res judicata*.

Allowing the appeals, the Supreme Court observed:

> "It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same ground which was urged on the earlier occasion is placed before the court in another form. The grounds now urged are entirely distinct and so, the decision of the High Court can be

[197] *Daryao* v. *State of U.P.*, (*ibid.*), see also *Workmen* v. *Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119 at pp. 125-26: AIR 1978 SC 1283 at pp. 1287-88; *Ahmedabad Mfg. Co.* v. *Workmen*, (1981) 2 SCC 663 at pp. 666-67: AIR 1981 SC 960 at pp. 962-63.

[198] *Daryao* v. *State of U.P.*, (*ibid.*).

[199] *Sarguja Transport Service* v. *STAT*, (1987) 1 SCC 5: AIR 1987 SC 88; *State of Maharashtra* v. *Ishwar Piraji*, (1996) 1 SCC 542: AIR 1996 SC 722; *Upadhyay & Co.* v. *State of U.P.*, (1999) 1 SCC 81: AIR 1999 SC 509.

[200] AIR 1964 SC 1013: 1963 Supp (1) SCR 172.

[201] *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013 at p. 1019: 1963 Supp (1) SCR 172.

upheld only if the principle of constructive *res judicata* could be said to apply to writ petitions filed under Article 32 or Article 226. *In our opinion, constructive res judicata which is a special and artificial form of res judicata enacted by Section 11 of the Civil Procedure Code should not generally be applied to writ petitions filed under Article 32 or Article 226.*"[202] (emphasis supplied)

In *Gulabchand Chhotalal Parikh* v. *State of Gujarat*[203] the Supreme Court did not decide the point whether the principles of constructive *res judicata* could be applied to writ petitions and the said question was left open.

However, now the position appears to be well-settled that the principle of constructive *res judicata* also applies to writ petitions. In *Devilal Modi* v. *STO*[204], discussing the applicability of constructive *res judicata*, the Supreme Court observed:

"This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but, basically, even this view is founded on the same considerations of public policy, because *if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy... .*"[205] (emphasis supplied)

A direct question, however, arose before the Supreme Court in the case of *State of U.P.* v. *Nawab Hussain*[206]. In that case, a Police S.-I. was dismissed from service by the D.I.-G. He challenged the said decision by filing a writ petition in the High Court on the ground that he was not afforded a reasonable opportunity, but the petition was dismissed. He then filed a suit and raised an additional plea that he was appointed by the I.G.-P. and D.I.-G. was not competent to pass an order against him. The State contended that the suit was barred by constructive *res judicata*. All the courts including the High Court held against the State and the matter was taken to the Supreme Court.

Allowing the appeal and after considering all the leading cases on the point, the court held that the plea was clearly barred by the principle of constructive *res judicata* as such plea was within the knowledge

[202] *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*, AIR 1964 SC 1013 at p. 1019: 1963 Supp (1) SCR 172.

[203] AIR 1965 SC 1153: (1965) 1 SCR 547.

[204] AIR 1965 SC 1150: (1965) 1 SCR 686.

[205] *Ibid.* at p. 1152 (AIR).

[206] (1977) 2 SCC 806: AIR 1977 SC 1680.

of the Police S.-I. and it could have been taken in the writ petition but was not taken at that time. The principle of *res judicata* comes into play not only when the issue has been directly and explicitly decided by the court, but also when such issue has been implicitly and constructively decided. *When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eyes of the law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.*[207] (emphasis supplied)

(*e*) *Habeas corpus petitions.*—English[208] as well as American[209] courts have taken the view that the principle of *res judicata* is not applicable to a writ of *habeas corpus*. In India also, the doctrine of *res judicata* is not made applicable to cases of habeas corpus petitions. In *Ghulam Sarwar* v. *Union of India*[210], rejecting the plea of application of constructive *res judicata*, the Supreme Court observed:

> "If the doctrine of constructive *res judicata* be applied, this Court, though is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. *That would be whittling down the wide sweep of the constitutional protection.*"[211] (emphasis supplied)

In *Lallubhai* v. *Union of India*[212], the petitioner was detained and the petition filed against the said order was dismissed by the Supreme Court by an order dated 9 May 1980, but the reasons were given on 4 August 1980. After the order of dismissal but before the reasons were recorded, the petitioner filed additional grounds on 21 July 1980. However, on 30 July 1980, he was informed that he may, if so advised, file a fresh petition on those additional grounds, which he did. The question which arose before the Supreme Court was whether the principle of constructive *res judicata* could apply to a writ of *habeas corpus*.

[207] *Ibid*, at p. 814 (SCC): at p. 1686 (AIR); see also, *Workmen* v. *Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119 at pp. 124-25: AIR 1978 SC 1283 at p. 1287; *Forward Construction Co.* v. *Prabhat Mandal (Regd.)*, (1986) 1 SCC 100: AIR 1986 SC 391; *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 at p. 741: AIR 1990 SC 1607.

[208] *Cox* v. *Hakes*, (1890) 15 AC 506; *Eshugbayi* v. *Nigerian Govt.*, 1928 AC 459; *Chapple, ex p.*, (1950) 66 TLR 932; *Hastings (No. 2), In re*, (1958) 3 All ER 625; *Hastings (No. 3), In re*, (1959) 1 All ER 698.

[209] *Edward* v. *Charles*, (1835) 9 LE 859; *Frank* v. *Mangum*, 237 US 309 (1915); *Salinger* v. *Loisel*, 68 L Ed 989: 265 US 224 (1923); *Waley v. Johnston*, 86 L Ed 1302: 316 US 101 (1941); *U.S.* v. *Shaughnessy*, 98 L Ed 681: 347 US 260 (1959).

[210] AIR 1967 SC 1335: (1967) 2 SCR 271.

[211] *Ibid*, at p. 1338 (AIR) *per* Subba Rao, C.J. See also supra, *Daryao case*; *Nazul Ali* v. *State of W.B.*, (1969) 3 SCC 698; *Niranjan Singh* v. *State of M.P.*, (1972) 2 SCC 542: AIR 1972 SC 2215; *T.P. Moideen Koya* v. *Govt. of Kerala*, (2004) 8 SCC 106: AIR 2004 SC 2120.

[212] (1981) 2 SCC 427: AIR 1981 SC 728.

After considering leading decisions on the point, Sarkaria, J. made the following remarkable observations, which, it is submitted, lay down correct law:

> "The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive *res judicata* is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of *habeas corpus* under Article 32 of the Constitution *on fresh grounds*, which were not taken in the earlier petition for the same relief."[213]
>
> (emphasis supplied)

(*f*) *General principles.*—In the leading case of *Daryao* v. *State of U.P.*[214], the Supreme Court has exhaustively dealt with the question of applicability of the principle of *res judicata* in writ proceedings and laid down certain principles which may be summarised thus:

1. If a petition under Article 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.
2. It would not be open to a party to ignore the said judgment and move the Supreme Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.
3. If the petition under Article 226 in a High Court is dismissed not on the merits but because of laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32.
4. Such a dismissal may, however, constitute a bar to a subsequent application under Article 32 where and if the facts thus found by the High Court be themselves relevant even under Article 32.
5. If the writ petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.

[213] *Ibid*, at p. 433 (SCC): at p. 731 (AIR); see also *Kirit Kumar* v. *Union of India*, (1981) 2 SCC 436: AIR 1981 SC 1621; *Sarguja Transport Service* v. *STAT*, (1987) 1 SCC 5: AIR 1987 SC 88; *T.P. Moideen Koya* v. *Govt. of Kerala*, (2004) 8 SCC 106: AIR 2004 SC 2120. *See also*, Author's *Lectures on Administrative Law* (2008) Lecture VII.

[214] AIR 1961 SC 1457: (1962) 1 SCR 574.

6 If the petition is dismissed *in limine* without a speaking order, such dismissal cannot be treated as creating a bar of *res judicata.*

7 If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Article 32 because, in such a case, there had been no decision on merits by the Court.[215]

To the above principles, few more may be added:

8 The doctrine of constructive *res judicata* applies to writ proceedings and when any point which *might* and *ought* to have been taken but was not taken in an earlier proceeding cannot be taken in a subsequent proceeding.[216]

9 The rule of constructive *res judicata* however does not apply to a writ of *habeas corpus.* Therefore, even after the dismissal of one petition of *habeas corpus,* a second petition is maintainable if fresh, new or additional grounds are available.[217]

10 The general principles of *res judicata* apply to different stages of the same suit or proceeding.[218]

11 If a petitioner withdraws the petition without the leave of the court to institute a fresh petition on the same subject-matter, the fresh petition is not maintainable.[219]

(25) Dismissal for default

The dismissal of suit in default cannot be said to be a matter "heard and finally decided" on merits and, hence, such dismissal will not operate as *res judicata* between the parties in subsequent proceedings.[220] In *Chand Kour* v. *Partab Singh,*[221] heir Lordships of the Privy Council observed that dismissal of a suit for plaintiff's default of appearance was plainly not intended to operate as *res judicata.* No doubt, it imposes certain disability upon the plaintiff. For instance, he is thereby precluded from bringing a fresh suit in respect of the same cause of action.

[215] *Daryao* v. *State of U.P.,* AIR 1961 SC 1457 at pp. 1465-66. For detailed discussion, *see,* V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. III, Chap. 1.

[216] *See supra,* "Constructive res judicata".

[217] *See supra,* "Habeas Corpus".

[218] *Satyadhyan Ghosal* v. *Deorjin Debi,* AIR 1960 SC 941: (1960) 3 SCR 590; *Arjun Singh* v. *Mohindra Kumar,* AIR 1964 SC 993: (1964) 5 SCR 946; *see also infra,* "Interim Orders".

[219] *Daryao* v. *State of U.P.,* AIR 1961 SC 1457: (1962) 1 SCR 574; *Sarguja Transport Service* v. *STAT,* (1987) 1 SCC 5: AIR 1987 SC 88; *Bhagwandas D. Tandel* v. *DG of Police,* (1996) 1 Guj LR 782: (1996) 1 Guj LH 433: (1996) 1 Guj CD 738.

[220] *Sheodan Singh* v. *Daryao Kunwar,* AIR 1966 SC 1332 at p. 1336: (1966) 3 SCR 300; *Ram Gobinda* v. *Bhaktabala,* (1971) 1 SCC 387 at p. 394: AIR 1971 SC 664 at pp. 670-71; *B. Prabhakar Rao* v. *State of A.P.,* 1985 Supp SCC 432 at pp. 464-65: AIR 1986 SC 210 at pp. 227-228; *Ram Awadh* v. *Director of Consolidation,* AIR 1986 All 167; *I.C. Co.* v. *Union of India,* AIR 1976 AP 76.

[221] (1887-88) 15 IA 156 (PC): ILR (1889) 16 Cal 98 at p. 102.

(26) Dismissal in limine

Sometimes, an application may be dismissed by the court by one word "dismissed". It is well-settled that such dismissal of an application *in limine* without passing a speaking order or recording reasons will not operate as *res judicata* in subsequent proceedings. No doubt, *prima facie* such dismissal would indicate that the court considered all the contentions and arguments of the applicant and dismissed the application not finding any substance therein. But in absence of grounds or reasons, it is difficult to decide what factors weighed with the court and why order of dismissal was passed.[222]

(27) Dismissal of Special Leave Petition (SLP)

The dismissal of a special leave petition *in limine* by a non-speaking order does not operate as *res judicata* between the parties and will not bar a fresh petition either under Article 32 or under Article 226 of the Constitution.[223]

As observed in *Workmen* v. *Board of Trustees, Cochin Port Trust,*[224] the effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court did not consider it to be a fit case where special leave should be granted. The conclusion might have been reached for several reasons. But when the order was not a speaking one, it cannot be assumed that the Supreme Court had necessarily decided all the questions in relation to the merits of the controversy which was under challenge in special leave petition. The dismissal of a special leave petition *in limine* by a non-speaking order does not, therefore, justify any inference that by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court.[225]

[222] *Daryao* v. *State of U.P.*, AIR 1961 SC 1457 at pp. 1465-66: (1962) 1 SCR 574.

[223] *Workmen* v. *Board of Trustees, Cochin Port Trust*, (1978) 3 SCC 119: AIR 1978 SC 1283; *Indian Oil Corpn. Ltd.* v. *State of Bihar*, (1986) 4 SCC 146: AIR 1986 SC 1780; *Ahmedabad Mfg. & Calico Printing Co. Ltd.* v. *Workmen*, (1981) 2 SCC 663: AIR 1981 SC 960; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187: AIR 1990 SC 334: (1989) 2 LLJ 506; *Yogendra Narayan* v. *Union of India*, (1996) 7 SCC 1; *Sree Narayana Dharmasanghom Trust* v. *Swami Prakasananda*, (1997) 6 SCC 78; *State of Maharashtra* v. *Prabhakar Bhikaji*, (1996) 3 SCC 463: AIR 1996 SC 3069; *Gopabandhu Biswal* v. *Krishna Chandra*, (1998) 4 SCC 447: AIR 1998 SC 1872

[224] (1978) 3 SCC 119: AIR 1978 SC 1283.

[225] *Ibid*, at pp. 125-26 (SCC); see also *Indian Oil Corpn. Ltd.* v. *State of Bihar*, (1986) 4 SCC 146: AIR 1986 SC 1780. For detailed discussion, *see*, V.G. Ramachandran: *Law of Writs* (2006) Vol. II at pp 581-83.

(28) Ex parte decree

An *ex parte* decree is a decree passed in absence of the defendant. Where the plaintiff appears and the defendant does not appear when the suit is called out for hearing even though duly served, the court may hear the suit in absence of the defendant and may pass a decree against him. Such decree is called *ex parte* decree.[226]

An *ex parte* decree passed by a competent court on merits will operate as *res judicata*. The fact that the defendant did not appear and the decree is *ex parte* is immaterial for application of Section 11 of the Code.[227]

It is well-settled that a party is as much bound by an ex parte decree as by a *bi-parte* decree. The only difference between the two is that in the former, the defendant was absent while in the latter, he was present.[228]

(29) Compromise decree

A compromise decree is not a decision by a court. It is the acceptance by a court of something to which the parties had agreed. A compromise decree merely sets the seal of a court on the agreement of parties. A court does not decide anything. Nor can it be said that the decision of a court is implicit in it.[229]

The decisions of courts are not uniform on the question whether the doctrine of *res judicata* applies to consent decrees. In some cases, it has been held that consent decrees operates as *res judicata*[230] whereas in some other cases, a contrary view is taken.[231]

It is submitted that the correct view is that the doctrine of *res judicata* does not apply to a consent decree, as in a consent decree a matter cannot be said to be "heard and finally decided" on merits. Such decree, however, precludes a party from challenging it by a rule of estoppel.[232]

[226] For detailed discussion of "*ex-parte*" decree, *see infra*, Chap. 8.

[227] *Chandu Lal* v. *Khalilur Rahaman*, AIR 1950 PC 17: (1949-50) 77 IA 27; *Raj Lakshmi* v. *Banamali Sen*, AIR 1953 SC 33: 1953 SCR 154; *Ram Gobinda* v. *Bhaktabala*, (1971) 1 SCC 387: AIR 1971 SC 664; *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627: AIR 1989 SC 2240.

[228] *Ibid*, see also *Vishnu Sagar Mills Ltd.* v. *ISP Trading Co.*, AIR 1984 Cal 246; *Bramhanand Rai* v. *Director of Consolidation*, AIR 1987 All 100: (1986) 12 All LR 97: 1986 All WC 306.

[229] *Pulavarthi Venkata* v. *Valluri Jagannadha*, AIR 1967 SC 591: (1964) 2 SCR 310; *Baldevdas* v. *Filmistan Distributors (India) (P) Ltd.*, (1969) 2 SCC 201: AIR 1970 SC 406.

[230] *Subba Rao* (*ibid.*) at p. 595 (AIR); *Baldevdas* (*ibid.*) at pp. 409-10 (AIR).

[231] *Shankar* v. *Balkrishna*, AIR 1954 SC 352: (1955) 1 SCR 99; *Prithvichand* v. *S.Y. Shinde*, (1993) 3 SCC 271: AIR 1993 SC 1929.

[232] *Sunderabai* v. *Devaji Shankar Deshpande*, AIR 1954 SC 82; *Sailendra Narayan Bhanja Deo* v. *State of Orissa*, AIR 1956 SC 346: 1956 SCR 72; see also, *Subha Rao*, *Baldevdas*, *Shankar*, *Prithvichand*, *supra*. For detailed discussion and conflicting decisions, *see*, C.K. Thakkar, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 230-34.

(30) Withdrawal of suit

A withdrawal of a suit does not operate as *res judicata* in filing a subsequent suit for the same cause of action. The basic principle of *res judicata* being final adjudication on merits, there can be no bar of *res judicata* if the suit is withdrawn. It is true that ordinarily when the plaintiff or the applicant finds that the court is not likely to grant relief that he seeks permission to withdraw the suit or application. But since there is no decision on merits, there cannot be a bar of *res judicata* in instituting a fresh suit or application. But such withdrawal would be a bar to the filing of a fresh suit under Or. 23 R. 1 of the Code.[233]

(31) Change in circumstances

The doctrine of *res judicata* applies to static situations and not to changing circumstances.

Thus, if a suit for eviction on the ground of *bona fide* requirement is dismissed, the second suit would not operate as *res judicata* if circumstances have been changed. It is well-settled that *bona fide* need must be considered with reference to the time when suit is taken up for hearing and is decided.[234]

Again, even if earlier petition by husband against his wife for divorce on ground of cruelty or desertion was dismissed for want of evidence, the subsequent petition will not be barred if the wife herself has stated that she is not inclined to return to matrimonial home.[235]

(32) Change in law

Where subsequent to a decision rendered by a court, the law has been changed, *res judicata* will not operate. Cases must be decided upon the law as it stands when judgment is pronounced and not upon what it was at the date of previous suit the law having been altered in the meantime.[236]

[233] *Sarguja Transport Service* v. *STAT*, (1987) 1 SCC 5: AIR 1987 SC 88, *see also infra*, Chap. 12.

[234] *Surajmal* v. *Radheyshyam*, (1988) 3 SCC 18: AIR 1988 SC 1348; *Korin* v. *India Cable Co. Ltd.*, (1978) 1 SCC 98: AIR 1978 SC 312.

[235] *Pramod Purshottam* v. *Vasundhara Pramod*, AIR 1989 Bom 75; *Ram Shanker Rastogi* v. *Vinay Rastogi*, AIR 1991 All 255: (1991) 13 All LR 67.

[236] *Alimunissa Chowdhrani* v. *Shama Charan Roy*, (1905) 32 Cal 749: 9 CWN 466; *Jaisingh* v. *Manamchand*, (1980) 3 SCC 162: AIR 1980 SC 1201; *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613: AIR 1971 SC 2355.

(33) Erroneous decision

The doctrine of *res judicata* applies whether the point involved in the earlier decision is one of fact, or one of law, or one of mixed law and fact.[237]

An incorrect decision is not the same as without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be set aside only in *appeals* or revisions to higher courts or tribunals if the law provides such remedy.[238] A pure question of law or of jurisdiction, however, does not operate as *res judicata*.[239]

(34) Test

In order to decide the question whether a subsequent proceeding is barred by *res judicata* it is necessary to examine the question with reference to (*i*) forum or competence of the court; (*ii*) parties and their representatives; (*iii*) matters in issue; (*iv*) matters which ought to have been made ground for attack or defence in the former suit; and (*v*) the final decision.[240]

(35) Interim orders

The doctrine of *res judicata* applies also to different stages of the same suit or proceeding. If any interlocutory order decides a controversy in part between parties, such decision would bind the parties and operate as *res judicata* at all subsequent stages of the suit and a court will not permit the party to "set the clock back" during the pendency of the proceeding.[241] For instance, orders regarding impleadment of parties, maintainability of a suit, jurisdiction of the Court, etc., once passed cannot be reopened in the same proceedings. It is, however, open to the party to challenge the correctness of such order later on in regular appeals or other appropriate proceedings arising out of the final judgment of the court.[242]

[237] *Halsbury's Laws of England* (2nd Edn.) Vol. 13, para 464 at pp. 409-10; *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613: AIR 1971 SC 2355.

[238] *Ibid*, see also *Isabella Johnson* v. *M.A. Susai*, (1991) 1 SCC 494; *Tarini Charan* v. *Kedar Nath Haldar*, AIR 1928 Cal 777: (1928) 56 Cal 723: 33 CWN 126; *Mohanlal Goenka* v. *Benoy Krishna*, AIR 1953 SC 65: 1953 SCR 377.

[239] *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, *supra*. For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 278-93.

[240] *Jaswant Singh* v. *Custodian*, (1985) 3 SCC 648: AIR 1985 SC 1096.

[241] *Satyadhyan Ghosal* v. *Deorjin Debi*, AIR 1960 SC 941: (1960) 3 SCR 590; *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993: (1964) 5 SCR 946; *Prahlad Singh* v. *Sukhdev Singh*, (1987) 1 SCC 727: AIR 1987 SC 1145; *Devidayal Rolling Mills* v. *Prakash Chimanlal*, (1993) 2 SCC 470: AIR 1993 SC 1982; *Ishwar Dutt* v. *Land Acquisition Collector*, (2005) 7 SCC 190: AIR 2005 SC 3165; *Ajay Mohan* v. *H.N. Rai*, (2008) 2 SCC 507: AIR 2008 SC 804.

[242] *Ibid*, see also *Jasraj Inder Singh* v. *Hemraj Multanchand*, (1977) 2 SCC 155: AIR 1977 SC 1011; *Sukhrani* v. *Hari Shanker*, (1979) 2 SCC 463: AIR 1979 SC 1436; *Devidayal Rolling*

4. BAR OF SUIT: SECTION 12

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies.[243]

The Code of Civil Procedure precludes a plaintiff from instituting a suit in the following cases:

(1)	Section 11	—	Where a suit is barred by *res judicata*.
(2)	Section 21-A	—	Where a decree is sought to be challenged on objection as to territorial (and/or pecuniary) jurisdiction of a Court.
(3)	Section 47(1)	—	Where questions relate to execution, discharge or satisfaction of decree.
(4)	Section 95(2)	—	Where an order is made determining an application for compensation for arrest, attachment or temporary injunction.
(5)	Section 144(2)	—	Where restitution can be claimed.
(6)	Order 2 Rule 2	—	Where there is omission to sue in respect of part of claim by a plaintiff.
(7)	Order 9 Rule 9	—	Where a decree is passed against a plaintiff by default.
(8)	Order 11 Rule 21(2)	—	Where a suit is dismissed for non-compliance with an order of discovery.
(9)	Order 22 Rule 9	—	Where a suit has abated.
(10)	Order 23 Rule 1(1)	—	Where a suit or part of a claim has been abandoned by a plaintiff.
(11)	Order 23 Rule 1(3)	—	Where a suit or part of a claim has been withdrawn by a plaintiff without the leave of the court.
(12)	Order 23 Rule 3-A	—	Where a compromise decree is sought to be challenged on the ground that the compromise was not lawful.

Mills v. *Prakash Chimanlal*, (1993) 2 SCC 470; *see also*, second proviso to Or. 39 R. 4.

[243] S. 12. For detailed discussion, *see*, those provisions.

PART II

3 Foreign Judgment

SYNOPSIS

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1. GENERAL

SECTIONS 13 and 14 enact a rule of *res judicata* in case of foreign judgments. These provisions embody the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as *res judicata* between the parties thereto except in the cases mentioned in Section 13.

2. FOREIGN COURT: DEFINITION

"Foreign court" is defined as a court situate outside India and not established or continued by the authority of the Central Government.[1]

[1] Section 2(5). For detailed discussion, *see supra*, Pt. I, Chap. 2.

3. FOREIGN JUDGMENT: DEFINITION

"Foreign judgment" means a judgment of a foreign court.[2] In other words, a foreign judgment means an adjudication by a foreign court upon a matter before it.[3] Thus judgments delivered by courts in England, France, Germany, USA, etc. are foreign judgments.

4. NATURE AND SCOPE

Section 13 embodies the principle of *res judicata* in foreign judgments. This provision embodies the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced in India. The section is not confined in its application to plaintiffs. A defendant is equally entitled to non-suit the plaintiff on the basis of a foreign judgment.[4]

5. OBJECT

The judgment of a foreign court is enforced on the principle that where a court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy that claim. The rules of private international law of each State must in the very nature of things differ, but by the comity of nations certain rules are recognised as common to civilised jurisdictions. Through part of the judicial system of each State these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign courts in certain matters, or as a result of international conventions.[5] Such a recognition is accorded not as an act of courtesy but on considerations of justice, equity and good conscience.[6] An awareness of foreign law in a parallel jurisdiction would be a useful guideline in determining our notions of justice and public policy. We are sovereign within our territory but "it is no derogation of sovereignty to take account of foreign law".[7]

As has been rightly observed by a great jurist,[8] "We are not so provincial as to say that every solution of a problem is wrong because we

[2] Section 2(6). For detailed discussion, *see supra*, Pt. I, Chap. 2.

[3] *Brij Lal* v. *Govindram*, AIR 1947 PC 192: (1946-47) 74 IA 203.

[4] *Badat & Co.* v. *East India Trading Co.*, AIR 1964 SC 538 at pp. 554-55: (1964) 4 SCR 19; *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp. 14-15: (1963) 3 SCR 22; *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

[5] *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp. 14-15: (1963) 3 SCR 22; *Badat & Co.* v. *East India Trading Co.*, AIR 1964 SC 538 at p. 557: (1964) 4 SCR 19; *Surinder Kaur* v. *Harbax Singh*, (1984) 3 SCC 698 at p. 703: AIR 1984 SC 1224 at p. 1226; *Narasimha Rao* v. *Venkata Lakshmi*, (1991) 3 SCC 451 at pp. 458-60.

[6] *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105; *Badat & Co.* v. *East India Trading Co.*, *supra*, at p. 552 (AIR).

[7] *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

[8] Cardozo, J. in *Loucks* v. *Standard Oil Co. of New York*, (1918) 224 NY 99 at p. 111.

deal with it otherwise at home"; and we shall not brush aside foreign judicial process unless doing so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal".

6. ILLUSTRATIONS

Let us see some illustrations to understand the principle:

(*i*) *A* sues *B* in a foreign court. The suit is dismissed. The judgment will operate as a bar to a fresh suit by *A* against *B* in India on the same cause of action.

(*ii*) *A* sues *B* in a foreign court. The suit is decreed. *A* then sues *B* on that judgment in India. *B* will be precluded from putting in issue the matters which were directly and substantially in issue before the foreign court and adjudicated upon by the court.

(*iii*) *A* sues *B* in a foreign court and obtains a decree. He then sues *B* on that judgment in India. *B* is not precluded from raising a plea that the judgment of the foreign court is not conclusive and does not operate as *res judicata* since it was obtained by fraud (or was not given on merits; or was contrary to law; or was opposed to natural justice, etc).

7. JURISDICTION OF FOREIGN COURT

It is well-settled proposition in private international law that unless a foreign court has jurisdiction in the international sense, a judgment delivered by that court would not be recognised or enforced in India.[9] But the jurisdiction which is important in such matters is only the competence of the court, i.e. territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts in this country.[10]

The material date to decide the jurisdiction of the court is the time when the suit is instituted.[11]

8. BINDING NATURE OF FOREIGN JUDGMENT: PRINCIPLES

The Code of Civil Procedure provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:

[9] *Sankaran Govindan* v. *Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 368: AIR 1974 SC 1764 at p. 1766.

[10] *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp. 14, 54-55: (1963) 3 SCR 22.

[11] *Andhra Bank Ltd.* v. *R. Srinivasan*, AIR 1962 SC 232 at p. 236: (1962) 3 SCR 391.

(*a*) where it has not been pronounced by a court of competent jurisdiction;
(*b*) where it has not been given on the merits of the case;
(*c*) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
(*d*) where the proceedings in which the judgment was obtained are opposed to natural justice;
(*e*) where it has been obtained by fraud;
(*f*) where it sustains a claim founded on a breach of any law in force in India.[12]

9. FOREIGN JUDGMENT WHEN NOT BINDING: CIRCUMSTANCES: SECTION 13

Under Section 13 of the Code, a foreign judgment is conclusive and will operate as *res judicata* between the parties thereto except in the cases mentioned therein. In other words, a foreign judgment is not conclusive as to any matter directly adjudicated upon, if one of the conditions specified in clauses (*a*) to (*f*) of Section 13 is satisfied and it will then be open to a collateral attack.[13]

Dicey[14] rightly states:

> "A foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either
> (1) of fact; or
> (2) of law."

In the following six cases, a foreign judgment shall not be conclusive:
(1) Foreign judgment not by a competent court;
(2) Foreign judgment not on merits;
(3) Foreign judgment against International or Indian Law;
(4) Foreign judgment opposed to natural justice;
(5) Foreign judgment obtained by fraud; and
(6) Foreign judgment founded on a breach of Indian Law.

(1) Foreign judgment not by a competent court

It is a fundamental principle of law that the judgment or order passed by the court which has no jurisdiction is null and void. Thus, a judgment of a foreign court to be conclusive between the parties must be

[12] S. 13.

[13] *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105; *Narasimha Rao* v. *Venkata Lakshmi*, (1991) 3 SCC 451 at pp. 562-63.

[14] *Conflict of Laws*, 7th Edn., R. 183 cited in *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at p. 58: (1963) 3 SCR 22.

a judgment pronounced by a court of competent jurisdiction.[15] Such judgment must be by a court competent both by the law of the State which has constituted it and in an international sense and it must have directly adjudicated upon the "matter" which is pleaded as *res judicata*.[16] But what is conclusive is the judgment, i.e., the final adjudication and not the reasons for the judgment given by the foreign court.[17]

Thus, if *A* sues *B* in a foreign court, and if the suit is dismissed, the decision will operate as a bar to a fresh suit by *A* in India on the same cause of action. On the other hand, if a decree is passed in favour of *A* by a foreign court against *B* and he sues *B* on the judgment in India, *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit and adjudicated upon by the foreign court.

The leading case on the point is *Gurdyal Singh* v. *Rajah of Faridkot*[18]. In that case, *A* filed a suit against *B* in the court of the Native State of Faridkot, claiming Rs 60,000 alleged to have been misappropriated by *B*, while he was in *A*'s service at Faridkot. *B* did not appear at the hearing, and an *ex parte* decree was passed against him. *B* was a native of another Native State Jhind. In 1869, he left Jhind and went to Faridkot to take up service under *A*. But in 1874, he left *A*'s service and returned to Jhind. The present suit was filed against him in 1879; when he neither resided at Faridkot nor was he domiciled there. On these facts, on general principles of international law, the Faridkot court had no jurisdiction to entertain a suit against *B* based on a mere personal claim against him. The decree passed by the Faridkot court in these circumstances was an absolute nullity. When *A* sued *B* in a court in British India, against *B* on the judgment of the Faridkot court, the suit was dismissed on the ground that Faridkot court had no jurisdiction to entertain the suit. The mere fact that the embezzlement took place at Faridkot, was not sufficient to give jurisdiction to the Faridkot court. But if *B* was residing at Faridkot at the date of the suit, the Faridkot court would have had complete jurisdiction to entertain the suit and to pass a decree against him.

Similarly, a court has no jurisdiction to pass a decree in respect of immovable property situated in a foreign State. A decree passed by a court in Ceylon against a native of India in a suit on a contract who

[15] *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp. 14-15: (1963) 3 SCR 22; *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105; *Sankaran Govindan* v. *Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 368: AIR 1974 SC 1764 at p. 1776.

[16] *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at p. 21: (1963) 3 SCR 22; *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

[17] *Viswanathan* v. *Abdul Wajid* (*ibid.*).

[18] (1895) 22 Cal 222 (PC): (1893-94) 21 IA 171.

was not residing in Ceylon is a nullity; and cannot be enforced by an Indian court.

(2) Foreign judgment not on merits

In order to operate as *res judicata*, a foreign judgment must have been given on merits of the case.[19] A judgment is said to have been given on merits when, after taking evidence and after applying his mind regarding the truth or falsity of the plaintiff's case, the judge decides the case one way or the other. Thus, when the suit is dismissed for default of appearance of the plaintiff; or for non-production of the document by the plaintiff even before the written statement was filed by the defendant, or where the decree was passed in consequence of default of defendant in furnishing security, or after refusing leave to defend, such judgments are not on merits.[20] However, the mere fact of a decree being *ex parte* will not necessarily justify a finding that it was not on merits.[21]

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.

(3) Foreign judgment against International or Indian law

A judgment based upon an incorrect view of international law or a refusal to recognise the law of India where such law is applicable is not conclusive.[22] But the mistake must be apparent on the face of the proceedings. Thus, where in a suit instituted in England on the basis of a contract made in India, the English court erroneously applied English Law, the judgment of the court is covered by this clause inasmuch as it is a general principle of Private International Law that the rights and

[19] *Narasimha Rao* v. *Venkata Lakshmi*, (1991) 3 SCC 451.

[20] *Keymer* v. *P. Viswanatham*, AIR 1916 PC 121: (1916-17) 44 IA 6; *Isidore Fernando* v. *Thommai Antoni*, AIR 1933 Mad 544; *K.M. Abdul Jabbar* v. *Indo Singapore Traders (P) Ltd.*, AIR 1981 Mad 118; *O.P. Verma* v. *Lala Gehrilal*, AIR 1962 Raj 231 at p. 240; *Lalji Raja & Sons* v. *Firm Hansraj Nathuram*, (1971) 1 SCC 721 at p. 726: AIR 1971 SC 974 at p. 977; *International Woollen Mills* v. *Standard Wool (U.K.) Ltd.*, (2001) 5 SCC 265: AIR 2001 SC 2134.

[21] *Lalji Raja & Sons* v. *Firm Hansraj Nathuram*, (1971) 1 SCC 721 at p. 725: AIR 1971 SC 974 at p. 977; *R.M.V. Vellachi Achi* v. *R.M.A. Ramanathan Chettiar*, AIR 1973 Mad 141: (1972) 2 Mad LJ 468.

[22] *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at pp. 21, 23: (1963) 3 SCR 22; *Badat & Co.* v. *East India Trading Co.*, AIR 1964 SC 538 at p. 554: (1964) 4 SCR 19.

liabilities of the parties to a contract are governed by the place where the contract is made (*lex loci contractus*).[23]

"When, therefore, a foreign judgment is founded on a jurisdiction or on a ground not recognised by Indian law or International law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country."[24]

(4) Foreign judgment opposed to natural justice[25]

It is the essence of a judgment of a court that it must be obtained after due observance of the judicial process, i.e., the court rendering the judgment must observe the minimum requirements of natural justice—it must be composed of impartial persons, act fairly, without bias, and in good faith; it must give reasonable notice to the parties to the dispute and afford each party adequate opportunity of presenting his case. A judgment which is the result of bias or want of impartiality on the part of a judge will be regarded as a nullity and the trial *"coram non judice"*.[26]

Thus, a judgment given without notice of the suit to the defendant or without affording a reasonable opportunity of representing his case is opposed to natural justice. Similarly, a judgment against a party not properly represented in the proceedings or where the judge was biased is contrary to natural justice and, therefore, does not operate as *res judicata*.

But the expression "natural justice" in clause (*d*) of Section 13 relates to the irregularities in procedure rather than to the merits of the case.[27] A foreign judgment of a competent court, therefore, is conclusive even if it proceeds on an erroneous view of the evidence or the law, if the minimum requirements of the judicial process are assured; correctness of the judgment in law or on evidence is not predicated as a condition for recognition of its conclusiveness by the municipal court.[28] Thus, a foreign judgment is not open to attack on the ground that the law of domicile had not been properly applied in deciding the validity of adoption or that the court disagrees with the conclusion of the

[23] *Gurdyal Singh* v. *Rajah of Faridkot*, (1895) 22 Cal 222 (PC): (1893-94) 21 IA 171; *Vishwanath* v. *Abdul Wajid, supra*, at pp. 21-22 (AIR).

[24] *Narasimha Rao* v. *Venkata Lakshmi*, (1991) 3 SCC 451 at p. 461; *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

[25] For detailed discussion *see*, Author's *Lectures on Administrative Law* (2008) Lecture VI.

[26] *Viswanathan* v. *Abdul Wajid, supra*, at pp. 24-25 and 32 (AIR); *Sankaran Govindan* v. *Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 356: AIR 1974 SC 1764 at p. 1768.

[27] *Sankaran Govindan* v. *Lakshmi Bharathi, supra*, at p. 367 (SCC): at pp. 1775-76 (AIR).

[28] *Viswanathan* v. *Abdul Wajid, supra*, at pp. 24-25 (AIR).

foreign court, if otherwise the principles of natural justice have been complied with.

(5) Foreign judgment obtained by fraud

It is a well-established principle of Private International Law that if a foreign judgment is obtained by fraud, it will not operate as *res judicata*.[29]

It has been said, "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*); or "Fraud and deceit ought to benefit none" (*fraus et dolus nemini patrocinari debent*).[30]

Lord Denning[31] observed, "No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud." Cheshire[32] rightly states, "It is firmly established that a foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action in England."[33] All judgments whether pronounced by domestic or foreign courts are void if obtained by fraud, for fraud vitiates the most solemn proceeding of a court of justice.[34]

Explaining the nature of fraud, de Grey, C.J.[35] stated that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was "mistaken", it might be shown that it was "misled". There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside if the court was imposed upon or tricked into giving the judgment.[36]

Recently, in *A.V. Papayya Sastry* v. *Govt. of A.P.*,[37] the Supreme Court observed:

> Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking

[29] *Sankaran Govindan* v. *Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 356: AIR 1974 SC 1764 at p. 1768.

[30] *A.V. Papayya Sastry* v. *Govt. of A.P.*, (2007) 4 SCC 221 at p. 231: AIR 2007 SC 1546.

[31] *Lazarus Estates Ltd.* v. *Beasley*, (1956) 1 QB 702: (1956) 2 WLR 502 (CA): (1956) 1 All ER 341 at p. 345.

[32] *Private International Law* (8th Edn.) at p. 368.

[33] *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

[34] *Mohendro Narain* v. *Gopal Mondul*, ILR (1890) 17 Cal 769 at p. 784 (FB); *S.P. Chengalvaraya Naidu* v. *Jagannath*, (1994) 1 SCC 1: AIR 1994 SC 853; *Mahboob Sahab* v. *Syed Ismail*, (1995) 3 SCC 693: AIR 1995 SC 1205.

[35] Duchess of Kingstone, *Smith's Leading Cases* (13th Edn.) at p. 644, 651.

[36] *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105; *Sankaran Govindan* v. *Lakshmi Bharathi*, (1975) 3 SCC 351 at p. 359: AIR 1974 SC 1764 at pp. 1769-70.

[37] (2007) 4 SCC 221: AIR 2007 SC 1546.

> undue advantage of another. In fraud one gains at the cost of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether *in rem* or *in personam*. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.[38]

In the leading case of *Satya* v. *Teja Singh*[39], a husband obtained a decree of divorce against his wife from an American court averring that he was domiciled in America. Observing that the husband was not a *bona fide* resident or domicile of America, and he had played fraud on a foreign court falsely representing to it incorrect jurisdictional fact, the Supreme Court held that the decree was without jurisdiction and a nullity.

Again, in *Narasimha Rao* v. *Venkata Lakshmi*[40], *A* (husband) obtained a decree of divorce against *B* (wife) again from an American court on the ground that he was a resident of America. Then he remarried *C*. *B* filed a criminal complaint against *A* and *C* for bigamy. *A* and *C* filed an application for discharge. Dismissing the application, the Supreme Court held that the decree of dissolution of marriage was without jurisdiction inasmuch as neither the marriage was solemnized nor the parties last resided together in America. It was, therefore, unenforceable in India.

In *S.P. Chengalvaraya Naidu* v. *Jagannath*[41], the Supreme Court stated, "It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and *non est* in the eye of the law. Such a judgment/decree—by the first court or by the highest court—has to be treated as a nullity by every court, whether superior or inferior. *It can be challenged in any court even in collateral proceedings.*"[42]

(emphasis supplied)

In *A.V. Papayya Sastry* v. *Govt. of A.P.*,[43] after referring to leading cases on the point, the Supreme Court stated:

> It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and *non est* in the eye of law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be

[38] *Ibid*, at pp. 231-32 (SCC) (*per* Thakker, J.)
[39] (1975) 1 SCC 120: AIR 1975 SC 105.
[40] (1991) 3 SCC 451.
[41] (1994) 1 SCC 1: AIR 1994 SC 853.
[42] *Ibid*, at p. 2 (SCC): at p. 853 (AIR).
[43] (2007) 4 SCC 221: AIR 2007 SC 1546.

challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.[44]

The fraud may be either fraud on the part of the party invalidating a foreign judgment in whose favour the judgment is given or fraud on the court pronouncing the judgment.[45] Such fraud, however, should not be merely constructive, but must be actual fraud consisting of representations designed and intended to mislead; a mere concealment of fact is not sufficient to avoid a foreign judgment.[46] The High Court of Madras[47] has held that merely because the plaintiff obtains a decree upon perjured evidence, it cannot be said that the decree has been obtained by fraud. It is submitted that the view expressed by the High Court of Madras appears to be erroneous in view of the above discussion and does not lay down correct law.

(6) Foreign judgment founded on breach of Indian law

Where a foreign judgment is founded on a breach of any law in force in India, it would not be enforced in India. The rules of Private International Law cannot be adopted mechanically and blindly.[48] Every case which comes before an Indian court must be decided in accordance with Indian law. It is implicit that the foreign law must not offend our public policy.[49]

Thus, a foreign judgment for a gaming debt or on a claim which is barred under the Law of Limitation in India is not conclusive. Similarly, a decree for divorce passed by a foreign court cannot be confirmed by an Indian court if under the Indian law the marriage is indissoluble.[50]

It is implicit that the foreign law and foreign judgment would not offend against our public policy.[51]

10. PRESUMPTION AS TO FOREIGN JUDGMENT: SECTION 14

Section 14 of the Code declares that the court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record, or is proved. However, if for admissibility of such copy any further condi-

[44] *Ibid*, at p. 231 (SCC) (*per* Thakker, J.).

[45] *Sankaran Govindan* v. *Lakshmi Bharathi*, (1975) 3 SCC 351 at pp. 359-60, 366: AIR 1974 SC 1764 at pp. 1770, 1775.

[46] *Castrique* v. *Behrens*, (1861) 30 LJ QB 163 at p. 168.

[47] *T. Sundaram Pillai* v. *Kandaswami Pillai*, AIR 1941 Mad 387: (1941) 1 Mad LJ 140.

[48] *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105; *Narasimha Rao* v. *Venkata Lakshmi*, (1991) 3 SCC 451.

[49] *Satya* v. *Teja Singh* (*ibid.*) at p. 138 (SCC): at pp. 117-18 (AIR).

[50] *Ibid*, see also supra, *Narasimha Rao* v. *Venkata Lakshmi*.

[51] *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105.

tion is required to be fulfilled, it can be admitted in evidence only if that condition is satisfied.[52]

Thus, in *Narasimha Rao* v. *Venkata Lakshmi*[53], the Supreme Court held that mere production of a photostat copy of a decree of a foreign court is not sufficient. It is required to be certified by a representative of the Central Government in America.

11. SUBMISSION TO JURISDICTION OF FOREIGN COURT

It is well-established that one of the principles on which foreign courts are recognised to be internationally competent is voluntary submission of the party to the jurisdiction of such foreign court. The reason behind this principle is that having taken a chance of judgment in his favour by submitting to the jurisdiction of the court, it is not open to the party to turn round when the judgment is against him and to contend that the court had no jurisdiction.[54]

Submission to jurisdiction of a foreign court may be express or implied. Whether the defendant has or has not submitted to the jurisdiction of a foreign court is a question of fact which must be decided in the light of the facts and circumstances of each case.[55]

12. FOREIGN JUDGMENT AND RES JUDICATA

A foreign judgment is conclusive as to any matter adjudicated upon by a competent foreign court. Section 13 of the Code in essence enacts a rule of *res judicata* in relation to foreign judgments. Hence, if a foreign judgment is delivered by a court having jurisdiction in the matter, it would operate as *res judicata*.[56]

13. CONCLUSIVENESS OF FOREIGN JUDGMENT

As stated above, a foreign judgment is conclusive and will operate as *res judicata* between the parties and privies though not strangers. It is firmly established that a foreign judgment can be examined from the point of view of *competence* but not of *errors*. In considering whether a judgment of a foreign court is conclusive, the courts in India will not

[52] *International Woollen Mills* v. *Standard Wool (U.K.) Ltd.*, (2001) 5 SCC 265: AIR 2001 SC 2134.

[53] (1991) 3 SCC 451 at pp. 463-64.

[54] *Godard* v. *Gray*, LR (1870) 6 QB 139 at p. 155: 40 LJ QB 62; *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1 at p. 18: (1963) 3 SCR 22; *Narasimha Rao* v. *Venkata Lakshmi*, (1991) 3 SCC 451 at p. 463.

[55] *Shalig Ram* v. *Firm Daulat Ram Kundanmal*, AIR 1967 SC 739: (1963) 2 SCR 574; *Ramanathan Chettiar* v. *Kalimuthu Pillai*, ILR (1914) 37 Mad 163.

[56] *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1: (1963) 3 SCR 22; *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105; *Sankaran Govindan* v. *Lakshmi Bharathi*, (1975) 3 SCC 351: AIR 1974 SC 1764; *see also infra*, "Conclusiveness of foreign judgment".

require whether conclusions recorded by a foreign court are correct or findings otherwise tenable. In other words, the court cannot go into the merits of the original claim and it shall be conclusive as to any matter thereby directly adjudicated upon between the same parties subject to the exceptions enumerated in clauses (*a*) to (*f*) of Section 13.[57]

14. IRREGULARITIES NOT AFFECTING FOREIGN JUDGMENT

There is distinction between want of jurisdiction and irregular exercise of jurisdiction. In the former case, a decree passed by the court is nullity and *non est*. In the latter case, the decree is merely irregular or wrong but not without jurisdiction and cannot be ignored.[58]

Once a foreign court has jurisdiction in the matter, the decree passed by it cannot be held to be without jurisdiction.

In *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*,[59] Shah, J. (as he then was) stated:

> In considering whether a judgment of a foreign court is conclusive, the court in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct, because *the binding character of the judgment may be displaced only by establishing that the case falls within one or more of the six clauses of Section 13, and not otherwise.* (emphasis supplied)

15. EFFECT OF FOREIGN JUDGMENT

A foreign judgment is conclusive as to any matter adjudicated upon between the parties. Such judgment is conclusive, binding and would create *res judicata* between the same parties or between the parties under whom they or any of them claim.[60]

16. ENFORCEMENT OF FOREIGN JUDGMENT

A foreign judgment which is conclusive under Section 13 of the Code can be enforced in India in the following ways:

(1) By instituting a suit on such foreign judgment, or
(2) By instituting execution proceedings.

(1) Suit on foreign judgment

A foreign judgment may be enforced by instituting a suit on such foreign judgment. The general principle of law is that any decision by a

[57] *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1: (1963) 3 SCR 22; *Badat & Co.* v. *East India Trading Co.*, AIR 1964 SC 538: (1964) 4 SCR 19; *Satya* v. *Teja Singh*, (1975) 1 SCC 120: AIR 1975 SC 105; *Narsimha Rao* v. *Venkata Lakshmi*, (1991) 3 SCC 451.

[58] For detailed discussion, *see supra*, Chap. 1.

[59] AIR 1963 SC 1 at p. 14: (1963) 3 SCR 22.

[60] For detailed discussion, *see supra*, "foreign judgment and res judicata" "Conclusiveness or foreign judgment" and "Binding nature of foreign judgments: Principles".

foreign court, tribunal or quasi-judicial authority is not enforceable in a country unless such decision is embodied in a decree of a court of that country.[61] In such suit, the court cannot go into the merits of the original claim and it shall be conclusive as to any matter thereby directly adjudicated upon between the same parties. Such a suit must be filed within a period of three years from the date of the judgment.[62]

(2) Execution proceedings

A foreign judgment may also be enforced by proceedings in execution in certain specified cases mentioned in Section 44-A of the Code. The said section provides that where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court. When a foreign judgment is sought to be executed under Section 44-A, it will be open to the judgment-debtor to take all objections which would have been open to him under Section 13 if a suit had been filed on such judgment.[63] The fact that out of six exceptions there has been due compliance with some of the conditions and there has been no violation of some of the exceptions is of no avail. *The decree can be executed under Section 44-A only if all the conditions of Section 13(a) to (f) are satisfied.*[64] (emphasis supplied)

17. FOREIGN AWARD

An award passed by a foreign arbitrator and enforceable in a country where it was made, can be enforced in India.[65]

18. EXECUTION OF FOREIGN JUDGMENT

A foreign judgment which is conclusive and does not fall within the mischief of any of the clauses (*a*) to (*f*) of Section 13 of the Code, may be enforced by taking out execution proceedings in India.[66]

[61] *Roshanlal* v. *R.B. Mohan Singh*, (1975) 4 SCC 628: AIR 1975 SC 824.

[62] Art. 101, Limitation Act, 1963.

[63] *R.M.V. Vellachi Achi* v. *R.M.A. Ramanathan Chettiar*, AIR 1973 Mad 141: (1972) 2 Mad LJ 468.

[64] *Ibid*, at p. 146 (AIR); see also *Narhari Shivram* v. *Pannalal Umediram*, (1976) 3 SCC 203: AIR 1977 SC 164; *Mohanlal* v. *Tribhovan*, AIR 1963 SC 358: (1963) 2 SCR 707; *Jose Da Costa* v. *Bascora Sadasiva*, (1976) 2 SCC 917: AIR 1975 SC 1843.

[65] For detailed discussion *see supra*, "Enforcement of foreign judgment".

[66] *Ibid.*

PART II

4 Place of Suing

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1. GENERAL

SUITS MAY be of different types. They may relate to movable properties or immovable properties; they may be based on contracts or torts; they may be matrimonial proceedings, suits for accounts and so on. The jurisdiction of a court to entertain, deal with and decide a suit may be restricted by a variety of circumstances, and the first thing which is to be determined is the place of suing. Sections 15 to 20 of the Code of Civil Procedure regulate the forum for the institution of suits.

2. SCHEME

Section 15 requires the plaintiff to file a suit in the court of the lowest grade competent to try it. Sections 16 to 18 deal with suits relating to immovable property. Section 19 applies to suits for compensation for

wrong to person or to movable property. Section 20 is a residuary section and covers all cases not dealt with by Sections 15 to 19. Section 21 recognises the well-established principle that the defect as to territorial or pecuniary jurisdiction can be waived. It forbids appellate or revisional court to allow objection as to place of suing or pecuniary limits. Section 21-A bars a substantive suit for setting aside a decree passed by a court on the ground of want of territorial jurisdiction.

3. PECUNIARY JURISDICTION

(a) General rule

Every suit shall be instituted in the court of the lowest grade competent to try it.[1]

(b) Nature and scope

Section 15 of the Code refers to the pecuniary jurisdiction of the court. It states that every suit should be instituted in the court of the lowest grade competent to try it.[2] The rule laid down in the section is a rule of procedure and does not affect the jurisdiction of the court. Hence, a decree passed by a court of a higher grade cannot be said to be without jurisdiction.[3] It is merely an irregularity covered by Section 99 of the Code and the decree passed by the court is not a nullity.[4]

(c) Object

The object underlying this provision is twofold,[5]

(*i*) to see that the courts of higher grades shall not be overburdened with suits; and

(*ii*) to afford convenience to the parties and witnesses who may be examined in such suits.

Thus, Bombay, Calcutta and Madras High Courts are having original jurisdiction like City Civil Courts and Small Causes Courts. The pecuniary jurisdiction of a Small Causes Court is, say, up to Rs 50,000. Therefore, a suit to recover Rs 5000 as damages for breach of contract can be tried by any of the courts. But according to Section 15 of the Code, the suit must be filed[6] in the lowest court, i.e., in the Small Causes

[1] S. 15.

[2] S. 15; see also *Nidhi Lal* v. *Mazhar Husain*, ILR (1885) 7 All 230: 1885 All WN 1 (FB); *Balgonda* v. *Ramgonda*, (1969) 71 Bom LR 582.

[3] *Gopal* v. *Shamrao*, AIR 1941 Nag 21; *Konthan Kesavan* v. *Varkey Thomman*, AIR 1964 Ker 206.

[4] *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340: (1955) 1 SCR 117; *see also* S. 21(2).

[5] *Nidhi Lal* v. *Mazhar Husain*, ILR (1885) 7 All 230 at p. 234: 1885 All WN 1 (FB); *Mohan Singh* v. *Lajya Ram*, AIR 1956 Punj 188; *Union of India* v. *Ladulal Jain*, AIR 1963 SC 1681 at p. 1683: (1964) 3 SCR 624.

[6] We have preferred to use the simple and more common expression "*to file*" instead of "*to institute*" used in the Code.

Court. But if the suit is filed in the City Civil Court and the decree is passed by that court, it is not a nullity.

(d) Mode of valuation

Prima facie, it is the plaintiff's valuation in the plaint that determines the jurisdiction of the court and not the amount for which ultimately the decree may be passed by the court. Thus, if the pecuniary jurisdiction of the court of the lowest grade is, say, Rs 10,000 and the plaintiff files a suit for accounts and finally the court finds on taking the accounts that Rs 15,000 are due, the court is not deprived of its jurisdiction to pass a decree for that amount.

In the case of *Kiran Singh* v. *Chaman Paswan*[7], a suit was valued at Rs 2950 and was filed in the court of the Subordinate judge, Monghyr. The suit was dismissed and the plaintiff filed an appeal in the District Court. That appeal was also dismissed by the District Court and the Second Appeal was filed in the High Court of Patna. The High Court held that the correct valuation was Rs 9880 and directed the appellant to pay the deficit court fees. On the revised valuation, the suit would be within the competence of the Subordinate judge, where it was filed but an appeal against the decree would lie directly to the High Court and not to the District Court. The appellant, in these circumstances, contended before the High Court that the appeal to the District Court was incompetent and the decree passed by the District Court was a nullity and that the Second Appeal should be treated and heard as a First Appeal. The High Court negatived the contention and dismissed the appeal as no prejudice was shown.[8] The matter was taken to the Supreme Court. While affirming the decision of the High Court, the Supreme Court held that the decree passed by the District Court was not a nullity and that a mere change of forum cannot be said to have caused prejudice to the appellant. The decree passed by the District Court was, therefore, upheld.

(e) Power and duty of court

Usually, a court will accept a valuation of the plaintiff in the plaint and proceed to decide the suit on merits on that basis.

That does not, however, mean that the plaintiff in all cases is at liberty to assign any arbitrary value to the suit, and to choose the court in which he wants to file a suit. If the plaintiff deliberately undervalues or overvalues the claim for the purpose of choosing the forum, the plaint cannot be said to be correctly valued and it is the duty of the court to return it to be filed in the proper court. If it appears to the

[7] AIR 1954 SC 340: (1955) 1 SCR 117; see also *Commercial Aviation & Travel Co.* v. *Vimla Pannalal*, (1988) 3 SCC 423: AIR 1988 SC 1636.

[8] S. A. 1152 of 1946, decided on 19-7-1950 (Pat).

court that the valuation is falsely made in the plaint for the purpose of avoiding the jurisdiction of the proper court, the court may require the plaintiff to prove that the valuation is proper.[9] "When there is an objective standard of valuaton, to put a valuation on the relief ignoring such objective standard might be a demonstratively arbitrary and unreasonable valuation and the court would be entitled to interfere in the matter."[10] But if the court is unable to come to a finding regarding the correct valuation of the relief, the court has to accept the valuation of the plaintiff.[11]

(f) Objection as to jurisdiction[12]

4. TERRITORIAL JURISDICTION

(a) Types of suits

For the purpose of territorial jurisdiction of a court, suits may be divided into four classes, viz.:

(*a*) Suits in respect of immovable property;
(*b*) Suits for movable property;
(*c*) Suits for compensation for wrong (tort); and
(*d*) Other suits.

(b) Immovable property: Sections 16-18

Sections 16 to 18 deal with suits relating to immovable property. Clauses (*a*) to (*e*) of Section 16 deal with the following five kinds of suits, viz.:

(*i*) Suits for recovery of immovable property;
(*ii*) Suits for partition of immovable property;
(*iii*) Suits for foreclosure, sale or redemption in case of mortgage of or charge upon immovable property;
(*iv*) Suits for determination of any other right to or interest in immovable property; and
(*v*) Suits for torts to immovable property.

These suits must be filed in the court within the local limits of whose jurisdiction the property is situate. This is very clear and simple and does not create any difficulty. But what will happen if the property is situate within the jurisdiction of more than one court? Section 17 of the Code provides for this contingency. It says that where a suit is to obtain a relief respecting, or damage for torts to, immovable property

[9] Or. 7 R. 10. See also *Balgonda* v. *Ramgonda*, (1969) 71 Bom LR 582.

[10] *Tara Devi* v. *Sri Thakur Radha Krishna Maharaj*, (1987) 4 SCC 69: AIR 1987 SC 2085; *Abdul Hamid* v. *Abdul Majid*, (1988) 2 SCC 575: AIR 1988 SC 1150.

[11] *Commercial Aviation & Travel Co.* v. *Vimla Pannalal*, (1988) 3 SCC 423: AIR 1988 SC 1636.

[12] For detailed discussion, *see infra*, under that head.

situate within the jurisdiction of different courts, the suit can be filed in the court within the local limits of whose jurisdiction any portion of the property is situate provided that the suit is within the pecuniary jurisdiction of such court. This provision is intended for the benefit of suitors and to prevent multiplicity of suits.

A case may, however, arise where it is not possible to say with certainty that the property is situate within the jurisdiction of the one or the other of several courts. In such a case, one of these courts, if it is satisfied that there is such uncertainty, may after recording a statement to that effect proceed to entertain and dispose of the suit.[13]

(c) Movable property: Section 19

It has been said, movables follow the person (*Mobilia sequuntur personam*).

A suit for wrong to movable property may be brought at the option of the plaintiff either at the place where the wrong is committed or where the defendant resides, carries on business or personally works for gain.

Where such wrong consists of a series of acts, a suit can be filed at any place where any of the acts has been committed. Similarly, where a wrongful act is committed at one place and the consequences ensue at another place, a suit can be instituted at the option of the plaintiff where the action took place or consequences ensued.

Illustrations

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

(*ii*) *A*, residing in Delhi, publishes in Calcutta statements defamatory to *B*. *B* may sue *A* either in Calcutta or in Delhi.

(*iii*) *A*, residing in Delhi, publishes in Calcutta statements defamatory to *B*. The newspaper is circulated in Bombay, Madras and Raipur. *B* may sue *A* either in Calcutta, or in Delhi, or in Bombay, or in Madras, or in Raipur.

(d) Compensation for wrong: Section 19

A suit for compensation for wrong (tort) to a person may be instituted at the option of the plaintiff either where such wrong is committed, or where the defendant resides, carries on business or personally works for gain.[14]

(e) Other suits: Section 20

Section 20 provides for all other cases not covered by any of the foregoing rules. All such suits may be filed at the plaintiff's option in any of the following courts, viz.:

(*i*) Where the cause of action, wholly or partly arises; or

[13] S. 18.

[14] For detailed discussion, *see supra*, "Movable property".

(*ii*) Where the defendant resides, or carries on business or personally works for gain; or

(*iii*) Where there are two or more defendants, any of them resides or carries on business or personally works for gain, provided that in such case (*a*) either the leave of the court is obtained; or (*b*) the defendants who do not reside or carry on business or personally work for gain at that place acquiesce in such institution.

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 India 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 Banaras, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Banaras, 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.

Section 20 of the Code has been designed to secure that justice might be brought as near as possible to every man's hearthstone and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself in cases in which he may be involved.[15]

(f) Selection of forum

It is a well-settled principle of law that consent can neither confer nor take away jurisdiction of a competent court. The same principle applies to ouster of jurisdiction of a court. Where the court has jurisdiction, neither consent, nor waiver, nor estoppel, nor acquiescence can oust it. An agreement to oust *absolutely* the jurisdiction of a competent court is void, being against public policy[16] (*Ex dolo malo non oritur actio*).

But when two or more courts have jurisdiction to entertain a suit, an agreement by the parties to submit to the jurisdiction of one of such courts to the exclusion of the rest is valid, binding and enforceable.[17]

[15] *Laxman Prasad* v. *Prodigy Electronics Ltd.*, (2008) 1 SCC 618 at p. 627: AIR 2008 SC 685; *Mohan Singh* v. *Lajya Ram*, AIR 1956 Punj 188; *Union of India* v. *Ladulal Jain*, AIR 1963 SC 1681 at p. 1683: (1964) 3 SCR 624.

[16] For detailed discussion, *see supra*, Chap. 1.

[17] *Hakam Singh* v. *Gammon (India) Ltd.*, (1971) 1 SCC 286: AIR 1971 SC 740; *Globe Transport Corpn.* v. *Triveni Engg. Works*, (1983) 4 SCC 707; *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163: AIR 1989 SC 1239; *Patel Roadways Ltd.* v. *Prasad Trading Co.*, (1991) 4 SCC 270: AIR 1992 SC 1514; *Angile Insulations* v. *Davy Ashmore India Ltd.*, (1995) 1 SCC 153: AIR 1995 SC 1766; *Lee* v. *Showmen's Guild of Great Britain*, (1952) 2 QB 329: (1952) 1 All ER 1175 (CA); *Laxman Prasad* v. *Prodigy Electronics Ltd.*, *supra*.

5. JURISDICTION AS TO SUBJECT-MATTER

Different courts have been empowered to decide different types of suits. Certain courts have no jurisdiction to entertain certain suits. For instance, the Presidency Small Cause Court has no jurisdiction to try a suit for specific performance of a contract. Likewise, suits for testamentary succession, divorce cases, probate proceedings, insolvency matters, etc. cannot be entertained by a Court of Civil judge (Junior Division). This is called jurisdiction as to the subject-matter of the suit.[18]

Where a court has no jurisdiction over the subject-matter of a suit, there is inherent lack of jurisdiction and a decree passed, judgment rendered or order made is a nullity.[19]

6. PLACE OF SUING: GENERAL PRINCIPLES

The provisions of the Code of Civil Procedure relating to the place of suing may be explained by the following chart:

	Nature of Suit		*Place of Suing*
1.	Every Suit		—Court of the lowest grade competent to try it (Section 15)
2.	Suits for		
	(i)	Recovery of;	—Court within whose jurisdiction the immovable property is situate [Section 16(*a*) to (*e*)]
	(ii)	Partition of;	
	(iii)	Foreclosure, sale or redemption of mortgage of or charge upon;	
	(iv)	Determination of any other right to or interest in;	
	(v)	Compensation for wrong to immovable property—	
3.	Recovery of movable property under actual distraint or attachment—		—Court within whose jurisdiction the immovable property is situate [Section 16(*f*)]

[18] For detailed discussion, *see supra*, Chap. 1.

[19] For detailed discussion, *see infra*, "Objection as to jurisdiction".

	Nature of Suit		*Place of Suing*
4.	(i)	Relief respecting ; or	Court within whose jurisdiction—
	(ii)	Compensation for wrong to— —immovable property held by or on behalf of the defendant where the relief sought can be entirely obtained through his personal obedience—	(i) the property is situate; or (ii) the defendant resides, or carries on business or personally works for gain (Proviso to Section 16)[19A]
5.	(i)	Relief respecting; or	—Court within whose jurisdiction any portion of the property is situate, provided that the entire claim is within the pecuniary jurisdiction of such court (Section 17)
	(ii)	Compensation for wrong to—	
		—immovable property situate within the jurisdiction of different courts—	
6.	Where it is uncertain within the jurisdiction of which of two or more courts any immovable property is situate—		—Any of those courts, provided that the court has pecuniary jurisdiction and jurisdiction as regards the subject matter of the suit (Section 18)
7.	Compensation for wrong to—		—In either of the courts at the option of the plaintiff (Section 19)
	(i)	person, or	
	(ii)	movable property—	
		—if the wrong is done within the jurisdiction of one court and the defendant resides or carries on business or personally works for gain within the jurisdiction of another court—	
8.	Any other suit—		(i) Where the cause of action wholly or partly arises; or
			(ii) the defendant resides, carries on business or personally works for gain; or
			(iii) where there are two or more defendants, where any one of them resides, carries on business or personally works for gain, provided that—

[19A] This provision is based on the well-known maxim, *Equity acts in personam*. *See* observations of Lord Selborne in *Ewing* v. *Ewing*, (1883) 9 AC 34 at p. 40.

Nature of Suit	*Place of Suing*
	(a) either the leave of the court is obtained; or (b) the defendants, who do not reside, carry on business or personally work for gain acquiesce (Section 20)

7. FORUM SHOPPING

The Supreme Court has not only disapproved but strongly deprecated the practice and increasing tendency on the part of the litigants of crossing a forum which may oblige them by entertaining suits or petitions though they have no jurisdiction in the matter.

In *Union of India* v. *Oswal Woollen Mills Ltd.*,[20] though the registered office of the company was at Ludhiana (Punjab), a petition was filed against it in High Court of Calcutta and *ex parte* ad interim relief was obtained by the petitioner. The Supreme Court set aside the order and observed that the action was taken as a part of manoeuvring legal battle.

In *Morgan Stanley Mutual Fund* v. *Kartick Das*,[21] the Supreme Court stated, "There is an increasing tendency on the part of litigants to indulge in speculative and vexatious litigation and adventurism which the fora seem readily to oblige. *We think such a tendency should be curbed.*" (emphasis supplied)

In *ONGC* v. *Utpal Kumar Basu*,[22] though no cause of action had arisen in Calcutta, the High Court entertained a writ petition and granted interim relief to the petitioner.

Observing that it was a "a great pity" that one of the premier High Courts had developed a tendency to assume jurisdiction on unsustainable grounds, the Supreme Court said:

> "We are greatly pained to say so but if we do not strongly deprecate the growing tendency we will, we are afraid, be failing in our duty to the institution and the system of administration of justice. *We do hope that we will not have another occasion to deal with such a situation.*"[23] (emphasis supplied)

[20] (1984) 2 SCC 646: AIR 1984 SC 1264.

[21] (1994) 4 SCC 225 at p. 246.

[22] (1994) 4 SCC 711.

[23] *Ibid*, at p. 722 (SCC); see also *State of Rajasthan* v. *Swaika Properties*, (1985) 3 SCC 217: AIR 1985 SC 1289; *Bloom Dekor Ltd.* v. *Subhash Himatlal Desai*, (1994) 6 SCC 322. For detailed discussion, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 481-87.

8. OBJECTION AS TO JURISDICTION: SECTION 21

(a) General

As stated above,[24] it is a fundamental rule that a decree of a court without jurisdiction is a nullity. Halsbury[25] rightly states:

> "Where by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled... . *Where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.*"[26] (emphasis supplied)

This does not, however, apply to territorial or pecuniary jurisdiction, inasmuch as objections to such jurisdiction are regarded by the Code as merely technical and, unless raised at the earliest possible opportunity, they will not be entertained in appeal or revision for the first time.[27]

(b) Object

The object underlying Section 21 is to protect honest litigants and to avoid harassment to plaintiffs who have *bona fide* and in good faith initiated proceedings in a court which is later on found to be wanting in jurisdiction. Dishonest litigants cannot take advantage of this provision.[28]

(c) Objection as to territorial jurisdiction

It is well-settled that the objection as to local or territorial jurisdiction of a court (place of suing) does not stand on the same footing of a court to try the case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been recognised by Section 21 of the Code.

[24] For detailed discussion, *see supra*, Chap. 1.

[25] *Halsbury's Laws of England* (2nd Edn.) Vol. VIII, Art. 1178 at p. 532; *Harshad Chiman Lal* v. *DLF Universal Ltd.*, (2005) 7 SCC 791.

[26] See also *United Commercial Bank Ltd.* v. *Workmen*, AIR 1951 SC 230 at p. 237: 1950 SCR 380; *Kiran Singh* v. *Chaman Paswan*, *infra*; *Hira Lal* v. *Kali Nath*, *infra*.

[27] *Hira Lal* v. *Kali Nath*, *infra*; *Kiran Singh* v. *Chaman Paswan*, *infra*.

[28] *ONGC* v. *Utpal Kumar Basu*, (1994) 4 SCC 711 at p. 723; *Morgan Stanley Mutual Fund* v. *Kartick Das*, (1994) 4 SCC 225; *Bloom Dekor Ltd.* v. *Subhash Himatlal Desai*, (1994) 6 SCC 322 at p. 328.

Thus, in *Hira Lal* v. *Kali Nath*[29], where the suit which ought to have been filed in an Agra court was filed in the Bombay High Court with the leave of the court, it was held that the objection to such jurisdiction falls within Section 21.

Under Section 21(1), no objection as to the place of suing will be allowed by an appellate or revisional court unless the following three conditions are satisfied:[30]

(*i*) The objection was taken in the court of first instance;

(*ii*) It was taken at the earliest possible opportunity and in cases where issues are settled at or before settlement of issues; and

(*iii*) There has been a consequent failure of justice.

All these three conditions must coexist.[31] (emphasis supplied)

The reason is obvious. It is well-settled that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court otherwise incompetent to try a suit. However, it is equally well-settled that the objection as to the local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived.[32] Section 21 is a statutory recognition of the said principle and provides that the defect as to the place of suing under Sections 15 to 20 may be waived. If the defendant allows the trial court to proceed to decide the matter without raising an objection as to the place of suing and takes the chance of a verdict in his favour, he clearly waives the objection, and will not be subsequently permitted to raise it. It is even possible to say that long and continued participation by the defendant in the proceedings without any protest may, in an appropriate case, amount to a waiver of an objection.[33]

The policy underlying Section 21 has been succinctly explained by the Supreme Court in *Kiran Singh* v. *Chaman Paswan*[34], wherein their Lordships observed:

> "[W]hen a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely

[29] AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747.

[30] *Pathumma* v. *Kuntalan Kutty*, (1981) 3 SCC 589: AIR 1981 SC 1683; *R.S.D.V. Finance Co. (P) Ltd.* v. *Shree Vallabh Glass Works Ltd.*, (1993) 2 SCC 130: AIR 1993 SC 2094.

[31] *Ibid*, at p. 591 (SCC): at p. 1684 (AIR); see also *Mantoo Sarkar* v. *Oriental Insurance Co. Ltd.*, (2009) 2 SCC 244.

[32] *Hira Lal* v. *Kali Nath*, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747.

[33] *Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu*, AIR 1966 SC 634 at p. 636: (1966) 1 SCR 461.

[34] AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117. See also *Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu*, AIR 1966 SC 634: (1966) 1 SCR 461.

on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to both territorial and pecuniary jurisdictions as technical and not open to consideration by an appellate court, unless there has been a prejudice on merits."[35]

But the section does not preclude objections as to the place of suing being taken in the appellate or revisional court, if the trial court has not decided the suit on merits.[36]

(d) Objection as to pecuniary jurisdiction

As discussed above, as a general rule, it is the plaintiff's valuation in the plaint that determines the jurisdiction of the court and not the amount for which ultimately the decree may be passed by the court. But if the defendant disputes the valuation put by the plaintiff, it is the duty of the trial court to inquire into it and to pass an appropriate order. But no objection as to overvaluation or undervaluation will be allowed by any appellate or revisional court unless the following three conditions exist:

(*i*) The objection was taken in the court of first instance;

(*ii*) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before settlement of issues; and

(*iii*) There has been a consequent failure of justice.

All these three conditions must coexist.[36] (emphasis supplied)

Illustration

A files a suit against *B* to recover possession of a house. He values his claim in the plaint at Rs 8000. The suit is filed in court *C*, which has jurisdiction to try suits of a value up to Rs 10,000. The market value of the house is Rs 12,000, but *B* does not object to the jurisdiction of the court. The decree is passed in favour of *A*. In appellate court, *B* cannot take the objection about the pecuniary jurisdiction of court *C*.

Thus, in *Kiran Singh* v. *Chaman Paswan*[37], negativing the contention of the appellant that a mere change of forum can be said to have caused prejudice to him, the Supreme Court rightly observed:

"If the fact of an appeal being heard by a Subordinate Court or District Court where the appeal would have laid to the High Court if the correct valuation had been given, is itself a matter of prejudice, then the decree passed by the Subordinate Court must,

[35] *Kiran Singh* v. *Chaman Paswan, supra,* at p. 342 (AIR); *Bahrein Petroleum Co. Ltd.* v. *P.J. Pappu, supra,* at p. 637 (AIR); *Subhash* v. *Nemasa,* (2007) 13 SCC 650: AIR 2007 SC 1828.

[36] *Pathumma* v. *Kuntalan Kutty,* (1981) 3 SCC 589: AIR 1981 SC 1683; *R.S.D.V. Finance Co. (P) Ltd.* v. *Shree Vallabh Glass Works Ltd.,* (1993) 2 SCC 130: AIR 1993 SC 2094.

[37] AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117.

without more, be liable to set aside, and the words 'unless the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits' would become wholly useless. These words clearly show that the decrees passed in such cases are liable to be interfered with in an appellate court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results. And *the prejudice envisaged by that section therefore must be something other than the appeal being heard in a different forum.*"[38] (emphasis supplied)

Whether there has been prejudice or not, is a matter to be determined on the facts of each case.[39]

(e) Objection as to subject-matter of jurisdiction

A court cannot adjudicate upon a subject-matter, which does not fall within its province as limited or defined by law. A jurisdiction as to the subject-matter of a suit is regarded as essential, for jurisdiction over the subject-matter is a condition precedent or a *sine qua non* to the acquisition of authority over the parties and the matter, and if the court does not possess that jurisdiction, a judgment given, order made or decree passed is absolutely null and void, which may be set aside in appeal, review or revision. It's validity can be challenged even in collateral proceedings.[40]

(f) Objection in execution proceedings

Sub-section (3) of Section 26 makes it clear that the principles of this section apply to execution proceedings also.[41]

9. EXECUTION PROCEEDINGS

The question of objection as to jurisdiction of the court in execution proceedings can be discussed under two heads;

(*a*) Position prior to Amendment Act, 1976; and

(*b*) Position after Amendment Act, 1976.

(a) Position prior to Amendment Act, 1976

Section 21 of the Code as originally enacted, did not, in terms apply to execution proceedings. There was, therefore, a difference of opinion whether the principle of Section 21 would govern execution pro-

[38] *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117.

[39] *Ibid*, at p. 344 (AIR): at p. 126 (SCR); See also supra, *Subhash* v. *Nemasa*.

[40] *Hriday Nath. Ram Chandra*, AIR 1921 Cal 34: (1921) 48 Cal 138 (FB); *Official Trustee* v. *Sachindra Nath*, AIR 1969 SC 823: (1969) 3 SCR 92; *Harshad Chiman Lal* v. *DLF Universal Ltd.*, (2005) 7 SCC 791. For detailed discussion, *see supra*, Chap. 1.

[41] For detailed discussion , *see infra*, "Execution proceedings".

ceedings also. No doubt in *Hira Lal* v. *Kali Nath*[42], the Supreme Court applied the principle of Section 21 to execution proceedings.

(b) Position after Amendment Act, 1976

With a view to avoiding delay in execution proceedings, an express provision has been made in the Code by the Code of Civil Procedure (Amendment) Act, 1976, which specifically provides that an objection as to territorial jurisdiction of a court executing the decree should not be allowed unless the condition laid down therein are fulfilled.[43]

10. BAR OF SUIT: SECTION 21-A

It is clear from the above discussion that as per Section 21, no objection to the place of suing can be taken at an appellate or revisional stage of the proceedings. But can that decision be challenged by filing a new suit? There were conflicting decisions on that point.

Section 21-A, as inserted by the Amendment Act of 1976, now specifically provides that no substantive suit can be filed to set aside a decree passed by a court on an objection as to the place of suing.[44]

The provision, however, is ambiguous, defective and incomplete. It speaks of place of suing (territorial limits) only and does not deal with pecuniary limits or defects. It is, however, submitted that the principle applicable to territorial defects will *pro tanto* apply to pecuniary defects as well.[45]

[42] AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747.

[43] Sub-s. (3) of S. 21; *see also*, "Statement of Objects and Reasons", Gazette of India, Extra., Pt. II, S. 2, dt. 08-04-1974, at p. 301.

[44] Statement of Objects and Reasons, Clause 9, Gazette of India, dt. 8-4-1974, Pt. II, S. 2, Extra., at p. 301.

[45] For detailed discussion, and analytical comment, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 489-535.

PART II

5 Institution of Suit

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1. GENERAL

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

2. SUIT: MEANING

The term "suit" has not been defined in the Code. According to the dictionary meaning, "suit" is a generic term of comprehensive signification referring to any proceeding by one person or persons against another or others in a court of law wherein the plaintiff pursues the remedy which the law affords him for the redress of any injury or the enforcement of a right, whether at law or in equity.[1]

Ordinarily, a suit is a civil proceeding instituted by the presentation of a plaint.[2]

3. ESSENTIALS OF SUIT

There are four essentials of a suit:[3]

(*i*) Opposing parties;
(*ii*) Subject-matter in dispute;
(*iii*) Cause of action; and
(*iv*) Relief

4. PARTIES TO SUIT: ORDER 1

(a) General

Order 1 deals with the parties to a suit. It also contains provisions for addition, deletion and substitution of parties, joinder, misjoinder and non-joinder of parties and objection as to misjoinder and non-joinder.

[1] *Chamber's 20th Century Dictionary* (1983) at p. 1234; *Black's Law Dictionary* (1990) at p. 1434; *New Oxford Dictionary of English* (1998) at p. 1044.

[2] *Hansraj Gupta* v. *Official Liquidators of The Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*, AIR 1933 PC 63 at p. 64: (1932-33) 60 IA 13; *Pandurang Ramchandra* v. *Shantibai Ramchandra*, 1989 Supp (2) SCC 627 at p. 639: AIR 1989 SC 2240 at p. 2248.

[3] *Krishnappa Bin. Shivappa Bin*, ILR (1907) 31 Bom 393 at p. 398 (*per* Sir Lawrence Jenkins, C.J.); see also *Uma Shanker* v. *Shalig Ram*, AIR 1975 All 36 at pp. 45-46: 1974 All LJ 793 (FB).

It also to some extent, deals with joinder of causes of action. A provision is also made for "representative suit".

(b) Plaint: Meaning

The term "plaint" is not defined in the Code. It may, however, be described as "a private memorial tendered to a court in which the person sets forth his cause of action, the exhibition of an action in writing."[4]

(c) Joinder of parties

The question of joinder of parties may arise either as regards the plaintiffs or as regards the defendants. An act may be done by a single individual and may adversely affect another individual. In that case, the question of joinder of parties does not arise at all. Thus, where *A* assaults *B*, the latter may sue *A* for tort, as it individually affects him. The question of joinder of parties arises only when an act is done by two or more persons or it affects two or more persons. Thus, if *A* assaults *B* and *C*, or *A* and *B* assault *C*, the question of joinder of plaintiffs or defendants arises.

(*i*) *Joinder of plaintiffs: Rule 1*

Rule 1 provides for joinder of plaintiffs. It states that all persons may be joined in one suit as plaintiffs if the following two conditions are satisfied:

(*i*) the right to relief alleged to exist in each plaintiff arises out of the same act or transaction; and

(*ii*) the case is of such a character that, if such persons brought separate suits, any common questions of law or fact would arise.[5]

Both the above conditions should be fulfilled.[6]

The primary object of Rule 1 is to avoid multiplicity of proceedings and unnecessary expenses.[7]

Illustrations

1. *A* enters into an agreement jointly with *B* and *C* to sell 100 tins of oil. *A* thereafter refuses to deliver the goods. Here both, *B* and *C*, have each of them a right to recover damages from *A*. The said right arises out of the same transaction, namely, the breach of agreement; and common questions of law and fact would also arise. *B* and *C*, therefore, may file a suit jointly as plaintiffs against *A* for damages.

[4] *Assan* v. *Pathumma*, (1899) 22 Mad 494 at p. 502; *Girija Bai* v. *A. Thakur Das*, AIR 1967 Mys 217 at p. 219.

[5] R. 1.

[6] *Stroud* v. *Lawson*, (1998) 2 QB 44: 97 LJ QB 718; *Sudhansu Sekhar* v. *State of W.B.*, AIR 1972 Cal 320; *Krishna Laxman* v. *Narsinghrao Vithalrao*, AIR 1973 Bom 358: (1973) 75 Bom LR 29.

[7] *Iswar Bhai* v. *Harihar Behera*, (1999) 3 SCC 457 at p. 461: AIR 1999 SC 1341.

2. An altercation takes place between *A* on the one hand and *B* and *C* on the other. *A* assaults *B* and *C* simultaneously. *B* and *C* may join as plaintiffs in one suit for damages against *A* for that tortious act since both the above conditions are fulfilled.

3. *A* agrees to sell and deliver 100 tins of oil to *B* at a particular rate on 1st January 1991. He also agrees to sell and deliver a like quantity of oil on the same day at the same price to *C*. *B* and *C* cannot join as plaintiffs in one suit against *A* as the transactions are different.

(*ii*) *Joinder of defendants: Rule 3*

Rule 3 provides for joinder of defendants. It states that all persons may be joined in one suit as defendants if the following two conditions are satisfied:

(*i*) the right to relief alleged to exist against them arises out of the same act or transaction; and

(*ii*) the case is of such a character that, if separate suits were brought against such persons, any common question of law or fact would arise.[8]

The word "and" makes it clear that both the conditions are cumulative and not alternative.[9]

The underlying object of Rule 3 is to avoid multiplicity of suits and needless expenses.[10]

Illustrations

1. There is a collision between a bus and a car. The bus belongs to *B* and the car belongs to *C*. As a result of the collision, *A*, a passer-by is injured. *A* may join *B* and *C* as defendants in one suit for damages for injuries caused to him by negligence on the part of both of them or any one of them, since the case involves common questions of fact arising out of the same act, namely, collision of two vehicles.

2. An altercation takes place between *A* on the one hand and *B* and *C* on the other. *B* and *C* simultaneously assault *A*. *A* may join *B* and *C* as defendants in one suit for damages for that tortious act as both the above conditions are fulfilled.

3. *B*, *C*, *D* and *E* each separately entered into an agreement with *A* to supply 100 tins of oil. They failed to supply the goods. *A* cannot join *B*, *C*, *D* and *E* as defendants in one suit for damages inasmuch as there are four distinct contracts and, therefore, four different transactions.

The plaintiff may join in one suit all or any of the persons severally or jointly and severally liable on any contract.[11] Similarly, where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in one suit.[12]

[8] R. 3.

[9] *Stroud* v. *Lawson, supra; Sant Singh* v. *Deo Ram*, AIR 1974 P&H 276 (CA); *C.S. Govindaraja* v. *Alagappa Thambiran*, AIR 1926 Mad 911: 51 Mad LJ 194: 97 IC 212 (FB).

[10] *Iswar Bhai* v. *Harihar Behera*, (1999) 3 SCC 457 at p. 461: AIR 1999 SC 1341; *State Bank of Patiala* v. *Hypine Carbons Ltd.*, AIR 1990 HP 10.

[11] R. 6.

[12] R. 7. *See also*, illustration 1 (above).

Where it appears to the court that any joinder of plaintiffs or defendants may embarrass or delay the trial of the suit, it may pass an order for separate trials.[13] Similarly, the court may give judgment for one or more of the plaintiffs as may be found entitled to relief against one or more of the defendants as may be found liable.[14]

(d) Necessary and proper parties

There is an essential distinction between a necessary party and a proper party to a suit. A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding.[15] In other words, in absence of a necessary party no decree can be passed, while in absence of a proper party a decree can be passed so far as it relates to the parties before the court. His presence, however, enables the court to adjudicate more "effectually and completely".[16]

Two tests have been laid down for determining the question whether a particular party is a necessary party to a proceeding:[17]

(*i*) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and

(*ii*) It should not be possible to pass an effective decree in absence of such a party.

[13] Rr. 2 and 3-A.

[14] R. 4.

[15] *United Provinces* v. *Atiqa Begum*, AIR 1941 FC 16 at p. 28: 1940 FCR 110: 92 IC 138; *Udit Narain Singh* v. *Board of Revenue*, AIR 1963 SC 786 at p. 788: 1963 Supp (1) SCR 676; *South Central Rly.* v. *A.V.R. Siddhanti*, (1974) 4 SCC 335 at pp. 341-42: AIR 1974 SC 1755 at p. 1759: 1974 Lab IC 587; *Ranjeet Mal* v. *N. Railway*, (1977) 1 SCC 484 at p. 486: AIR 1977 SC 1701 at pp. 1702-03; *B. Prabhakar Rao* v. *State of A.P.*, 1985 Supp SCC 432: 1985 Lab IC 1545; *LIC* v. *Gangadhar*, (1989) 4 SCC 297 at p. 305: AIR 1990 SC 185 at p. 191; *Ramesh Hirachand* v. *Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524 at p. 528; *U.P. Awas Evam Vikas Parishad* v. *Gyan Devi*, (1995) 2 SCC 326: AIR 1995 SC 724; *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251 at p. 273: AIR 1985 SC 167; *Ishwar Singh* v. *Kuldip Singh*, 1995 Supp (1) SCC 179: (1995) 29 ATC 144; *J. Jose Dhanapaul* v. *S. Thomas*, (1996) 3 SCC 587 at p. 588: *Arun Tewari* v. *Zila Mansavi Shikshak Sangh*, (1998) 2 SCC 332 at p. 337: AIR 1998 SC 331; *Kasturi* v. *Iyyamperumal*, (2005) 6 SCC 733: AIR 2005 SC 2813.

[16] *Shahasaheb Mard* v. *Sadashiv Supdu*, ILR (1918) 43 Bom 575 at p. 581; *Udit Narain* v. *Board of Revenue*, (*ibid.*); *Ramesh Hirachand* v. *Municipal Corpn. of Greater Bombay* (*ibid.*) at p. 529 (SCC).

[17] *Kasturi* v. *Iyyamperumal*, (2005) 6 SCC 733 at p. 738: AIR 2005 SC 2813; *Benares Bank Ltd.* v. *Bhagwan Das*, AIR 1947 All 18: ILR 1946 All 891 (FB); *Bharawan Estate* v. *Rama Krishna*, AIR 1953 SC 521: 1954 SCR 506; *Hardeva* v. *Ismail*, AIR 1970 Raj 167: ILR 1970 Raj 20: 1970 Raj LW 316 (FB).

Thus, in a suit for partition, all sharers are necessary parties. Similarly, a purchaser of property in a public-auction is a necessary party to the suit for a declaration to set aside the said public-auction. Likewise, in an action against selection and appointment by an authority, candidates who are selected and appointed are directly affected and, therefore, they are necessary parties.

On the other hand, a subtenant is only a proper party in a suit for possession by the landlord against his tenant. So also, grandsons are proper parties to a suit for partition by sons against their father. Likewise, a local authority for whose benefit land is sought to be acquired by the Government is a proper party in land acquisition proceedings. Again, in a complaint against a seniority list prepared by an employer, if no relief is sought against a particular individual, the persons shown as senior to the petitioner/plaintiff are proper parties. But if relief is claimed against a specific person, he is also a necessary party to the proceeding.

It may, however, be noted that where several persons are interested in a suit, it is not always necessary that all of them should be joined as plaintiffs or defendants. Rule 8 of Order 1 applies to such suits and it is sufficient if some of them are joined as plaintiffs or defendants, as the case may be.[18]

(e) Non-joinder or misjoinder of parties: Rule 9

Where a person, who is a necessary or proper party to a suit has not been joined as a party to the suit, it is a case of non-joinder. Conversely, if two or more persons are joined as plaintiffs or defendants in one suit in contravention of Order 1 Rules 1 and 3 respectively and they are neither necessary nor proper parties, it is a case of misjoinder of parties.

The general rule is that a suit cannot be dismissed only on the ground of non-joinder or misjoinder of parties.[19] Nor a decree passed by a competent court on merits will be set aside on the ground of misdescription of the defendant.[20] However, this rule does not apply in case of non-joinder of a necessary party.[21]

If the person who is likely to be affected by the decree is not joined as a party in the suit or appeal, the suit or appeal is liable to be dismissed

[18] For detailed discussion, *see infra*, "Representative suit".

[19] R. 9. See also *Jagan Nath* v. *Jaswant Singh*, AIR 1954 SC 210 at p. 213: 1954 SCR 892; *GM South Central Rly.* v. *Siddhantti case, supra*; *Laxmishankar* v. *Yashram Vasta*, (1993) 3 SCC 49: AIR 1993 SC 1587; *S.K. Saldi* v. *U.P. State Sugar Corpn. Ltd.*, (1997) 9 SCC 661: AIR 1997 SC 2182.

[20] *Patasibai* v. *Ratanlal*, (1990) 2 SCC 42.

[21] Proviso to R. 9; see also *Diwakar Shrivastava* v. *State of M.P.*, 1984 Supp SCC 214: AIR 1984 SC 468; *Jagan Nath* v. *Jaswant Singh*, AIR 1954 SC 210: 1954 SCR 892; *Kanakarathanammal* v. *V.S. Loganatha Mudaliar*, AIR 1965 SC 271: (1964) 6 SCR 1.

on that ground alone.[22] But in *B. Prabhakar Rao* v. *State of A.P.*[23], where all the affected persons had not been joined as parties to the petition, and some of them only were joined, the Supreme Court took the view that the interests of the persons who were not joined as parties were identical with those persons who were before the court and were sufficiently and well represented and, therefore, the petition was not liable to be dismissed on that ground. Similarly, no decree or order under Section 47 of the Code can be reversed or substantially varied in appeal, *inter alia*, on account of any misjoinder or non-joinder of parties, not affecting the merits of the case or the jurisdiction of the court, provided that such party is not a necessary party.[24]

(f) Objections as to non-joinder or misjoinder of parties: Rule 13

All objections on the ground of non-joinder or misjoinder of parties must be taken at the earliest opportunity, otherwise they will be deemed to have been waived.[25] But if the objection as to non-joinder of necessary party has been taken by the defendant at the earliest stage and the plaintiff declines to add the necessary party, he cannot subsequently be allowed in appeal to rectify the error by applying for amendment.[26]

(g) Striking out, adding or substituting parties: Rule 10

Rule 10(1) of Order 1 deals with striking out, addition and substitution of parties.

(*i*) *Adding or substituting plaintiffs*

If after the filing of the suit, the plaintiff discovers that he cannot get the relief he seeks without joining some other person also as a plaintiff or where it is found that some other person and not the original plaintiff is entitled to the relief, as prayed for, an application for addition or substitution of the plaintiff can be made.

The object underlying this provision is to save honest plaintiffs, believing *bona fide* in the maintainability of their claims being non-suited

[22] *Naba Kumar* v. *Radhashyam*, AIR 1931 PC 229 at p. 231: 134 IC 654; *Kanakarathanammal* v. *V.S. Loganatha Mudaliar*, AIR 1965 SC 271: (1964) 6 SCR 1; *Chief Conservator of Forests* v. *Collector*, (2003) 3 SCC 472: AIR 2003 SC 1805.

[23] 1985 Supp SCC 432: 1985 Lab IC 1545; see also *Diwakar Shrivastava* v. *State of M.P., supra*; *Joseph* v. *Union of India*, 1993 Supp (2) SCC 627: (1993) 24 ATC 812.

[24] Ss. 99, 99-A; see also *Laxmishankar* v. *Yashram Vasta*, (1993) 3 SCC 49: AIR 1993 SC 1587.

[25] R. 13.

[26] *Naba Kumar* v. *Radhashyam*, AIR 1931 PC 229 at p. 231: 134 IC 654; *Kanakarathanammal* v. *V.S. Loganatha Mudaliar*, AIR 1965 SC 271: (1964) 6 SCR 1; *State Bank of Patiala* v. *Hypine Carbons Ltd.*, AIR 1990 HP 10.

on a mere technical ground.[27] In other words, the policy is to decide the real questions in controversy between the parties bypassing the mere technical objection for defeating a just and honest claim by discouraging puerile contest on technicalities.[28] The provision, therefore, must be liberally construed so as to advance the cause of justice.[29]

To bring a case within this sub-rule, the following three conditions must be satisfied:[30]

(*i*) The suit has been filed in the name of a wrong person as plaintiff;

(*ii*) Such mistake must be *bona fide*; and

(*iii*) The substitution or addition of the plaintiff is necessary for the determination of the real matter in dispute.

Illustrations

1. *C*, the agent of *A*, under a *bona fide* mistake files a suit against *B* in his own name. The court can substitute the name of principal *A* for that of the original plaintiff *C*.

2. *A* joint Hindu family firm files a suit under a *bona fide* mistake in the name of the firm although the provisions of Order 30 relating to filing of suits by firms do not apply to such a firm. The court may allow substitution of the names of the members of the Hindu joint family firm as plaintiffs.

3. *A*, claiming a title under a gift deed, files a suit for possession of a house against *B* under a *bona fide* mistake that the house was gifted to him by the said deed. When it was found that the deed did not pertain to that house, the real owner could be substituted as plaintiff in place of *A*.

4. *A* sues *B* for possession of a house. *B* contends that since *A* has transferred the house to *C*, he has no title to sue and the suit is, therefore, not maintainable. *A* maintains his right contending that no transfer was made, but the contention is found to be false. Thereupon, *A* applies for adding *C* as a co-plaintiff. The application requires to be rejected since the mistake was not found to be *bona fide*.

Such amendment may be allowed by the court at any stage of the suit or even at the appellate stage and upon such terms and conditions

[27] *Rameswara Das* v. *Vuppuluri Purnachandra*, AIR 1958 AP 494 at p. 497; *A.M. Koman Nair* v. *Kunhambu Moolacheri Nair*, AIR 1935 Mad 95 at p. 96: 154 IC 747; *Bal Niketan Nursery School* v. *Kesari Prasad*, (1987) 3 SCC 587: AIR 1987 SC 1970; *Anil Kumar* v. *Shivnath*, (1995) 3 SCC 147.

[28] *Monghibai* v. *Cooverji Umersey*, AIR 1939 PC 170 at p. 173: (1938-39) 66 IA 210; *Radhaballabh Prasad* v. *Raghunath Lal*, AIR 1939 Pat 397 at p. 398: 180 IC 833.

[29] *Bongi Narayana* v. *Bangari Gurramma*, AIR 1941 Mad 364 at p. 365: (1940) 2 Mad LJ 918; *Rameswara Das* v. *Vuppuluri Purnachandra*, *supra*; *T.N. Housing Board* v. *T.N. Ganapathy*, (1990) 1 SCC 608: AIR 1990 SC 642; *Razia Begum* v. *Sahebzadi Anwar Begum*, AIR 1958 AP 195: 1958 ALT 844: (1958) 1 AnWR 1; *Savitri Devi* v. *District judge*, (1999) 2 SCC 577: AIR 1999 SC 976.

[30] R. 10(1); see also *Razia Begum* v. *Sahebzadi Anwar Begum*, *supra*.

as it thinks just.[31] No person can be added as a plaintiff without his consent.[32]

(*ii*) *Striking out or adding parties*

Sub-rule (2) of Rule 10 empowers the court to add any person as a party to the suit on either of the two grounds:

(*i*) Such person ought to have been joined as a plaintiff or a defendant, and is not so joined; or

(*ii*) Without his presence, the question involved in the suit cannot be completely decided.[33]

The purpose of this provision is to bring before the court, at the same time, all the persons interested in the dispute so that the dispute may be finally determined at the same time in the presence of all the parties without the delay, inconvenience and expense of several actions and trials and inconclusive adjudications.[34] This provision, thus, confers wide discretion on the court to meet with every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. Addition of parties is, however, a judicial discretion which is required to be exercised judiciously.[35]

(*iii*) *Power and duty of court*

The provisions of Rule 10(2) of Order 1 confer very wide powers on the court regarding joining of parties. Such powers have to be exercised on sound judicial principles keeping in mind all the facts and circumstances of the case.

Two considerations especially will have to be kept in mind before exercising powers, namely, (*i*) the plaintiff is a *dominus litis*. He is the best judge of his interest. It is, therefore, for him to choose his opponent from whom he claims relief and, *normally*, the court should not compel him to fight against a person whom he does not want to fight and from whom he claims no relief; and (*ii*) if the court is satisfied that the presence of a particular person is necessary to effectively and completely adjudicate all the disputes between the parties, irrespective of

[31] *Razia Begum* v. *Sahebzadi Anwar Begum*, AIR 1958 AP 195: 1958 ALT 844: (1958) 1 AnWR 1; see also *Kanakarathanammal* v. *V.S. Loganatha Mudaliar*, AIR 1965 SC 271: (1964) 6 SCR 1; *Ramesh Hirachand* v. *Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524 at p. 528.

[32] R. 10(3).

[33] R. 10(2); see also *Razia Begum* v. *Sahebzadi Anwar Begum*, *supra*; *Saila Bala Dassi* v. *Nirmala Sundari Dassi*, AIR 1958 SC 394 at p. 398: 1958 SCR 1287; *R.S. Maddanappa* v. *Chandramma*, AIR 1965 SC 1812: (1965) 3 SCR 283; *Anil Kumar* v. *Shivnath*, (1995) 3 SCC 147.

[34] *Anil Kumar* v. *Shivnath*, (1995) 3 SCC 147; *Razia Begum* v. *Sahebzadi Anwar Begum*, AIR 1958 AP 195: 1958 ALT 844: (1958) 1 AnWR 1; *Jayashree Chemicals Ltd.* v. *K. Venkataratnam*, AIR 1975 Ori 86 at p. 87.

[35] *Ramesh Hirachand* v. *Municipal Corpn. of Greater Bombay*, *supra*.

the wishes of the plaintiff, the court may exercise the power and join a person as party to the suit.[36]

The power may be exercised by the court at any stage of the proceedings either upon an application of the parties or even *suo motu* (of its own motion) and on such terms and conditions as may appear to the court to be just.

In *Anil Kumar* v. *Shivnath*[37], considering the provisions of Order 1 Rule 10(2), the Supreme Court observed that "Though the court may have power to strike out the name of a party improperly joined or add a party either on application or without application of either party, but the condition precedent is that the court must be satisfied that the presence of such party to be added, would be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit... . *The object of the rule is to bring on record all the persons who are parties to the dispute relating to the subject-matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings*".[38]

(emphasis supplied)

Thus, if a special statute makes a person a necessary party to the proceeding and also provides that non-joinder thereof will result in dismissal of the petition, the court cannot use the curative powers of Order 1 Rule 10 as to avoid consequences of non-joinder of such party.[39]

(*iv*) *Test*

The test is not whether the plaintiff agrees or objects to the addition of the party to the suit, but whether presence of such party is required for full and complete adjudication of the dispute.

(*v*) *Principles*

Suffice it to say that in the leading case of *Razia Begum* v. *Sahebzadi Anwar Begum*[40], the Supreme Court has laid down the following principles regarding the power of the court to add the parties under Rule 10(2) of the Code:

(1) That the question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial

[36] *Razia Begum* v. *Sahebzadi Anwar Begum, supra; Ramesh Hirachand* v. *Municipal Corpn. of Greater Bombay, supra; Savitri Devi* v. *District judge,* (1999) 2 SCC 577: AIR 1999 SC 976.

[37] (1995) 3 SCC 147.

[38] *Ibid,* at pp. 149-50; see also *Kasturi* v. *Iyyamperumal,* (2005) 6 SCC 733: AIR 2005 SC 2813.

[39] *Mohan Raj* v. *Surendra Kumar,* AIR 1969 SC 677 at p. 681: (1969) 1 SCR 630.

[40] AIR 1958 AP 195: 1958 ALT 844: (1958) 1 AnWR 1. See also *Firm of Mahadeva Rice and Oil Mills* v. *Chennimalai Goundar,* AIR 1968 Mad 287 at p. 289.

jurisdiction of the court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code;

(2) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest in the subject-matter of the litigation;

(3) Where the subject-matter of a litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy; (and)

(4) The cases contemplated in the last proposition have to be determined in accordance with the statutory provisions of Sections 42 and 43 of the Specific Relief Act.[41]

In *Razia Begum* v. *Anwar Begum*[42], *A* sought a declaration that she was the legally-wedded wife of *B*. One *C* claimed to be another married wife of *B* and sought to be added as a party defendant. The prayer was granted since the declaration sought for concerned the status of marriage and legitimacy of children and would affect the parties for generations to come. Thus, the test is not whether the plaintiff agrees to adding a party as a defendant or not, but whether the relief claimed by the plaintiff will directly affect the intervener in the enjoyment of his rights.[43] The court must, in every case, record reasons in support of its order impleading or refusing to implead a party.[44]

But the party cannot be added so as to introduce a new cause of action, or to alter the nature of the suit. The power can be exercised by the court at the stage of trial and that too without prejudice to the said party's plea of limitation.[45] Rule 10-A enables the court in its discretion to request any pleader to address as to any interest likely to be affected by its decision, if such party is not represented by a pleader.

[41] Act 1 of 1877, Ss. 34 and 35 of the Specific Relief Act, 1963.

[42] AIR 1958 AP 195: 1958 ALT 844: (1958) 1 AnWR 1; see also *Razia Begum* v. *Sahebzadi Anwar Begum*, AIR 1958 SC 886: 1959 SCR 1111.

[43] *Sampatbai* v. *Madhusingh*, AIR 1960 MP 84; *Dollfus Mieg Et Compagnie SA* v. *Bank of England*, (1950) 2 All ER 605.

[44] *Neelacanta Panicker* v. *Govinda Pillai*, 1968 KLT 691.

[45] R. 10(5); *Ramprasad* v. *Vijaykumar*, AIR 1967 SC 278: 1966 Supp SCR 188; *K. Venkateswara Rao* v. *Bekkam Narasimha*, AIR 1969 SC 872: (1969) 1 SCR 679.

A reference may be made to a decision of the Supreme Court in *Ramesh Hirachand* v. *Municipal Corpn. of Greater Bombay,*[46]. In that case, the plaintiff was a dealer on the land held by the Hindustan Petroleum Corporation (lessee) and was in possession of a service station. The Municipal Corporation issued a notice to the plaintiff for demolition of a certain construction alleging that it was unauthorised. The plaintiff filed a suit for permanent injunction against the Municipal Corporation. Hindustan Petroleum Corporation applied for being impleaded as a party defendant on the ground that it had material to show that the structure was unauthorised. The prayer was granted by the courts below. The plaintiff approached the Supreme Court.

Allowing the appeal and setting aside the order, the Supreme Court held that the Hindustan Petroleum Corporation was neither necessary nor proper party to the proceedings. The person to be joined must be one whose presence is necessary as a party. The test is not whether his presence is necessary for the correct solution of the dispute before the court but whether the order would affect him or his interest would be prejudiced. In the instant case, the question before the court was whether an unauthorised structure was made by the plaintiff contrary to the Bombay Provincial Municipal Corporation Act and not whether such construction was contrary to the agreement between the plaintiff and Hindustan Petroleum Corporation. It was altogether a different cause of action. "The mere fact that a fresh litigation can be avoided is no ground to invoke the power under the rule in such cases."[47]

The Court rightly stated, "It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect... . It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally, that is, by curtailing his legal rights. *It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action.*"[48] (emphasis supplied)

The court is also authorised to strike out any party improperly joined either as a plaintiff or as a defendant in a suit.[49]

[46] (1992) 2 SCC 524 at p. 528.

[47] *Ramesh Hirachand* v. *Municipal Corpn. of Greater Bombay,* (1992) 2 SCC 524 at p. 528; *Kasturi* v. *Iyyamperumal,* (2005) 6 SCC 733: AIR 2005 SC 2813.

[48] *Ibid,* at p. 531 (SCC); see also *New Redbank Tea Co. (P) Ltd.* v. *Kumkum Mittal,* (1994) 1 SCC 402.

[49] R. 10(2); see also *Kasturi* v. *Iyyamperumal,* (2005) 6 SCC 733: AIR 2005 SC 2813.

(vi) Effect

Where any person is added as defendant in the suit, as regards him, the suit shall be deemed to have been instituted from the date he is joined as a party.[50]

Where a defendant is added, the plaint shall be amended and the amended copies of the summons and the plaint must be served on the new defendant.[51]

(h) Transposition of parties

In transposition, a person who is already on record as a plaintiff or a defendant seeks his transposition from one capacity to another capacity; i.e. from plaintiff to defendant or *vice versa*.

Since primary object of Order 1 Rule 10 of the Code is to avoid multiplicity of proceedings, there is no reason why the doctrine of addition or striking out parties does not apply to transferring the parties from one side to the other side.[52]

A court can, therefore, order transposition of parties in an appropriate case. This can be done either on an application by a party or by a court *suo motu*.[53] No such transposition, however, can be allowed if it alters the character of the suit or causes prejudice to the opposite party.[54]

5. REPRESENTATIVE SUIT: RULE 8[55]

(a) General

As a general rule, all persons interested in a suit ought to be joined as parties to it, so that the matters involved therein may be finally adjudicated upon and fresh litigations over the same matters may be

[50] R. 10(5).

[51] R. 10(4).

[52] *Saila Bala Dassi* v. *Nirmala Sundari Dassi*, AIR 1958 SC 394: 1958 SCR 1287; *Bhupendra Narayan* v. *Rajeshwar Prosad*, AIR 1931 PC 162: (1930-31) 58 IA 228: 132 IC 610.

[53] *Ibid*, see also *Dalbir Singh* v. *Lakhi Ram*, AIR 1979 P&H 10; *Mohanlal* v. *Bhikhabhai*, (1978) 19 Guj LR 865; *Bhairabendra Narain* v. *Udai Narain*, AIR 1924 Cal 251.

[54] *Ibid*, see also *Santuram Hari* v. *Trust of India Assurance Co.*, AIR 1945 Bom 11: (1944) 46 Bom LR 752; *Khazir Bhat* v. *Ahmad Dar*, AIR 1960 J&K 57.

[55] Rule 8 reads thus:

"8. *One person may sue or defend on behalf of all in same interest.*— (1) Where there are numerous persons having the same interest in one suit;

(*a*) one or more of such persons may, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(*b*) the court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The court shall, in every case where a permission is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or

avoided. Rule 8 is an exception to this general principle. It provides that when there are a number of persons similarly interested in a suit, one or more of them can, with the permission of the court or upon a direction from the court, sue or be sued on behalf of themselves and others.[56] The plaintiff in a representative suit need not obtain the previous consent of the persons whom he seeks to represent.

(b) Definition

Thus, "representative suit" may be defined as under:

> "A 'representative suit' is a suit filed by or against one or more persons on behalf of themselves and others having the same interest in the suit."

(c) Object

The object underlying this provision is really to facilitate the decision of questions in which a large number of persons are interested without recourse to the ordinary procedure.[57] Order 1 Rule 8 of the Code has been framed in order to save time and expense, to ensure a single comprehensive trial of question in which numerous persons are interested and to avoid harassment to parties by a multiplicity of suits.[58] In cases where the common right or interest of a community or members of an association or large sections is involved, there will be insuper-

any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended under sub-rule (1), may apply to the court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3) of R. 1 of Or. 23 and no agreement, compromise or satisfaction shall be recorded in any such suit under R. 3 of that Order, unless the court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.—For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

[56] *Diwakar Shrivastava* v. *State of M.P.*, 1984 Supp SCC 214: AIR 1984 SC 468.

[57] *Kodia Goundar* v. *Velandi Goundar*, AIR 1955 Mad 281 at p. 287: ILR 1955 Mad 339 (FB); *T.N. Housing Board* v. *T.N. Ganapathy*, (1990) 1 SCC 608 at pp. 611-12: AIR 1990 SC 642.

[58] *Lingam Ramaseshayya* v. *Myneni Ramayya*, AIR 1957 AP 964 at p. 965; *Srinivasa Chariar* v. *Raghava Chariar*, ILR (1900) 23 Mad 28.

able practical difficulties in the institution of suits under the ordinary procedure, where each individual has to maintain an action by a separate suit. To avoid numerous suits being filed for decision of a common question, Order 1 Rule 8 has come to be enacted.[58] The provision, therefore, should receive liberal interpretation which will subserve the object of its enactment.[59]

To bring a case within the provisions of Order 1 Rule 8 of the Code of Civil Procedure all the members of a class should have a common interest in a subject-matter and a common grievance and the relief sought should, in its nature, be beneficial to all.[60]

Order 1 Rule 8 of the Code of Civil Procedure, is an enabling provision and does not compel anyone to represent many if, by himself, he has a right of suit. The rule does not vest a right of suit in a person and if he, by himself, has no right to sue, he cannot proceed to sue on behalf of others by invoking the aid of Order 1 Rule 8 of Code of Civil Procedure. At the same time, Order 1 Rule 8 of the Code of Civil Procedure does not debar a member of the village community from maintaining a suit in his own right in respect of a wrong done to him though the act complained of may also be injurious to some other villagers.[61]

(d) Enabling provision

Order 1 Rule 8 of the Code is merely an enabling provision. It, however, does not compel an individual to represent body of persons having the same interest if his action is otherwise maintainable without joining the rest in the suit. In other words, it does not debar a member of a community from maintaining a suit in his own right in respect of a wrong done to him.[62]

(e) Conditions

For the rule to apply, the following conditions must exist:[63]

(*i*) The parties must be numerous;

(*ii*) They must have the same interest in the suit;

[59] *T.N. Housing Board* v. *T.N. Ganapathy, supra; Teja Singh* v. *Union Territory, Chandigarh,* AIR 1982 P&H 169: (1982) 1 P&H 383: 84 Punj LR 150 (FB).

[60] *Ibid,* see also supra, *Lingam Ramaseshayya* v. *Myneni Ramayya.*

[61] *T.N. Housing Board* v. *T.N. Ganapathy, supra; Teja Singh* v. *Union Territory, Chandigarh, supra; Lingam Ramaseshayya* v. *Myneni Ramayya, supra;* see also *Durga Dass* v. *Lt. Col. Banaras Dev,* AIR 1972 J&K 6; *Saraswatibai* v. *Durga Sahai,* AIR 1982 MP 147.

[62] *Lingam Ramaseshayya* v. *Myneni Ramayya,* AIR 1957 AP 964: 1956 AnWR 249: 1956 ALR 470; *S.K. Murugesa* v. *Baruda Arunagiri,* AIR 1951 Mad 498: (1950) 2 Mad LJ 770; *T.N. Housing Board* v. *T.N. Ganapathy,* (1990) 1 SCC 608: AIR 1990 SC 642.

[63] *T.N. Housing Board* v. *T.N. Ganapathy, supra; Kalyan Singh* v. *Chhoti,* (1990) 1 SCC 266: AIR 1990 SC 397; *Kodia Goundar* v. *Velandi Goundar, supra.*

(*iii*) The permission must have been granted or direction must have been given by the court; and

(*iv*) Notice must have been issued to the parties whom it is proposed to represent in the suit.

(*i*) *Numerous persons*

The first requirement for the application of Rule 8 is that numerous persons must be interested in the suit. The word "numerous" is by no means a term of art. It does not fix any limit to the number. It is not synonymous with the word "numberless" or "innumerable". It has an ordinary meaning implying a group of persons. Therefore, the question whether the parties can be said to be "numerous" must be decided by the court upon the facts of each case taking into account the nature of controversy, the subject-matter in dispute and so on.

It is, however, not necessary that the number of persons should be capable of ascertainment. But it is necessary that the body of persons represented by the plaintiffs or defendants must be sufficiently definite so as to enable the court to recognize as participants in the suit. Thus, a representative suit on behalf of inhabitants of a village with reference to village property, or on behalf of the members of a sect, caste or community is maintainable under this rule.[64]

(*ii*) *Same interest*

The second requirement for the maintainability of the representative suit is that the persons on whose behalf the suit is instituted must have the same interest. The interest must be common to them all or they must have a common grievance which they seek to get redressed. Community of interest is, therefore, essential and it is a condition precedent for bringing a representative suit.[65]

The interest need not be a proprietary one, nor need it be joint or concurrent. As explained by Lord MacNaughten in *Duke of Bedford* v. *Ellis*[66], "given a common interest and common grievance a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent". Thus, where a person dies leaving numerous creditors, any one of them may sue on behalf of himself and other creditors, or any one taxpayer may file a suit against a municipality on behalf of himself and the other taxpayers to restrain the municipality from misapplying its funds.

The Explanation added by the Amendment Act of 1976 clarifies that such persons need not have the same cause of action. Again, it

[64] *Hasanali* v. *Mansoorali*, AIR 1948 PC 66 at p. 70: (1947-48) 75 IA 1; *Moran Mar Basselios Catholicos* v. *Thukalan Paulo Avira*, AIR 1959 SC 31.

[65] *Kodia Goundar* v. *Velandi Goundar*, *supra*, at pp. 286-87; see also *T.N. Housing Board* v. *T.N. Ganapathy*, *supra*.

[66] 1901 AC 1(HL).

is not necessary that the interest must arise from the "same transaction". Even if the persons who are represented in a representative suit have separate causes of action or there are separate transactions, a suit under Order 1 Rule 8 can be filed if all of them have the same interest.[67] Explanation to Rule 8 of Order 1, as inserted by the Code of Civil Procedure (Amendment) Act, 1976 makes it clear that the persons need not have the same cause of action.

In Statement of Objects and Reasons, it was stated:

> "Rule 8 of Order 1 deals with representative suits. Under this rule, where there are numerous persons having the same interest in one suit, one or more of them may, with the permission of the court, sue or be sued, on behalf of all of them. The rule has created a doubt as to whether the party representing others should have the same cause of action as the persons represented by him. The rule is being substituted by a new rule and an Explanation is being added to clarify that such persons need not have the same cause of action."[68]

In *T.N. Housing Board* v. *T.N. Ganapathy*[69], residential buildings were allotted by the Housing Board to the applicants who belonged to the low-income group. After settlement of price, excess demand was made by the Board. The allottees challenged the demand by filing a suit in a representative capacity. It was contended that such a suit in a representative capacity was not maintainable as separate demand notices were issued against each of the allottees, giving rise to separate causes of action. Negativing the contention the Supreme Court held that all of them had the same interest and, therefore, the suit was maintainable.

(iii) Permission by court

The third requirement for the application of the rule is that the permission must have been granted or the direction must have been given by the court. If this essential condition is not fulfilled, the suit does not become a representative one. The court has discretion to grant permission to a person to sue in a representative capacity. It cannot, however, *ipso facto* grant such permission merely on the basis of averments made in the plaint. In deciding whether such leave is to be granted, the principal consideration that should weigh with the court is whether it is satisfied that there is sufficient community of interest as between the plaintiffs or the defendants, as the case may be, to justify the adoption of the procedure laid down in Rule 8.[70]

[67] *T.N. Housing Board* v. *T.N. Ganapathy, supra.*

[68] Statement of Objects and Reasons, clause 55(*iv*).

[69] (1990) 1 SCC 608: AIR 1990 SC 642.

[70] *Kodia Goundar* v. *Velandi Goundar, supra; Kalyan Singh* v. *Chhoti,* (1990) 1 SCC 266 at p. 271: AIR 1990 SC 397 at p. 401.

The proper course is to obtain permission before the suit is filed. But it may be granted after filing of the suit or even at an appellate stage by allowing amendment of the plaint. Where a plaintiff intends to sue on behalf of others, it is the plaintiff who should apply for leave. Where numerous defendants having the same interest are sued and it is sought to be defended by one of them on behalf of others, such application should be made by that defendant. Such permission may be express or implied and may be gathered from the proceedings of the court in which the suit is filed. Under sub-rule (1)(*b*), where there are numerous persons having the same interest in the suit, the court may direct that one or more of such persons may sue or be sued or may defend such suit on behalf of, or for the benefit of, all persons so interested.

(iv) Notice

As stated above, where a person sues or is sued, or defends a suit on behalf of himself and others, any decree that may be passed in the suit is binding upon them all[71], unless such decree has been obtained by fraud or collusion.[72] It is, therefore absolutely necessary that the notice of the suit should be given to all the parties who would be bound by the decree, for otherwise a person might be prejudicially affected by such decree even though he was not on record and not aware of the suit. The issue of notice of the institution of the suit is, thus, peremptory, and if it is not given, the decree will bind only those parties who are on record.[73]

It is the duty of the court to take care that proper notice is issued which would provide sufficient information to the persons interested in the suit so that they might apply for becoming parties to the suit. It is also the duty of the court to see that the notice is published in a newspaper which the persons interested are likely to read. This is particularly necessary in view of the fact that the decision in a representative suit becomes *res judicata* not only against the persons who are on record but also against them who are not on record and yet covered under this rule.[74]

(f) Title

Where the suit is filed by or against persons in a representative capacity, that fact should be stated in the body of the plaint as well as in

[71] Expln. VI to S. 11. *See also*, R. 8(6); *Forward Construction Co.* v. *Prabhat Mandal (Regd.)*, (1986) 1 SCC 100: AIR 1986 SC 391. For detailed discussion, *see supra*, Chap. 2.

[72] S. 44, Evidence Act, 1872.

[73] *Kumaravelu Chettiar* v. *Ramaswami Ayyar*, AIR 1933 PC 183: (1932-33) 60 IA 278.

[74] *Bishan Singh* v. *Mastan Singh*, AIR 1960 Punj 26; *Punjab Coop. Bank Ltd.* v. *Hari Singh*, AIR 1933 Lah 749; *Kumaravelu Chettiar* v. *Ramaswami Ayyar*, AIR 1933 PC 183: (1932-33) 60 IA 278.

the title of the suit. The title of the suit[75] where the plaintiff sues in a representative capacity is as follows:

A,B, on behalf of himself and all other creditors of *C,D* — Plaintiff;

Versus

C,D — Defendant.

(g) Addition or substitution of parties

Sub-rule (3) of Rule 8 provides that any person on whose behalf a suit is filed or defended under sub-rule (1) may apply to the court to be added as a party to the suit. Such person must show that the conduct of the suit is not in proper hands and that his interests will be seriously affected to his prejudice if he is not joined as a party to the suit. The reason is that considerable delay may be caused in filing a fresh suit by such party and the cost of litigation will also be increased. Such application must be made without delay. Such person can only be added as a co-plaintiff or a co-defendant but cannot be substituted for the original parties. But sub-rule (5) as added by the Amendment Act of 1976 now provides that where any person suing in a representative capacity or defending a representative suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit.

(h) Non-compliance: Effect

Rule 8 is mandatory and must be complied with. A suit filed without complying with the provisions of Rule 8 is not maintainable. Likewise, a decree passed in a representative suit without observing the conditions prescribed by Rule 8 will not bind the persons represented in the suit, though it will bind the persons joined as parties.[76]

(i) Withdrawal or compromise

Under sub-rule (4), no part of the claim in a representative suit can be abandoned under sub-rule (1), and no such suit can be withdrawn under sub-rule (3) of Rule 1 of Order 23 and no agreement, compromise or satisfaction can be recorded in any such suit under Order 23 Rule 3, unless the court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2) either by personal service or by public advertisement. Similarly, Order 23 Rule 3-B as inserted by the Amendment Act of 1976 provides that no agreement or compromise can be entered in a representative suit without the leave of the court.

[75] For other details in a plaint, *see infra*, Appendix 'A'.

[76] *Bhagbat Jena* v. *Gobardhan Patnaik*, AIR 1983 Ori 50: (1982) 50 Cut LT 30; *Hindu Religious & Charitable Endowment* v. *Nattamai K.S. Ellappa*, AIR 1987 Mad 187: 100 Mad LW 240; *Sri Ram Krishna Mission* v. *Paramanand*, AIR 1977 All 421.

(j) Conduct of suit: Rule 8-A

Rule 8-A empowers the court to permit a person or body of persons interested in any question of law in issue in any suit to present his or its opinion before the court and to take part in the proceedings in the suit. This power is discretionary and hence a person or body of persons even though interested or concerned with a question of law arising in the suit cannot claim to present his or its opinion or to take part in the proceedings of the suit as of right. Under Rule 11, the court may give the conduct of a suit to such person as it deems fit, while Rule 12 provides that the plaintiffs or the defendants may authorise one or more of them to appear, plead or act for them.[77]

(k) Decree

A decree passed in a representative suit is binding on all persons on whose behalf, or for whose benefit, such suit is instituted or defended.[78] It also operates as *res judicata*.[79]

(l) Res judicata

Explanation VI to Section 11 deals with representative suits. It states that where a representative suit has been decided, such a decision would operate as res judicata.[80]

(m) Abatement

In a representative suit, the persons appointed to conduct such suit are merely the representatives of other persons who are constructively parties to the suit. Hence, even if any person dies such suit will not abate and other person or persons interested in the suit may proceed with the suit or may apply to be added as plaintiff or plaintiffs.[81]

(n) Costs

In a representative suit also, parties on record may be made liable to pay costs. In exceptional cases, however, even unrepresented parties (i.e. parties not on record) may can be directed to pay costs, to the other side.[82] In appropriate cases, the court may direct costs to be paid out of the property belonging to the community represented in the suit.[83]

[77] R. 11, *see also*, R. 10-A.

[78] R. 8(6).

[79] *See infra*, "Res judicata".

[80] For detailed discussion, *see supra*, Chap. 2.

[81] *Ram Kumar* v. *Jiwanlal*, AIR 1960 Mad 288; *State of Rajasthan* v. *Parwati Devi*, AIR 1966 Raj 210; *Venkatanarayana* v. *Sabbamal*, (1914-15) 42 IA 125: AIR 1915 PC 124.

[82] *Musaddi Lal* v. *Dal Chand*, AIR 1935 Oudh 369; *Bhicoobai* v. *Haribai Raguji*, AIR 1917 Bom 141.

[83] *Geereeballa Dabee* v. *Chunder Kant*, (1885) 11 Cal 213.

(o) Execution

A decree passed in a representative suit can be executed like any other decree passed in a regular suit. It can be executed against the persons representing and who are parties *eo nomine* as also against the persons represented through parties on record.[84]

6. FRAME OF SUIT: ORDER 2

(a) Inclusion of whole claim: Rules 1-2

Every suit must include the whole of the plaintiff's claim in respect of the cause of action[85], and, as far as practicable, all matters in dispute between the parties be disposed of finally.[86] The intention of the legislature underlying the provisions appears to be that as far as possible all matters in dispute between the parties relating to the same cause of action should be disposed of in the same suit so as to prevent further litigation.

(b) "As far as practicable"

The words *"as far as practicable"* indicate that in each case the court will have to see whether it was practicable for the plaintiff so to frame his suit as to include a cause of action which he had omitted or intentionally relinquished. Thus, this provision is more in the nature of a general policy statement than a mandatory requirement.[87]

(c) Splitting of claim

Order 2 Rule 2[88] lays down that every suit must include the whole of the claim to which the plaintiff is entitled in respect of the cause of action and where the plaintiff omits to sue for or intentionally relinquishes any portion of his claim, he shall not afterwards be allowed to sue in respect of the portion so omitted or relinquished.

[84] For analytical discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. III at pp. 85-90.

[85] R. 2(1).

[86] R. 1.

[87] *Shankarlal* v. *Gangabisen*, AIR 1972 Bom 326 at p. 331: 1972 Mah LJ 738.

[88] Or. 2 R. 2 reads as under:

"2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to 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) Where a plaintiff omits to sue in respect of, or relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) 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 such relief so omitted."

(d) Object

The provision of Order 2 Rule 2 is based on the cardinal principle of law that a defendant should not be vexed twice for the same cause. The principle contained in this provision is designed to counteract two evils, namely, (*i*) splitting up of claims and (*ii*) splitting up of remedies.[89]

In *Naba Kumar* v. *Radhashyam*[90], the Privy Council stated, "The rule in question is intended to deal with the vice of splitting a cause of action. It provides that a suit must include the whole of any claim which the plaintiff is entitled to make in respect of the cause of action on which he sues, and that if he omits (except with the leave of the court) to sue for any relief to which his cause of action would entitle him, he cannot claim it in a subsequent suit. *The object of this salutary rule is doubtless to prevent multiplicity of suits.*" (emphasis supplied)

The Supreme Court has also stated that Order 2 Rule 2 is based on "cardinal principal that the defendant should not be vexed twice for the same cause."[91]

(e) Order 2 Rule 2 and res judicata[92]

(f) Interpretation

The provisions of Order 2 Rule 2 are penal in nature and divestive in effect. They should, therefore, be construed strictly. A plea of Order 2 Rule 2 is highly technical and deprives a party to a legitimate right otherwise available to him. Hence, it should not be lightly upheld.[93] Such plea should be raised at the earliest opportunity.[94]

(g) Illustrations

(1) *A* lets a house to *B* at a yearly rent of 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 the year 1906. *A* shall not afterwards sue *B* for the rent due for 1905 or 1907.

[89] *Naba Kumar* v. *Radhayshyam*, AIR 1931 PC 229: 134 IC 654; *Mohd. Khalil* v. *Mahbub Ali*, AIR 1949 PC 78: (1947-48) 75 IA 121; *Kewal Singh* v. *Lajwanti*, (1980) 1 SCC 290: AIR 1980 SC 161 at p. 163; *Deva Ram* v. *Ishwar Chand*, (1995) 6 SCC 733; *Abnasi Singh* v. *Lajwant Kaur*, AIR 1977 Punj 1 (3); *State of Maharashtra* v. *National Construction Co.*, (1996) 1 SCC 735: AIR 1996 SC 2367.

[90] AIR 1931 PC 229 at p. 230: 134 IC 654.

[91] *Deva Ram* v. *Ishwar Chand*, (1995) 6 SCC 733 at p. 737: AIR 1996 SC 378 at p. 380; *Kunjan Nair* v. *Narayanan Nair*, (2004) 3 SCC 277: AIR 2004 SC 1761.

[92] For detailed discussion, *see supra*, "Res judicata and splitting of claims", Chap. 2.

[93] *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810: (1964) 7 SCR 831; *Deva Ram* v. *Ishwar Chand*, *supra*.

[94] *Rikabdas* v. *Deepak Jewellers*, (1999) 6 SCC 40.

(2) *A* advances loan of Rs 2200 to *B*. To bring the suit within the jurisdiction of court *X*, *A* sues *B* for Rs 2000 only. *A* cannot afterwards sue for Rs 200.

(3) *A* sues *B* for Rs 200. Against this claim, *B* claims set-off for Rs 200 being part of Rs 1200 due to *B* by *A* but omits to counterclaim the balance of Rs 1000. *B* cannot afterwards sue *A* for Rs 1000.

(4) *A* sues *B* for possession alleging that *B* is tenant in arrears. The suit is dismissed on the ground that *B* is mortgagee in possession. A subsequent suit by *A* against *B* for redemption is not barred.

(5) *A* sues *B* for rent. The suit is dismissed on finding that *A* was not the landlord but *A* and *B* were tenants-in-common. A subsequent suit by *A* against *B* for partition of property is not barred.

(h) Conditions

To make the rule applicable, the following three conditions must be satisfied[95], namely:

(*i*) The second suit must be in respect of the same cause of action as that on which the previous suit was based;

(*ii*) In respect of that cause of action, the plaintiff was entitled to more than one relief; and

(*iii*) Being thus entitled to more than one relief, the plaintiff without leave of the court omitted to sue for the relief for which the second suit has been filed.

In other words, before the bar of Order 2 Rule 2 is invoked, the following three questions should be asked:

(1) Whether the cause of action in the previous suit and the subsequent suit is identical?

(2) Whether the relief claimed in the subsequent suit could have been given in the previous suit on the basis of the pleadings made in the plaint?

(3) Whether the plaintiff omitted to sue for a particular relief on the cause of action which has been disclosed in the previous suit?[96]

(i) Same cause of action[97]

In order to apply the provisions of Order 2 Rule 2 to bar the second suit, it must be proved that the second suit must have been based on the same cause of action on which the previous suit was based. Unless

[95] *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810 at p. 1812: (1964) 7 SCR 831. See also *Abnasi Singh* v. *Lajwanti Kaur* (*ibid.*); *Inacio Martins* v. *Narayan Hari Naik*, (1993) 3 SCC 123: AIR 1993 SC 1756.

[96] *K. Palaniappa* v. *Valliammal*, AIR 1988 Mad 156; *State of Maharashtra* v. *National Construction Co.*, (1996) 1 SCC 735: AIR 1996 SC 2367; *Kewal Singh* v. *Lajwanti*, (1980) 1 SCC 290: AIR 1980 SC 161.

[97] For detailed discussion of "Cause of action", *see infra*, Chap. 7.

this condition is fulfilled, there could be no bar to the subsequent suit. Unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based, there would be no scope for the application of the bar of Order 2 Rule 2.[98] The cause of action should not merely be similar, but it must be the same.

As Mulla[99] states, "This rule does not require that when several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. What the rule lays down is that there is one entire cause of action, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts." When the subsequent suit is based on a cause of action different from that in the first suit, the subsequent suit is not barred. The rough test, although not a conclusive one, as to whether the cause of action in a subsequent suit is the same as that in the former suit, is to see whether the same evidence will sustain both the suits.[100]

What the rule requires is the unity of all claims based on the same cause of action in one suit. It does not contemplate unity of distinct and separate causes of action. If the subsequent suit is based on a different cause of action, the rule will not operate.[101] The rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction.[102]

One of the tests is whether the claim in the subsequent suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit. If the answer is in the affirmative, the bar does not apply.[103]

Thus, where the rent of several years is in arrears and the plaintiff claims the rent of only one year, he cannot subsequently sue for the rent of other years. Similarly, a suit for specific performance of a contract

[98] *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810: (1964) 7 SCR 831; *Kewal Singh* v. *Lajwanti*, (1980) 1 SCC 290: AIR 1980 SC 161; *State of Maharashtra* v. *National Construction Co.*, *supra*.

[99] *Code of Civil Procedure* (1995-96) Vol. II at p. 1056; see also *K.V. George* v. *Water & Power Deptt.*, (1989) 4 SCC 595 at p. 601: AIR 1990 SC 53 at p. 58.

[100] *Mohd. Khalil* v. *Mahbub Ali*, AIR 1949 PC 78 at p. 86: (1947-48) 75 IA 121; *Kewal Singh* v. *Lajwanti*, (1980) 1 SCC 290: AIR 1980 SC 161.

[101] *Arjun Lal* v. *Mriganka Mohan*, (1974) 2 SCC 586: AIR 1975 SC 207 at p. 208; *State of M.P.* v. *State of Maharashtra*, (1977) 2 SCC 288: AIR 1977 SC 1466; *Deva Ram* v. *Ishwar Chand*, (1995) 6 SCC 733; *State of Maharashtra* v. *National Construction Co.*, (1996) 1 SCC 735: AIR 1996 SC 2367.

[102] *Payana Reena Saminathan* v. *Pana Lana Palaniappa*, (1913-1914) 41 IA 142 at p. 148: 26 IC 228.

[103] *Kewal Singh* v. *Lajwanti*, (1980) 1 SCC 290 at p. 295: AIR 1980 SC 161 at p. 163; *State of Maharashtra* v. *National Construction Co.*, *supra*, at p. 740 (SCC).

bars a subsequent suit for damages for failure to perform the said contract. But the dismissal of a suit for specific performance of a contract to transfer land is no bar to a suit for the return of the consideration money. So also, a suit to eject the defendant on the basis of a lease is no bar to a suit based on title. The dismissal of a suit for enhancement of rent is no bar to a suit for recovery of rent originally fixed.

Like *res judicata*, a plea of bar of Order 2 Rule 2 must be established by the defendant by placing before the court, the plaint of the previous suit and other evidence for proving the identity of cause of action in both the suits. The court cannot take cognizance of such plea *suo motu*.[104]

(ii) One of several reliefs

The rule applies only where the plaintiff is entitled to more than one relief in respect of the same cause of action and he omits to sue for all such reliefs.

Thus, where the plaintiff files a suit for damages for breach of contract and omits to claim a portion of damages for which he is entitled, a subsequent suit for such portion is barred. Similarly, a suit by a coparcener challenging the mortgage of certain coparcenary properties is a bar to a subsequent suit in respect of other properties included in the same mortgage transaction. Such relinquishment of claim need not be express. It may be implied in the conduct of the plaintiff.[105]

This rule, however, does not apply when the right to relief in respect of which a subsequent suit is brought, did not exist at the time of the previous suit[106], or in the earlier suit the petitioner could not have claimed the relief which he sought in the subsequent suit.[107]

As stated by the Privy Council[108], if a particular cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he is precluded from claiming the balance by instituting independent proceedings. "The crux of the matter is presence or lack of awareness of the right at the time of the first suit."

(iii) Leave of court

The rule applies only when leave of the court is not obtained. Therefore, if the omission has been with the permission of the court,

[104] *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810: (1964) 7 SCR 831; *Rikabdas* v. *Deepak Jewellers*, (1999) 6 SCC 40.

[105] *Shankar* v. *Balkrishna*, AIR 1954 SC 352: (1955) 1 SCR 99; *Sidramappa* v. *Rajashetty*, (1970) 1 SCC 186: AIR 1970 SC 1059; *Inacio Martins* v. *Narayan Hari Naik*, (1993) 3 SCC 123: AIR 1993 SC 1756.

[106] *State of M.P.* v. *State of Maharashtra*, (1977) 2 SCC 288 at p. 295: AIR 1977 SC 1466 at p. 1472.

[107] *Ibid*, see also *Sidramappa* v. *Rajashetty*, (1970) 1 SCC 186: AIR 1970 SC 1059.

[108] *Mohd. Hafiz* v. *Mohd. Zakariya*, AIR 1922 PC 23: (1921-22) 49 IA 9; *Amanat Bibi* v. *Imdad Husain*, (1887-88) 15 IA 106: ILR 15 Cal 800 (PC).

the subsequent suit for the same relief in respect of the same cause of action is not barred. Such leave need not be express and it may be inferred from the circumstances of the case. It can be obtained at any stage.[109]

The power to grant leave is discretionary, and, normally, exercise of such discretion will not be interfered with by a superior court.

(i) Test

The test for finding out whether a subsequent suit be barred because of the previous suit is whether the claim in the second suit is in fact, founded on a cause of action which was the foundation of the former suit. If the answer is in the affirmative, the bar of Order 2 Rule 2 would apply. But if it is in the negative, it would not be attracted.[110]

(j) Principles

In *Mohd. Khalil* v. *Mahbub Ali*,[111] after considering several cases on the point, the Privy Council laid down the following principles governing bar to a subsequent suit under this rule:

(1) The correct test in cases falling under Order 2 Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit".

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers... to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.[112]

[109] *Hare Krishna* v. *Umesh Chandra*, AIR 1921 Pat 193 (FB).

[110] *State of Maharashtra* v. *National Construction Co.*, (1996) 1 SCC 735: AIR 1996 SC 2637; *Kewal Singh* v. *Lajwanti*, (1980) 1 SCC 290: AIR 1980 SC 161.

[111] AIR 1949 PC 78: 75 IA 121.

[112] *Ibid*, at p. 86 (AIR) (*per* Sir Madhavan Nair); see also *Dwarkadas* v. *Vimal*, AIR 1964 Bom 42; *Ram Deyal* v. *Indrasan Kuer*, AIR 1964 Pat 452; *Haryana Coop. Sugar Mills Ltd.* v. *Gupta Drum Supply Co.*, AIR 1976 P&H 117; *C. Ramakrishnan* v. *Corpn. of Madras*, AIR 1976 Mad 128.

(k) Applicability to other proceedings

The provisions of Order 2 Rule 2 apply only to suits and not to appeals[113], execution proceedings[114], arbitration proceedings[115] or to a petition under Article 226 of the Constitution of India.[116]

(l) Joinder of claims: Rules 4-5

Rules 4 and 5 provide for joinder of claims. Rule 4 lays down that in a suit for the recovery of immovable property, a plaintiff is not entitled, without the leave of the court, to join any claim, except:

(*a*) claims for mesne profits or arrears 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.

Rule 5 deals with suits by or against three classes of persons, viz., executors, administrators and heirs. It provides that no claim by or against the aforesaid persons in their representative capacity shall be joined with claims by or against them personally in the same suit, except:

(*a*) where the personal claims arise with reference to the estate he represents; or

(*b*) where he was entitled to or liable for, those claims jointly with the deceased whom he represents.

The primary object of these provisions is to prevent a representative from intermingling the assets of his testator with his own estates.

(m) Joinder of causes of action: Rules 3, 6

Rule 3 deals with joinder of causes of action. This rule enables joinder of several causes of action in one suit in certain circumstances subject to the provisions of the Code. (Rules 4 and 5 of Order 2 and Rules 1 and 3 of Order 1.) It contemplates the following four types of situations:

(*i*) *One plaintiff, one defendant and several causes of action*

Where there is only one plaintiff and one defendant, the plaintiff is at liberty to unite in the same suit several causes of action. But if it appears to the court that the joinder of causes of action may embarrass

[113] *M. Ramnarain (P) Ltd.* v. *State Trading Corpn.*, (1983) 3 SCC 75 at pp. 99-100: AIR 1983 SC 786 at p. 799.

[114] *Sohan Raj* v. *Mahendra Singh*, AIR 1970 Raj 204.

[115] *Seth Kerorimall* v. *Union of India*, AIR 1964 Cal 545; *K.V. George* v. *Water & Power Deptt.*, (1989) 4 SCC 595: AIR 1990 SC 53.

[116] Explanation to S. 141 as added by the Amendment Act of 1976. See also *Devendra* v. *State of U.P.*, AIR 1962 SC 1334 at p. 1337: 1962 Supp (1) SCR 315; *Gulabchand* v. *State of Gujarat*, AIR 1965 SC 1153: (1965) 2 SCR 547.

or delay the trial or is otherwise inconvenient, the court may order separate trials.[117]

(ii) Joinder of plaintiffs and causes of action

Where there are two or more plaintiffs and several causes of action, the plaintiffs may unite such causes of action in one suit against the same defendant if they all are jointly interested. But this provision must be read with Order 1 Rule 1. Thus, where there are two or more plaintiffs and two or more causes of action, they may be joined in one suit only if the following two conditions are fulfilled:

(1) the causes of action must have arisen from the same act or transaction; and

(2) common questions of law or fact must have been involved.

Therefore, where the plaintiffs are not jointly interested in several causes of action which have been joined in one suit and the right to relief does not arise from the same act or transaction or where common questions of law or fact are not involved, the suit will be bad for misjoinder of plaintiffs and causes of action.

(iii) Joinder of defendants and causes of action

Where there is one plaintiff and two or more defendants and several causes of action, the plaintiff may unite in the same suit several causes of action against those defendants, if the defendants are jointly interested in the causes of action. But this provision also must be read subject to Order 1 Rule 3, and therefore, two or more defendants can be joined in one suit, provided the following two conditions are fulfilled:

(1) the relief claimed must have been based on the same act or transaction; and

(2) common questions of law or fact must have been involved.

Where, in one suit, two or more defendants have been joined against whom the causes of action are separate and therefore they are not jointly liable to the plaintiff in respect of those causes of action and the right to relief claimed is not based on the same act or transaction or where common questions of fact or law are not involved, the suit will be bad for misjoinder of defendants and causes of action, technically called as *multifariousness.*

(iv) Joinder of plaintiffs, defendants and causes of action

Where there are two or more plaintiffs, two or more defendants and several causes of action, the plaintiffs may unite the causes of action against the defendants in the same suit only when all the plaintiffs are jointly interested in the causes of action and the defendants are also jointly interested in the causes of action. If the plaintiffs are not jointly interested in the causes of action, the suit will be bad for misjoinder

[117] R. 6.

of plaintiffs and causes of action. On the other hand, if the defendants are not jointly interested in the causes of action, the suit will be bad for *multifariousness*. And if neither the plaintiffs nor the defendants are jointly interested in the causes of action, the suit will be bad for double misjoinder, i.e. misjoinder of plaintiffs and causes of action and misjoinder of defendants and causes of action.

(n) Objections as to misjoinder of causes of action: Rule 7

All objections on the ground of misjoinder of causes of action must be taken at the earliest opportunity, otherwise they will be deemed to have been waived.[118] Similarly, no decree or order under Section 47 of the Code can be reversed or substantially varied in appeal, *inter alia*, on account of any misjoinder or non-joinder of causes of action not affecting the merits of the case or the jurisdiction of the court.[119]

7. INSTITUTION OF SUIT: ORDER 4

(a) General

Section 26 and Order 4 provide for institution of suits. Order 1 deals with parties to a suit. It also contains provisions for addition, deletion and substitution of parties, joinder, non-joinder and misjoinder of parties and objection as to non-joinder and misjoinder. Order 2 lays down rules relating to frame of suit, splitting and joinder of claims, joinder of causes of action and objections as to misjoinder.

(b) Plaint: Meaning

The expression "plaint" has not been defined in the Code, but it means "a private memorial tendered to a court in which a person sets forth his cause of action; the exhibition of an action in writing."[120]

(c) Presentation of plaint: Section 26, Or. 4 R. 1

Every suit must be instituted by the presentation of a plaint in duplicate or in such other manner as may be prescribed by the Code[121] by the plaintiff himself or by his advocate or by his recognised agent or by any person duly authorised by him.[122] Therefore, generally, a proceeding which does not commence with a plaint is not a suit.

[118] R. 7.

[119] Ss. 99 & 99-A.

[120] *Assan* v. *Pathumma*, (1899) 22 Mad 494 at p. 502.

[121] Ss. 26, 2(16); Or. 4 R. 1.

[122] *Basanta Kumar* v. *Lakhsma Moni*, AIR 1968 Ass 57; *Ramgopal* v. *Ramsarup*, AIR 1934 Bom 91: (1934) 36 Bom LR 84; *Basdev* v. *Krishna Kumar*, AIR 1953 Punj 160; *Barkata* v. *Feroze Khan*, AIR 1944 Lah 131.

(d) Time and place of presentation

A plaint must be presented to the court or such officer as it appoints in that behalf.[123] Generally, the presentation of a plaint must be on a working day and during the office hours. However, there is no rule that such presentation must be made either at a particular place or at a particular time. A judge, therefore, may accept a plaint at his residence or at any other place even after office hours, though he is not bound to accept it. But if not too inconvenient, the judge must accept the plaint, if it is the last day of limitation.[124] Thereafter, the particulars of a suit will be entered by the court in a book kept for the said purpose, called the register of civil suits.[125] After the presentation, the plaint will be scrutinized by the Stamp Reporter. If there are defects, the plaintiff or his advocate will remove them. Thereafter the suit will be numbered.[126]

(e) Particulars in plaint

Every plaint must contain necessary particulars.[127]

(f) Register of suits

Particulars of every suit will be entered in the register of civil suits.

(g) Suit by indigent persons

Order 33 of the Code deals with suits by indigent persons (paupers).[128]

(h) Suit against minor

A suit against a minor can be said to have been instituted when a plaint is presented and not when a guardian *ad litem* is appointed.[129]

(i) Suit against dead person

According to one view, a suit against a person who is dead at the time of institution thereof is *non est* and of no legal effect. According to the other view, however, such suit is not void *ab initio* and can be continued against legal representatives of deceased defendant if they have

[123] R. 1(1); see also *Kalyan Singh* v. *Baldev Singh*, AIR 1961 HP 2.

[124] *Pindukuru Balarami Reddy* v. *Jaladanki Venkatasubbaiah*, AIR 1965 AP 386 at pp. 387-88; *Thakur Din Ram* v. *Haridas*, (1912) 34 All 482 (FB); *Sattayya Padayaci* v. *Soundarathachi*, AIR 1924 Mad 448 (FB); *Patna College* v. *Kalyan Srinivas*, AIR 1966 SC 707: (1966) 1 SCR 974; *Alok Kumar Roy* v. *Dr. S.N. Sarma*, AIR 1968 SC 453: (1968) 1 SCR 813; *Kisanlal* v. *Mohan Chandmal*, AIR 1971 Bom 410.

[125] R. 2.

[126] *Ramgopal* v. *Ramsarup*, *supra*; *Union Bank of India* v. *Sunpac Corpn.*, AIR 1986 Bom 353: (1986) 88 Bom LR 148: 1986 Mah LJ 237.

[127] For detailed discussion, *see infra*, Chap. 7.

[128] For detailed discussion, *see infra*, Chap. 16.

[129] *Ibid.*

been brought on record in accordance with law. Thus, if a suit is filed against a dead person by the plaintiff without the knowledge about the death of the defendant and takes prompt action as soon as he comes to know about such death, then he cannot be deprived of his remedy against the legal representatives of the deceased defendant.[130]

[130] For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. III at pp. 268-69.

PART II

6 Pleadings

SYNOPSIS

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1. GENERAL

ORDER 6 deals with pleadings in general. Rule 1 defines pleading, while Rule 2 lays down the fundamental principles of pleadings. Rules 3 to 13 require the parties to supply necessary particulars. Rules 14 and 15 provide for signing and verification of pleadings. Rule 16 empowers a court to strike out unnecessary pleadings. Rules 17 and 18 contain provisions relating to amendment of pleadings.

2. PLEADING: DEFINITION: RULE 1

"Pleading" is defined as plaint or written statement.[1] According to Mogha,[2] "Pleadings are statements in writing drawn up and filed by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer."

A plaintiff's pleading is his plaint, a statement of claim in which the plaintiff sets out his cause of action with all necessary particulars[3], and a defendant's pleading is his written statement, a defence in which the defendant deals with every material fact alleged by the plaintiff in the plaint and also states any new facts which are in his favour, adding such legal objections as he wishes to take to the claim.[4] Where the defendant, in his written statement, pleads a set-off, the plaintiff may file his written statement thereto. Again, in some cases, the defendant after filing his written statement may file an additional written statement with the leave of the court.

3. OBJECT

The whole object of pleadings is to bring parties to definite issues and to diminish expense and delay and to prevent surprise at the hearing. A party is entitled to know the case of his opponent so that he can meet it. In other words, the sole object of pleadings is to ascertain the real disputes between the parties, to narrow down the area of conflict and to see where the two sides differ, to preclude one party from taking the other by surprise and to prevent miscarriage of justice.[5]

In the leading case of *Throp* v. *Holdsworth*[6], Jessel, M.R. stated:

> "The whole object of pleadings is to bring parties to an issue, and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. *In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to di-*

[1] Or. 6 R. 1; see also *Bharat Singh* v. *State of Haryana*, (1988) 4 SCC 534: AIR 1988 SC 2181.

[2] *Mogha's Law of Pleadings* (1983) at p. 1.

[3] *Ibid*, for detailed discussion of "plaint", *see infra*, Chap. 7.

[4] *Ibid*, for detailed discussion of "written statement", *see infra*, Chap. 7.

[5] *Throp* v. *Holdsworth*, (1876) 3 Ch D 637; *Someshwar Dutt* v. *Tribhawan Dutt*, AIR 1934 PC 130 at p. 132: (1933-34) 61 IA 224: 149 IC 480; *J.K. Iron and Steel Co. Ltd.* v. *Mazdoor Union*, AIR 1956 SC 231 at p. 235: (1955) 2 SCR 1315; *Ram Sarup* v. *Bishnu Narain Inter College*, (1987) 2 SCC 555: AIR 1987 SC 1242.

[6] (1876) 3 Ch D 637.

minish expense and delay, especially as regards the amount of testimony required on either side at the hearing."[7] (emphasis supplied)

In *Sayad Muhammad* v. *Fatteh Muhammad*[8], Lord Halsbury said:

> "Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have opportunity of bringing forward such evidence as may be appropriate to the issues."[9]

In *Ganesh Trading Co.* v. *Moji Ram*[10], the Supreme Court observed, "Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."[11]

In *Virendra Kashinath* v. *Vinayak N. Joshi*[12], the Supreme Court stated, "The object of the rule is twofold. *First* is to afford the other side intimation regarding the particular facts of his case so that they may be met by the other side. *Second* is to enable the court to determine what is really the issue between the parties."[13]

4. IMPORTANCE

Importance of pleadings cannot be underestimated.

Jacob[14] states, "Pleadings do not only define the issues between the parties for the final decision of the court at the trial, they manifest and exert their importance throughout the whole process of the litigation."

Pleadings provide a guide for the proper mode of trial. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They also determine the range of admissible evidence which the parties should adduce at the trial. They also lay down limit on the relief that can be granted by the court.

[7] *Ibid*, at p. 639; *see also*, the following observations of Lord Halsbury in *Sayad Muhammad* v. *Fatteh Muhammad*, (1894) 22 IA 4: (1894) 22 Cal 324 at p. 331 (PC): "Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have opportunity of bringing forward such evidence as may be appropriate to the issues."

[8] (1894) 22 IA 4: (1894) 22 Cal 324 (PC).

[9] *Ibid*, at p. 331 (Cal).

[10] (1978) 2 SCC 91: AIR 1978 SC 484.

[11] *Ibid*, at p. 93 (SCC): at pp. 485-86 (AIR). See also *Sayad Muhammad* v. *Fatteh Muhammad*, (1894) 22 IA 4: (1894) 22 Cal 324 (PC).

[12] (1999) 1 SCC 47: AIR 1999 SC 162.

[13] *Ibid*, at p. 52 (SCC): at p. 165 (AIR).

[14] *The Present Importance of Pleadings* (1960) at pp. 75-76, Bullen, Leake and Jacob, *Precedents and Pleadings*, *Mogha's Law of Pleadings*, *supra*.

5. BASIC RULES OF PLEADINGS: RULE 2

Sub-rule (1) of Rule 2 lays down the fundamental principles of pleadings. It reads as under:

> 2(1). Every pleading shall contain, and contain only a statement in a 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.

On analysis, the following general principles emerge:

(*i*) Pleadings should state facts and not law;
(*ii*) The facts stated should be material facts;
(*iii*) Pleadings should not state the evidence; and
(*iv*) The facts should be stated in a concise form.

Let us discuss these principles in detail:

(1) Facts and not law

The first principle of pleadings is that they should state *only* facts and not law. It is the duty of the parties to state only the facts on which they rely upon for their claims. It is for the court to apply the law to the facts pleaded.[15]

The law of pleading may be tersely summarised in four words; "Plead facts not law."[16]

Thus, existence of a custom or usage is a question of fact which must be specifically pleaded. Similarly, intention is also a question of fact and it must be pleaded.

Again, waiver or negligence is a plea of fact and must be pleaded in the pleading.

But a plea about maintainability of the suit raises a question of law and need not be pleaded.[17] Likewise, when Hindu sons are sued for a debt incurred by their deceased father, it is not necessary to formulate in the plaint the Hindu Law as to the pious obligation of Hindu sons to pay their father's debt. A construction or interpretation of a document, being a point of law, need not be pleaded.

This is based on the principle that a judge is bound to apply correct law even if incorrect law is pleaded by a party.

A mixed question of law and fact, however, should be specifically pleaded.[18]

[15] *Kedar Lal* v. *Hari Lal*, AIR 1952 SC 47 at p. 51: 1952 SCR 179; *Manoj* v. *Shanti*, (1997) 1 SCC 553: AIR 1997 SC 2153; *Lakhi Ram* v. *Trikha Ram*, (1998) 2 SCC 720: AIR 1998 SC 1230; *Syed Dastagir* v. *T.R. Gopalkrishna Setty*, (1999) 6 SCC 337: AIR 1999 SC 3029.

[16] *Gouri Dutt Ganesh Lall Firm* v. *Madho Prasad*, AIR 1943 PC 147: 209 IC 192.

[17] *State of Rajasthan* v. *Rao Raja Kalyan Singh*, (1972) 4 SCC 165: AIR 1971 SC 2018 at p. 2019.

[18] *Ram Prasad* v. *State of M.P.*, (1969) 3 SCC 24: AIR 1970 SC 1818.

(2) Material facts

The second principle of pleadings is that they should contain a statement of material facts and material facts only. Though the expression "material facts" has not been defined in the Code, it means all facts upon which the plaintiff's cause of action or the defendant's defence depends, or, in other words, all those facts which must be proved in order to establish the plaintiff's right to relief claimed in the plaint or the defendant's defence in the written statement.[19]

In *Udhav Singh* v. *Madhav Rao Scindia*[20], the Supreme Court has defined the expression "material facts" in the following words:

> "All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are material facts."[21]

Recently, in *Virender Nath* v. *Satpal Singh*,[22] the Supreme Court stated:

> "The phrase 'material facts' may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. *It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.*"[23] (emphasis supplied)

The distinction between "material facts" and "particulars" cannot be overlooked. Material facts are primary and basic facts which must be pleaded by the party in support of the case set up by it. Since the object and purpose is to enable the opposite party to know the case it has to meet, in absence of pleading, a party cannot be allowed to lead evidence. Failure to state material facts, hence, will entail dismissal of the suit. Particulars, on the other hand, are the details of the case. They amplify, refine and embellish material facts. They give the finishing touch to the basic contours of a picture already drawn so as to

[19] *Union of India* v. *Sita Ram*, (1976) 4 SCC 505: AIR 1977 SC 329; *Brahma Parkash* v. *Manbir Singh*, AIR 1963 SC 1607: 1964 SCD 485; *Calcutta Discount Co. Ltd.* v. *ITO*, AIR 1961 SC 372: (1961) 2 SCR 241.

[20] (1977) 1 SCC 511: AIR 1976 SC 744.

[21] *Ibid*, at p. 523 (SCC): 752 (AIR). See also *Mohan Rawale* v. *Damodar Tatyaba*, (1994) 2 SCC 392 at p. 398; *Gajanan Krishnaji* v. *Dattaji Raghobaji*, (1995) 5 SCC 347: AIR 1995 SC 2284. *Mogha, supra*, at p. 22.

[22] (2007) 3 SCC 617: AIR 2007 SC 581.

[23] *Ibid*, at p. 628 (SCC) (*per* Thakker, J.); see also *Harkirat Singh* v. *Amrinder Singh*, (2005) 13 SCC 511.

make it full, more detailed and more informative. Thus, the distinction between "material facts" and "particulars" is one of degree.[24]

In *Virender Nath* v. *Satpal Singh*,[25] the Supreme Court said:

> "A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. *'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise.*"[26]
>
> (emphasis supplied)

Whether a particular fact is or is not a material fact which is required to be pleaded by a party depends on the facts and circumstances of each case.[27]

All material facts must appear in the pleadings and the necessary particulars must be there so as to enable the opposite party to know the case he is required to meet and to put him on his guard. The rule is not of mere technicality and, therefore, if a party omits to state material facts, it would mean that the plea has not been raised at all and the court will not allow the party to lead evidence of that fact at the trial, unless the court gives that party leave to amend his pleadings. The reason is that non-mention of material facts amounts to non-pleading and, therefore, no cause of action arises in favour of such party.

What particulars are to be stated depends upon the facts of each case, but it is absolutely essential that the pleading, not to be embarrassing to the defendant, should state those facts which will put his opponents on their guard and tell them what they have to meet when the case comes up for trial.[28]

[24] *D. Ramachandran* v. *R.V. Janakiraman*, (1999) 3 SCC 267: AIR 1999 SC 1128; *Udhav Singh* v. *Madhav Rao Scindia*, (1977) 1 SCC 511: AIR 1976 SC 744.

[25] (2007) 3 SCC 617: AIR 2007 SC 581.

[26] *Ibid*, at p. 629 (SCC) (*per* Thakker, J.); see also *Harkirat Singh* v. *Amrinder Singh*, (2005) 13 SCC 511.

[27] *Virender Nath* v. *Satpal Singh*, *supra*; *Ramachandran* v. *Janakiraman*, *supra*; *Udhav Singh* v. *Madhav Rao Scindia*, *supra*; *Gajanan Krishnaji. Dattaji Raghobaji*, (1995) 5 SCC 347: AIR 1995 SC 2284; *Charan Lal Sahu* v. *Giani Zail Singh*, (1984) 1 SCC 390: AIR 1984 SC 309; *Calcutta Discount Co. Ltd.* v. *ITO*, AIR 1961 SC 372: (1961) 2 SCR 241.

[28] *Ibid*, see also *Charan Lal Sahu* v. *Giani Zail Singh*, (1984) 1 SCC 390 at pp. 405-06: AIR 1984 SC 309 at p. 317; *Mohan Rawale* v. *Damodar Tatyaba* (*ibid.*); Bullen, Leake and Jacob, *Precedents of Pleadings* (1975) at p. 112.

Thus, it has been held that a plaintiff, filing a suit on the basis of title, must state the nature of the deeds on which he relies in deducing his title. Similarly, a party relying upon the fact that the notice of dishonour is not necessary, or that the woman claiming maintenance has lost her right on account of her incontinence, or that the person who has signed the plaint in a suit by a corporate body has authority under the Code, is bound to allege those facts in his pleadings.

(3) Facts and not evidence

The third principle of pleadings is that the evidence of facts, as distinguished from the facts themselves, need not be pleaded. In other words, the pleadings should contain a statement of material facts on which the party relies but not the evidence by which those facts are to be proved.[29]

The facts are of two types:

(*a*) *Facta probanda*—the facts required to be proved (material facts); and

(*b*) *Facta probantia*—the facts by means of which they are to be proved (particulars or evidence).

The pleadings should contain only *facta probanda* and not *facta probantia*. The material facts on which the plaintiff relies for his claim or the defendant relies for his defence are called *facta probanda*, and they must be stated in the plaint or in the written statement, as the case may be. But the facts or evidence by means of which the material facts are to be proved are called *facta probantia* and need not be stated in the pleadings. They are not the "fact in issue", but only relevant facts required to be proved at the trial in order to establish the fact in issue.

As observed by Lord Denman, C.J.,[30] "It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation."

Brett, L.J.[31] also stated, "I will not say that it is easy to express in words what are facts which must be stated and what matters need not be stated.... The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts.... *The facts which ought to be stated are the material facts on which the party pleading relies.*" (emphasis supplied)

[29] *R.M. Seshadri* v. *G. Vasantha Pai*, (1969) 1 SCC 27 at pp. 34-35: AIR 1969 SC 692 at p. 699; *Manphul Singh* v. *Surinder Singh*, (1973) 2 SCC 599 at p. 608: AIR 1973 SC 2158 at pp. 2164-65; *Khushalbhai Mahijibhai* v. *Firm of Mohmadhussain Rahimbux*, 1980 Supp SCC 1: AIR 1981 SC 977.

[30] *Williams* v. *Wilcox*, 112 ER 857: (1835-42) All ER Rep 25: (1838) 8 Ad&El 314 at p. 331.

[31] *Philipps* v. *Philipps*, (1878) 4 QB 127 at p. 133: (1874-1880) All ER Rep Ext 1684 (CA).

In *Virender Nath* v. *Satpal Singh*[32], after referring the leading English and Indian decisions on the point, the Supreme Court observed:

> "There is distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the fact or facts by means of which *facta probanda* (material facts) are proved and which are in the nature of *facta probantia* (particulars or evidence) need not be set out in the pleadings. They are not 'fact in issue', but only relevant facts required to be proved at the trial in order to establish the fact in issue."[33]

The aforesaid principle is well illustrated in the case of *Borrodaile* v. *Hunter*[34]. *A* was insured with an insurance company. One of the terms of the policy was that the policy would be void if the insured committed suicide. *A* actually committed suicide by shooting himself with a pistol and thereupon an action was brought against the company on the policy. The company should only plead that *A* committed suicide. This is *facta probanda*. Other facts, that *A* was melancholy for weeks, that he bought a pistol a day before his death, shot himself with the said pistol and that a letter was found with him addressed to his wife stating that he intended to kill himself—all these facts are *facta probantia* and they need not be pleaded. Similarly, it is wrong to set out admission made by the opposite party in the pleading, as that fact is only evidence.

Thus, in an election petition the plea that cars were used by the successful candidate for the purpose of conveying voters contrary to the Act must be stated in the pleadings since it is a fact in issue (*facta probanda*). But the facts as to from where the cars were obtained, who hired them and used them for conveyance of voters are merely evidentiary facts (*facta probantia*) and need not be stated in the pleadings.[35]

It is, however, not easy to express in words what are the facts which must be stated in the pleadings and what are the matters which need not be so set out. The question must be decided in the light of facts and circumstances of each case.[36] To put it differently, the dividing line

[32] (2007) 3 SCC 617: AIR 2007 SC 581.

[33] *Ibid*, at pp. 631-32 (SCC) (*per* Thakker, J.), see also *Harkirat Singh* v. *Amrinder Singh*, (2005) 13 SCC 511.

[34] (1845) 5 M&G 639.

[35] *Virender Nath* v. *Satpal Singh*, (2007) 3 SCC 617: AIR 2007 SC 581; *R.M. Seshadri* v. *G. Vasantha Pai*, *supra*.

[36] *Philipps* v. *Philipps*, (1878) 4 QB 127; *Mohan Rawale* v. *Damodar Tatyaba*, (1994) 2 SCC 392.

between these two classes of facts (*facta probanda* and *facta probantia*) is often very difficult to draw; but a fact as to which there is a doubt as to whether it should be placed in the one class or the other should be pleaded.[37]

(4) Concise form

The fourth and the last general principle of pleadings is that the pleadings should be drafted with sufficient brevity and precision. The material facts should be stated precisely succinctly and coherently.

The importance of a specific pleading can be appreciated only if it is realised that the absence of a specific plea puts the defendant at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing what the plaintiff wants to convey by a vague pleading. Therefore, the pleading must be precise, specific and unambiguous. A party cannot be allowed to keep his options open until the trial and adduce such evidence as seems convenient and handy.[38]

The words "in a concise form" are definitely suggestive of the fact that brevity should be adhered to while drafting pleadings. Of course, brevity should not be at the cost of excluding necessary facts, but it does not mean niggling in the pleadings. *If care is taken in syntactic process, pleadings can be saved from tautology.*[39] (emphasis supplied)

Every pleading should be divided into paragraphs and sub-paragraphs. Each allegation should be contained in a separate paragraph. Dates, totals and numbers must be mentioned in figures as well as in words.[40] Rule 3 lays down that forms in Appendix A of the Code should be used where they are applicable; and where they are not applicable, forms of like character should be used.

The facts must be pleaded with certainty. In other words, they should be definitely stated as facts, and should not be left to be inferred from vague or ambiguous expressions. All material facts must be stated in a summary form, as briefly as the nature of the case requires. Immaterial averments and unnecessary details must be omitted and material allegations and necessary particulars must be included.

[37] *Millington* v. *Loring*, (1880) 6 QB 190 (CA).

[38] *Charan Lal Sahu* v. *Giani Zail Singh*, (1984) 1 SCC 390 at pp. 405-06: AIR 1984 SC 309 at p. 317.

[39] *Virendra Kashinath* v. *Vinayak N. Joshi*, (1999) 1 SCC 47 at p. 52: AIR 1999 SC 162 at p. 165 ("Elaboration of facts in pleading is not the ideal measure and that is why the sub-rule embodies the words "and contain only" just before the succeeding words "a statement in a concise form of the material facts").

[40] R. 2(2), (3).

6. OTHER RULES OF PLEADINGS: RULES 4-18

Over and above the aforesaid basic rules, there are other rules of pleadings dealing with cases of a special nature. They have been laid down in Rules 4 to 18 of Order 6. They may be summarised thus:

(1) Wherever misrepresentation, fraud, breach of trust, wilful default or undue influence are pleaded in the pleadings, particulars with dates and items should be stated.[41]

In *Bishundeo Narain* v. *Seogeni Rai*[42], the Supreme Court observed:

> "Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud which any court ought to take notice of, however strong the language in which they are couched may be, and the same applies to undue influence and coercion."[43]

What particulars are to be set out in the pleadings must depend upon the facts of each case. As a general rule, so much certainty and particularity should be insisted upon as is reasonable, having regard to the circumstances and the nature of the acts. "To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."[44]

(2) As stated above, the object of pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose. Rule 4 has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. Therefore, if the particulars stated in the pleading are not sufficient and specific, the court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up.[45]

[41] R. 4.

[42] AIR 1951 SC 280: 1951 SCR 548.

[43] *Ibid*, at p. 283 (AIR): at p. 556 (SCR); see also *Bharat Dharma Syndicate Ltd.* v. *Harish Chandra*, AIR 1937 PC 146: 168 IC 620: (1936-37) 64 IA 143; *Ladli Prashad* v. *Karnal Distillery Co. Ltd.*, AIR 1963 SC 1279: (1964) 1 SCR 270; *Bijendra Nath* v. *Mayank Srivastava*, (1994) 6 SCC 117: AIR 1994 SC 2562.

[44] *Ratcliffe* v. *Evans*, (1892) 2 QB 524 at p. 532): 61 LJ QB 535.

[45] *Ladli Prashad* v. *Karnal Distillery Co. Ltd.*, *supra*, at p. 1288 (AIR).

(3) The performance of a condition precedent need not be pleaded since it is implied in the pleadings. Non-performance of a condition precedent, however, must be specifically and expressly pleaded.[46]

(4) Generally departure from pleading is not permissible, and except by way of amendment, no party can raise any ground of claim or contain any allegation of fact inconsistent with his previous pleadings.[47]

(5) A bare denial of a contract by the opposite party will be construed only as a denial of *factum* of a contract and not the legality, validity or enforceability of such contract.[48]

(6) Documents need not be set out at length in the pleadings unless the words therein are material.[49]

(7) Wherever malice, fraudulent intention, knowledge or other condition of the mind of a person is material, it may be alleged in the pleading only as a fact without setting out the circumstances from which it is to be inferred.[50] Such circumstances really constitute evidence in proof of material facts.

(8) Whenever giving of notice to any person is necessary or a condition precedent, pleadings should only state regarding giving of such notice, without setting out the form or precise terms of such notice or the circumstances from which it is to be inferred, unless they are material.[51]

(9) Implied contracts or relations between persons may be alleged as a fact, and the series of letters, conversations and the circumstances from which they are to be inferred should be pleaded generally.[52]

(10) Facts which the law presumes in favour of a party or as to which the burden of proof lies upon the other side need not be pleaded.[53]

(11) Every pleading should be signed by the party or one of the parties or by his pleader.[54]

(12) A party to the suit should supply his address. He should also supply address of the opposite party.[55]

(13) Every pleading should be verified on affidavit by the party or by one of the parties or by a person acquainted with the facts of the case.[56]

[46] R. 6.

[47] R. 7. *See also infra*, "Alternative and inconsistent pleadings".

[48] R. 8. See also *Kalyanpur Lime Works Ltd.* v. *State of Bihar*, AIR 1954 SC 165: 1954 SCR 958.

[49] R. 9.

[50] R. 10.

[51] R. 11.

[52] R. 12.

[53] R. 13.

[54] R. 14. For detailed discussion, *see infra*, "signing and verification of pleadings".

[55] R. 14-A. *See also ibid.*

[56] R. 15. *See also ibid.*

(14) A court may order striking out a pleading if it is unnecessary, scandalous, frivolous, vexatious or tends to prejudice, embarrass or delay fair trial of the suit.[57]

(15) A court may allow amendment of pleadings.[58]

(16) Forms in Appendix A of the Code should be used wherever they are applicable. Where they are not applicable, forms of like nature should be used.[59]

(17) Every pleading should be divided into paragraphs, numbered consecutively. Each allegation or averment should be stated in a separate paragraph.[60]

(18) Dates, totals and numbers should be written in figures as well as in words.[61]

7. FORMS OF PLEADING

Averments in pleadings should conform with the forms in Appendix A to the (First) Schedule. But the forms in Appendix A are not statutory. Non-compliance thereof, hence, would not result in dismissal of the suit. A party will not be non-suited on that ground.[62]

8. PLEADING IN WRIT PETITIONS

There is essential distinction between pleading under the Code and a pleading under Article 32 or 226 of the Constitution.

Under the Code, every pleading (plaint or written statement) should state only material facts and not evidence. In a writ petition, on the other hand, the petitioner, or in a counter-affidavit, the respondent, should not only state material facts but also the evidence in support and proof of such facts by annexing necessary orders and documents.[63]

9. ALTERNATIVE AND INCONSISTENT PLEADINGS

The expression "alternative" means the one or the other of two things. It conveys a choice. A party to a litigation may include in his pleadings two or more sets of facts and claim relief in the alternative.

"Inconsistent", on the other hand, means mutually repugnant, contradictory, irreconcilable or destructive. One is contrary to the other. Both, therefore, cannot stand. Acceptance or establishment of one necessarily implies abrogation or abandonment of the other.

[57] R. 16. For detailed discussion, *see infra*, "striking out pleadings".

[58] R. 17. For detailed discussion, *see infra*, "Amendment of pleadings".

[59] R. 3.

[60] R. 2(2).

[61] R. 2(3).

[62] *R.C. Chandiok* v. *Chuni Lal*, (1970) 3 SCC 140: AIR 1971 SC 1238.

[63] *Bharat Singh* v. *State of Haryana*, (1988) 4 SCC 534: AIR 1988 SC 2181.

There is nothing in the Code to prevent the plaintiff from relying upon several different reliefs in the alternative or to prevent the defendant from raising several different defences in the alternative.

As observed by Lindley, L.J.:[64]

> "A person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them; and *it appears to me to be a far too strict a construction of this Order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark.*"[65] (emphasis supplied)

The underlying object of allowing alternative pleas and permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation and to decide the entire controversy in one litigation only.[66]

Thus, a suit for possession of property is maintainable on the basis of title or in the alternative on the basis of lease. Similarly, a landlord can file a suit for eviction of his tenant on the ground of personal requirement or in the alternative on the ground of non-payment of rent. Likewise, a prayer for specific performance of an agreement or, in the alternative, a prayer for damages or compensation can be made.[67]

The Code does not prohibit a party from making two or more inconsistent sets of allegations.[68] A plaintiff may rely on several different rights alternatively, although they may be inconsistent, so also a defendant may raise by his statement of defence, without leave of the court, as many distinct and separate inconsistent defences as he may think proper. It is open to the parties to raise even mutually inconsistent pleas and if relief could be founded on the alternative plea it could

[64] *Morgan, In re*, (1887) 35 Ch D 492 (CA); see also *Philipps* v. *Philipps*, (1878) 4 QB 127.

[65] *Ibid*, at p. 499. Suppose *A* is accused of breaking a school-room window. *A*'s defence may run thus: "In the first place, sir, the school room has no window. In the second place, the school room window is not broken. In the third place, if it is broken, I did not do it. In the fourth place, it was an accident." All these defences are permissible. First three are traverses, whereas the last is a confessional one. (Glanville Williams, *Learning of the Law*, 11th Edn. at pp. 20-21).

[66] *Firm Sriniwas Ram Kumar* v. *Mahabir Prasad*, AIR 1951 SC 177: 1951 SCR 277.

[67] *Jagdish Singh* v. *Natthu Singh*, (1992) 1 SCC 647: AIR 1992 SC 1604.

[68] *Bhuban Mohini* v. *Kumud Bala*, AIR 1924 Cal 467: 28 CWN 131: 82 IC 934; *Ardeshir Mama* v. *Flora Sassoon*, AIR 1928 PC 208: (1927-28) 55 IA 360: 111 IC 413; *Firm Sriniwas Ram Kumar* v. *Mahabir Prasad*, AIR 1951 SC 177: 1951 SCR 277; *Chapsibhai* v. *Purushottam*, (1971) 2 SCC 205 at pp. 213-14: AIR 1971 SC 1878 at p. 1885; *Modi Spg. & Wvg. Mills Co. Ltd.* v. *Ladha Ram*, (1976) 4 SCC 320 at p. 321: AIR 1977 SC 680; *P.M.C. Kunhiraman Nair* v. *C.R. Naganatha Iyer*, (1992) 4 SCC 254: AIR 1993 SC 307; *Basavan Jaggu Dhobi* v. *Sukhanandan*, 1995 Supp (3) SCC 179; *Arundhati Mishra* v. *Ram Charitra Pandey*, (1994) 2 SCC 29; *Akshaya Resturant* v. *P. Anajanappa*, 1995 Supp (2) SCC 303: AIR 1995 SC 1498; *G. Nagamma* v. *Siromanamma*, (1996) 2 SCC 25.

be granted.[69] This is, however, subject to the provision that such pleading does not prejudice or embarrass fair trial of the suit. But a pleading is not embarrassing merely because it sets up an inconsistent set of facts or irreconcilable pleas.

Thus, a claim of ownership or in the alternative a right of pre-emption; or a plea of forgery or in the alternative a plea of execution under undue influence or fraud; or a plea of grant of perpetual tenancy or in the alternative a plea of adverse possession can be taken.

Though inconsistent pleas are not impermissible, they are seen with suspicion by the court and the party really takes risk in adopting this method of pleading. Likewise, a party who takes inconsistent pleas and tries to establish both of them by contradictory oral evidence, places himself in peril as the evidence adduced in support of both the pleas would be conflicting, contradictory and mutually destructive and may hardly inspire confidence.

Moreover, all the inconsistent pleas sought to be raised by a party must be maintainable at law. Thus, a plaintiff cannot pray for a declaration that a particular contract is void and in the alternative for the specific performance of the same contract since it is not permissible under Section 37 of the Specific Relief Act, 1877.[70] Moreover, such inconsistent pleas are subject to Rule 16 of Order 6 which empowers the court to strike out any matter either in the plaint or in the written statement which may embarrass fair trial of the suit.

Finally, where a party has taken up a definite stand once and the court has given a decision on that footing, he cannot be subsequently allowed to take an inconsistent position with regard to the same matter.[71] In other words, a party cannot play fast and loose[72], blow hot and cold[73], or approbate and reprobate[74], to the detriment of the other side.

[69] *Firm Sriniwas Ram Kumar* v. *Mahabir Prasad, supra; Arundhati Mishra* v. *Ram Charitra Pandey, supra.*

[70] *Prem Raj* v. *D.L.F. Housing and Construction Ltd.*, AIR 1968 SC 1355 at pp. 1356-57: (1968) 3 SCR 648.

[71] *Supdt. of Taxes* v. *Bormahajan Tea Co. Ltd.*, (1978) 1 SCC 513 at pp. 518-19: AIR 1978 SC 533 at p. 536; *G. Sarana (Dr.)* v. *University of Lucknow*, (1976) 3 SCC 585 at p. 591: AIR 1976 SC 2428 at p. 2433.

[72] *Mamleshwar Prasad* v. *Kanhaiya Lal*, (1975) 2 SCC 232 at p. 235: AIR 1975 SC 907 at p. 909.

[73] *Prasun Roy* v. *Calcutta Municipal Development Authority*, (1987) 4 SCC 217 at p. 221: AIR 1988 SC 205 at p. 207; *Iftikhar Ahmed* v. *Syed Meharban Ali*, (1974) 2 SCC 151 at p. 155: AIR 1974 SC 749 at p. 751.

[74] *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593 at pp. 601-02: 1956 SCR 451; *Michael Goldetz* v. *Serajuddin & Co.*, AIR 1963 SC 1044 at p. 1046: (1964) 1 SCR 9; *Swaran Lata* v. *Union of India*, (1979) 3 SCC 165 at p. 188; *Bar Council of Delhi* v. *Surjeet Singh*, (1980) 4 SCC 211: AIR 1980 SC 1612 at p. 1618; *R.C. Chandiok* v. *Chuni Lal*, (1970) 3 SCC 140: AIR 1971 SC 1238 at p. 1243; *R.N. Gosain* v. *Yashpal Dhir*, (1992) 4 SCC 683: AIR 1993

Scrutton, L.J. rightly stated:[75]

> "It startles me to hear it argued that a person can say the judgment is wrong and at the same time accept payment under the judgment as being right."

His Lordship added:

> "[I]n my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."[76]

Thus, a party proceeding on the basis of a rule as valid, cannot, during the arguments, challenge the validity thereof.[77] Similarly, a party claiming right of ownership of property in the previous litigation cannot claim right of easement in a subsequent suit.[78]

In *P.R. Deshpande* v. *Maruti Balaram*[79], however, it was held by the Supreme Court that the principle would not apply to a tenant giving an undertaking to vacate the premises and not filing an appeal in a superior court. "By directing the party to give such an undertaking no court can scuttle or foreclose a statutory remedy of appeal or revision, much less a constitutional remedy."[80]

10. CONSTRUCTION OF PLEADINGS[81]

It has been uniformly held that pleadings in India should not be construed very strictly. They have to be interpreted liberally and regard must be had to the substance of the matter than the form thereof.[82] They have to be interpreted not with formalistic rigour but with latitude or awareness of low legal literacy of poor people.[83] Again, plead-

SC 352; *P.R. Deshpande* v. *Maruti Balaram, infra. Devasahayam* v. *P. Savithramma*, (2005) 7 SCC 653.

[75] *Dexters Ltd.* v. *Hill Crest Oil Co.*, (1926) 1 KB 348 at p. 358: (1925) All ER Rep 273: 95 LJ KB 386, CA.

[76] *Ibid*, see also *R.C. Chandiok* v. *Chuni Lal, supra*; *R.N. Gosain* v. *Yashpal Dhir, supra.*

[77] *Madhusudhan* v. *Radharani*, AIR 1971 Cal 534; *I.L. Honnegouda* v. *State of Karnataka*, AIR 1978 SC 28; *Bapatla Venkata* v. *Sikhara Ramakrishna*, AIR 1958 AP 322.

[78] *Dhirajlal* v. *Sankleshwar*, AIR 1976 Guj 180: (1976) 17 Guj LR 67; *Yogendra Kumar* v. *Union of India*, AIR 1972 Del 234; *Sultan* v. *Ganesh*, (1988) 1 SCC 664: AIR 1988 SC 716.

[79] (1998) 6 SCC 507: AIR 1998 SC 2979.

[80] *Ibid*, at p. 512 (SCC): at p. 2982 (AIR); see also *Evans* v. *Bartlam*, (1937) 2 All ER 646: 1937 AC 473: 106 LJ KB 568.

[81] *See also supra*, "Interpretation", Pt. I, Chap. 1; *Mogha, supra*, at p. 7.

[82] *Harish Chandra* v. *Triloki Singh*, AIR 1957 SC 444 at p. 456: 1957 SCR 370; *Katikara Chintamani Dora* v. *Guntreddi Annamanaidu*, (1974) 1 SCC 567 at p. 583-84: AIR 1974 SC 1069 at p. 1080; *Udhav Singh* v. *Madhav Rao Scindia*, (1977) 1 SCC 511: AIR 1976 SC 744 at p. 750; *Madan Gopal* v. *Mamraj Maniram*, (1977) 1 SCC 669 at p. 674: AIR 1976 SC 461 at p. 470; *Suraj Prakash* v. *Raj Rani*, (1981) 3 SCC 652 at p. 655: AIR 1981 SC 485 at p. 487; *Haridas Aildas Thadani* v. *Godrej Rustom Kermani*, (1984) 1 SCC 668: AIR 1983 SC 319; *Ram Sarup* v. *Bishnu Narain Inter College*, (1987) 2 SCC 555: AIR 1987 SC 1242.

[83] *Ibid*, n. 62. See also *Manjushri Raha* v. *B.L. Gupta*, (1977) 2 SCC 174 at p. 178: AIR 1977 SC 1158 at p. 1161; *K.C. Kapoor* v. *Radhika Devi*, (1981) 4 SCC 487 at p. 499: AIR 1981

ings have to be read as a whole and it is not permissible to cull out a passage and to read it out of context, in isolation. The intention of the party is to be gathered, primarily, from the tenor and terms of his pleadings as a whole.[84]

In *Madan Gopal* v. *Mamraj Maniram*[85], the Supreme Court has rightly observed, "It is well-settled that pleadings are loosely drafted in courts and *the courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds.*"[86] (emphasis supplied)

Pleadings are not statutes and legalism is not verbalism. Common sense should not be kept in the cold storage when pleadings are construed. Parties win or lose on substantial questions, not "technical tortures" and courts cannot be "abettors".[87]

In *Ram Sarup* v. *Bishnu Narain Inter College*[88], it was stated:

> "It is well-settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that the other party may not be taken by surprise. The pleadings, however, should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. *It is not desirable to place undue emphasis on form, instead the substance of the pleading should be considered.*"[89]
>
> (emphasis supplied)

The reason is obvious. As stated above[90], the rules of procedure are intended as aids for a fair trial and for reaching a just decision. Their function is to facilitate justice and further its ends and not to obstruct it. A procedural law is not a tyrant but a servant, not an obstruction but

SC 2118.

[84] *Udhav Singh* v. *Madhav Rao Scindia, supra; Indian Oil Corpn.* v. *Municipal Corpn. Jullundhar,* (1993) 1 SCC 333: AIR 1993 SC 844; *Virendra Kashinath* v. *Vinayak N. Joshi,* (1999) 1 SCC 47: AIR 1999 SC 162.

[85] (1977) 1 SCC 669: AIR 1976 SC 461.

[86] *Ibid,* at p. 674 (SCC): at p. 470 (AIR); *Virendra Kashinath* v. *Vinayak N. Joshi,* (1999) 1 SCC 47: AIR 1999 SC 162.

[87] *S.B. Noronah* v. *Prem Kumari,* (1980) 1 SCC 52 at p. 54: AIR 1980 SC 193 at p. 195; *Syed Dastagir* v. *T.R. Gopalkrishna Setty,* (1999) 6 SCC 337: AIR 1999 SC 3029.

[88] (1987) 2 SCC 555: AIR 1987 SC 1242.

[89] *Ibid,* at pp. 562-63 (SCC): at pp. 1246-47 (AIR).

[90] *See supra,* "Interpretation", Pt. I, Chap. 1.

an aid to justice, not a mistress but a handmaid to the administration of justice.[91] Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent deviations from the course which litigation on particular causes of action must take.

It is respectfully submitted that the following well-known and oft-quoted observations of Vivian Bose, J. in the leading case of *Sangram Singh* v. *Election Tribunal*[92] must be borne in mind while interpreting procedural laws:

> "... [A] code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people. *Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for furtherance of justice be used to frustrate it.*"[93] (emphasis supplied)

Thus, it has been held that the court will not dismiss the suit of the plaintiff only on the ground that the claim is wrongly described, or a wrong section is quoted, or that proper relief is not claimed.

This does not, however, mean that the rules of pleadings are altogether ignored. The liberal construction must be confined within reasonable limits. Therefore, where the plaintiff is a practising lawyer and is also represented by a lawyer, or where a technical defence is set up against a just claim, or where in an election petition charges of corrupt practice have been levelled against the successful candidate, the pleadings must be strictly construed.

11. STRIKING OUT PLEADINGS: RULE 16

The court is empowered to strike out any pleading if it is unnecessary, scandalous, frivolous or vexatious, or tends to prejudice, embarrass or delay the fair trial of the suit or is otherwise an abuse of the process of the court.[94]

In *Sathi Vijay Kumar* v. *Tota Singh*[95], the Supreme Court observed that bare reading of Rule 16 of Order 6 of the Code makes it clear that a court may order striking of pleadings in the following cases:

[91] *Suraj Prakash* v. *Raj Rani*, (1981) 3 SCC 652 at p. 655: AIR 1981 SC 485 at p. 486.
[92] AIR 1955 SC 425: (1955) 2 SCR 1.
[93] *Ibid*, at p. 429 (AIR): at p. 8 (SCR).
[94] R. 16; see also *Mohan Rawale* v. *Damodar Tatyaba*, (1994) 2 SCC 392 at p. 399.
[95] (2006) 13 SCC 353 at p. 365.

(*i*) where such pleading is unnecessary, scandalous, frivolous or vexatious; or

(*ii*) where such pleading tends to prejudice, embarrass or delay fair trial of the suit; or

(*iii*) where such pleading is otherwise an abuse of the process of the court.

Generally, a court does not advise parties as to how they should draft their pleadings. But this is subject to the rider that the parties do not offend the rules of pleadings by making averments or introducing pleas which are unnecessary, which may tend to prejudice, embarass or delay fair trial. In such cases, the court will interfere. This power, however, must be exercised by the court sparingly.[96]

Recently, in *Sathi Vijay Kumar* v. *Tota Singh*[97], considering English and Indian decisions on the point, the Supreme Court stated:

> "(I)t cannot be overlooked that *normally*, a court cannot direct parties as to how they should prepare their pleadings. If the parties have not offended the rules of pleadings by making averments or raising arguable issues, the court would not order striking out pleadings. *The power to strike out pleadings is extraordinary in nature and must be exercised by the court sparingly and with extreme care, caution and circumspection.*" (emphasis supplied)

12. SIGNING AND VERIFICATION OF PLEADINGS: RULES 14-15

As a general rule, every pleading must be signed by the party or by one of the parties or by his pleader. But if the party is unable to sign the pleading, it can be signed by any person authorised by him.[98] Similarly, every pleading must be verified by the party or by one of the parties pleading or by some other person acquainted with the facts of the case. The person verifying the pleading must specify what paragraphs he verifies upon his knowledge and what paragraphs he verifies upon information received by him and believed by him to be true. The verification must be signed on an affidavit by the person verifying and must contain the date on which and the place at which it was signed. The person verifying the pleading should also furnish an affidavit in support of his pleadings.[99]

The object underlying this provision is to fix upon the party verifying or on whose behalf verification is made the responsibility for the statement that it contains, and to prevent as far as possible disputes as

[96] *Roop Lal* v. *Nachhattar Singh*, (1982) 3 SCC 487: AIR 1982 SC 1559; *K.K. Modi* v. *K.N. Modi*, (1998) 3 SCC 573: AIR 1998 SC 1297; *United Bank of India* v. *Naresh Kumar*, (1996) 6 SCC 660: AIR 1997 SC 3.

[97] (2006) 13 SCC 353 at p. 366.

[98] R. 14.

[99] R. 15.

to whether the suit was instituted or defended with the knowledge or authority of the party, who has signed the verification or on whose behalf it has been signed.[100] Rule 14-A as added by the Amendment Act of 1976 requires a party to the suit to supply the address for service of notice. It further provides for the stay of suit of the plaintiff or striking off defence of the defendant in case the address supplied by him is found to be incomplete, false or fictitious.

A defect in the matter of signing and verification of pleadings is merely an irregularity and can be corrected at a later stage of the suit with the leave of the court and a suit cannot be dismissed nor an order be passed against a party on the ground of defect or irregularity in signing or verification of plaint or written statement.[101] Similarly, if the affidavit filed by the party is defective, a court, instead of rejecting it, may give an opportunity to the party to file a proper affidavit.[102]

13. VARIANCE BETWEEN PLEADING AND PROOF

It is well-settled that a party can be permitted to adduce evidence on the basis of the case pleaded by him in his pleading and he cannot set up a case inconsistent with his pleading.[103] "No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party."[104]

The purpose is twofold; (*i*) to appraise the opposite party, distinctly and specifically, of the case he is called upon to answer, so that he may properly prepare his defence and may not be taken by surprise; and (*ii*) to maintain an accurate record of the cause of action as a protection against a second or subsequent proceeding founded upon the same allegations.[105]

The fundamental rule of pleading is that a party can only succeed on the basis of what he has pleaded and proved. He cannot succeed on a case not set up by him. He also cannot be permitted to change his case at the stage of trial if it is inconsistent with his pleadings. Such

[100] *A.K.K. Nambiar* v. *Union of India*, (1969) 3 SCC 864 at p. 867: AIR 1970 SC 652 at pp. 653-54.

[101] *Bhikaji* v. *Brijlal*, AIR 1955 SC 610: (1955) 2 SCR 428; *Purushottam Umedbhai & Co.* v. *Manilal & Sons*, AIR 1961 SC 325: (1961) 1 SCR 982.

[102] *Dwarka Nath* v. *ITO*, AIR 1966 SC 81 at p. 88: (1965) 3 SCR 536.

[103] *Om Prabha* v. *Abnash Chand*, AIR 1968 SC 1083; *Vinod Kumar* v. *Surjit Kaur*, (1987) 3 SCC 711: AIR 1987 SC 2179; *Om Prakash* v. *Ram Kumar*, (1991) 1 SCC 441: AIR 1991 SC 409.

[104] *Abubakar Abdul Inamdar* v. *Harun Abdul Inamdar*, (1995) 5 SCC 612: AIR 1996 SC 112; *Siddik Mahd. Shah* v. *Saran*, AIR 1930 PC 57: 121 IC 204; *Bondar Singh* v. *Nihal Singh*, (2003) 4 SCC 161.

[105] *Siddik Mahd. Shah* v. *Saran*, *supra*; *Om Prabha* v. *Abnash Chand*, *supra*; *Lala Karam Chand* v. *Firm Mian Mir Ahmad Aziz Ahmad*, AIR 1938 PC 121: 173 IC 736.

variation would cause surprise and confusion and is always looked upon by courts with considerable disfavour and suspicion.[106]

It will also introduce a great amount of uncertainty into judicial proceedings, if final determination of causes is founded upon inferences, at variance with the pleadings of the parties.[107]

Each and every variance between the pleading and the proof, however, is not necessarily fatal. Where there is foundation in the pleading, or no prejudice to the other side, a party should not be denied just relief.[108]

Whether or not a particular plea has been raised must be decided by reading the pleading as a whole keeping in mind the substance rather than the form of pleadings. Where parties are aware of the controversy and go to trial with full knowledge that a particular question is at issue, absence of specific pleading is a mere irregularity.[109] Finally, a pure question of law or of jurisdiction can be raised at any stage.[110]

14. OBJECTION TO PLEADING

An objection to pleading should be taken at the earliest. If at an appropriate stage such objection is not raised, it is deemed to have been waived. This is based on the principle that, in such cases, it cannot be held that prejudice has been caused to the party raising a plea at the belated stage.[111]

15. AMENDMENT OF PLEADINGS: RULES 17-18

(a) General

As already stated, material facts and necessary particulars must be stated in the pleadings and the decision cannot be based on the grounds outside the pleadings. But many a times the party may find it necessary to amend his pleadings before or during the trial of the case. "Fresh information has come to hand; interrogatories have been fully answered by his opponent; documents whose existence was unknown to him have been disclosed which necessitates reshaping his

[106] *Narendra* v. *Abhoy*, AIR 1934 Cal 54 (FB); *Nagubai Ammal* v. *B. Sham Rao*, AIR 1956 SC 593: 1956 SCR 451.

[107] *Eshanchunder Sing* v. *Samachurn Bhutto*, (1886) 11 MIA 7: 6 Suth WR 57 (PC); *Trojan & Co.* v. *RM.N.N. Nagappa Chettiar*, AIR 1953 SC 235: 1953 SCR 789; *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593: 1956 SCR 451.

[108] *Babu Raja Mohan* v. *Babu Manzoor Ahmad*, (1942-43) 70 IA 1: AIR 1943 PC 29; *Union of India* v. *Khas Karanpura Colliery Co. Ltd.*, AIR 1969 SC 125: (1968) 3 SCR 784.

[109] *Firm Srinivas Ram Kumar* v. *Mahabir Prasad*, AIR 1951 SC 177: 1951 SCR 277; *K.C. Kapoor* v. *Radhika Devi*, (1981) 4 SCC 487: AIR 1981 SC 2118.

[110] *State of Rajasthan* v. *Rao Raja Kalyan Singh*, (1972) 4 SCC 165: AIR 1971 SC 2018.

[111] *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593: 1956 SCR 451; *Kunju Kesavan* v. *M.M. Philip*, AIR 1964 SC 164: (1964) 3 SCR 634; *K.C. Kapoor* v. *Radhika Devi*, (1981) 4 SCC 487: AIR 1981 SC 2118.

claim or defence. Or his opponent may have raised some well-founded objections to his pleadings, in which case it will be advisable for him to amend at once his pleadings before it is too late."[112]

(b) Rule 17

Rule 17 provides for amendment of pleadings. It reads as under:

> "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

(c) Object

The object of the Rule is that the courts should try the merits of the cases that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.[113] Ultimately, courts exist for the purpose of doing justice between the parties and not for punishing them, and they are empowered to grant amendments of pleadings in the larger interest of doing full and complete justice to the parties.[114] Provisions for the amendment of pleadings are intended for promoting the ends of justice and not for defeating them.[115]

The Privy Council[116] has rightly observed, "All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct

[112] Bullen, Leake and Jacob, *Precedent and Pleadings* (1959) at p. 61. See also supra, *Mogha* at pp. 126-69.

[113] *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363: 1957 SCR 559.

[114] *Jai Jai Ram Manohar* v. *National Building Material Supply*, (1969) 1 SCC 869: AIR 1969 SC 1267.

[115] *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91: AIR 1978 SC 484; *Rajesh Kumar* v. *K.K. Modi*, (2006) 4 SCC 385: AIR 2006 SC 1647; *State of A.P.* v. *Pioneer Builders*, (2006) 12 SCC 119: AIR 2007 SC 113.

[116] *Ma Shwe Mya* v. *Maung Mo Hnaung*, AIR 1922 PC 249: (1920-21) 48 IA 214.

cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."[117]

In the leading case of *Cropper* v. *Smith*[118], the object underlying amendment of pleadings has been laid down by Bowen, L.J. in the following words:

> "I think it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights... . I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace... . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as *anything else in the case is a matter of right*."[119] (emphasis supplied)

(d) Discretion of court

Rule 17 of Order 6 confers wide discretion on a court to allow either party to alter or amend his pleading at any stage of the proceedings on such terms as it deems fit. Such discretion, however, must be exercised judicially and in consonance with well-established principles of law.[120] The proviso as inserted by the Amendment Act, 2002, however, puts further restrictions on the power of the court in allowing amendment.[121]

(e) Applicability to other proceedings

Over and above civil suits, the provisions of Rule 17 apply to several other proceedings such as execution proceedings, insolvency proceedings, arbitration proceedings, election matters, proceedings under the Land Acquisition Act, claim petitions etc. Even where the provisions of the Code are not applicable, courts and tribunals are competent to

[117] *Ibid*, at pp. 250-51 (AIR): 216-17 (IA); see also *Suraj Prakash* v. *Raj Rani*, (1981) 3 SCC 652 at p. 655: AIR 1981 SC 485 at p. 487.

[118] (1884) 29 Ch D 700.

[119] *Ibid*, at pp. 710-11.

[120] For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. III at pp. 444-45.

[121] For detailed discussion, *see infra*, "Amendment after commencement of trial: Proviso".

devise their own procedure consistent with and based on the general principles of justice, equity and good conscience.[122]

(f) Rule 17: Whether exhaustive

The provisions of Rule 17 of Order 6 are not exhaustive of the power of a court in a matter of amendment of pleadings. The power of amendment is inherent in the court and where Rule 17 does not apply, resort can be had to Section 151 of the Code.[123]

(g) Leave to amend when granted

The rule confers a very wide discretion on courts in the matter of amendment of pleadings. As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised in pleadings, where the amendment will occasion no injury to the opposite party and can be sufficiently compensated for by costs or other terms to be imposed by the order.[124]

It is submitted that the following observations of Batchelor, J. in the case of *Kisandas* v. *Rachappa Vithoba*[125], lay down correct law:

> "All amendments ought to be allowed which satisfy the two conditions (*a*) of not working injustice to the other side, and (*b*) of being necessary for the purpose of determining the real questions in controversy between the parties."[126]

Therefore, the main points to be considered before a party is allowed to amend his pleading are: *firstly*, whether the amendment is necessary for the determination of the real question in controversy; and *secondly*, can the amendment be allowed without injustice to the other side.

The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary

[122] For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. III at pp. 445-46.

[123] For detailed discussion of *see infra*, "Inherent powers of courts", Pt. V, Chap. 4.

[124] *Tildesley* v. *Harper*, (1878) 10 Ch D 393: (1874-80) All ER Rep Ext 1612 (CA); *Jai Jai Ram Manohar* v. *National Building Material Supply, supra*, at p. 871 (SCC): 1269 (AIR); *Harcharan* v. *State of Haryana*, (1982) 3 SCC 408 at pp. 411-12: AIR 1983 SC 43 at p. 45; *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; *Deena* v. *Union of India*, (1983) 4 SCC 645: AIR 1983 SC 1155; *CST* v. *Auraiya Chamber of Commerce*, (1986) 3 SCC 50: AIR 1986 SC 1556; *Chinnammal* v. *P. Arumugham*, (1990) 1 SCC 513: AIR 1990 SC 1828; *Ganesh Trading Co.* v. *Moji Ram, supra*; *N.T. Veluswami* v. *G. Raja Nainar*, AIR 1959 SC 422: 1959 Supp (1) SCR 623; *B.K. Narayana* v. *Parameswaran*, (2000) 1 SCC 712; *Usha Balashaheb* v. *Kiran Appaso*, (2007) 5 SCC 602: AIR 2007 SC 1663.

[125] ILR (1909) 33 Bom 644: 4 IC 726: (1909) 11 Bom LR 1042.

[126] *Ibid*, at p. 655 (ILR). See also *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363 at p. 366: 1957 SCR 559; *L.J. Leach & Co. Ltd.* v. *Jairdine Skinner & Co.*, AIR 1957 SC 357: 1957 SCR 438; *Suraj Prakash* v. *Raj Rani*, (1981) 3 SCC 652 at p. 655: AIR 1981 SC 485 at p. 487; *B.K. Narayana* v. *Parameswaran*, (2000) 1 SCC 712; *Usha Balashaheb* v. *Kiran Appaso*, (2007) 5 SCC 602: AIR 2007 SC 1663.

for the determination of the real question in controversy. If that condition is not satisfied, the amendment should not be allowed. On the other hand, if the amendment is necessary to decide the "real controversy" between the parties, the amendment should be allowed even though the court may think that the party seeking the amendment will not be able to prove the amended plea. This is the basic test which governs the courts' unchartered powers of amendment of pleadings. *No amendment should be allowed when it does not satisfy this cardinal test.*[127]

(emphasis supplied)

Thus, it has been held that where the amendment is sought to avoid multiplicity of suits,[128] or where the parties in the plaint are wrongly described,[129] or where some properties are omitted from the plaint by inadvertence,[130] or where there is a mistake in the statement of the cause of action,[131] or a *bona fide* omission in making the necessary averments in the plaint,[132] or a suit is brought under a wrong Act,[133] the amendment should be allowed.

The second condition is also equally important, according to which no amendment will be allowed which will cause injustice to the opposite party. It is settled law that the amendment can be allowed if it can be made without injustice to the other side.[134] But it is also a cardinal rule that "there is no injustice if the other side can be compensated by costs".[135]

Bowen, L.J.[136] rightly states, "I have found in my experience that there is one panacea which heals every sore in litigation, and that

[127] *Per* P.B. Mukharji, J. in *Nrising Prasad* v. *Steel Products Ltd.*, AIR 1953 Cal 15 at p. 17: 89 Cal LJ 140.

[128] *L.J. Leach & Co. Ltd.* v. *Jairdine Skinner & Co.*, AIR 1957 SC 357: 1957 SCR 438.

[129] *Jai Jai Ram Manohar* v. *National Building Material Supply*, (1969) 1 SCC 869: AIR 1969 SC 1267.

[130] *Someshwari Prasad* v. *Maheshwari Prasad*, AIR 1936 PC 332: (1935-36) 63 IA 441.

[131] For detailed discussion, *see supra*, Chap. V.

[132] *S. Rm. Ar. S. Sp. Sathappa Chettiar* v. *S. Rm. Ar. Rm. Ramanathan Chettiar*, AIR 1958 SC 245: 1958 SCR 1024; *Nanduri Yogananda Lakshminarasimhachari* v. *Agastheswaraswamivaru*, AIR 1960 SC 622 at p. 624: (1960) 2 SCR 768.

[133] *Jai Jai Ram Manohar* v. *National Building Material, supra*; *A.K. Gupta and Sons Ltd.* v. *Damodar Valley Corpn.*, AIR 1967 SC 96: (1966) 1 SCR 796.

[134] *Jai Jai Ram Manohar* v. *National Building Material, supra*; *Haridas* v. *Varadaraja Pillai*, (1971) 2 SCC 601: AIR 1971 SC 2366 at p. 2369; *Ganesh Trading Co.* v. *Moji Ram, supra*, at p. 871 (SCC): 1269 (AIR).

[135] *Clarapede & Co.* v. *Commercial Union Assn.*, (1883) 32 WR 262 at p. 263; *Weldon* v. *Neal*, (1887) 19 QB 394 (CA) at p. 396; *Haridas* v. *Varadaraja Pillai*, (1971) 2 SCC 601: AIR 1971 SC 2366; *Ganesh Trading Co.* v. *Moji Ram, supra*; *B.K. Narayana* v. *Parameswaran, supra*.

[136] *Cropper* v. *Smith, supra*. See also *Suraj Prakash* v. *Raj Rani*, (1981) 3 SCC 652: AIR 1981 SC 485.

is costs." Bramwell, L.J.[137] also observed, "I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise."[138]

Thus, the court may allow amendment for the purpose of granting consequential relief;[139] or granting relief on the basis of different approaches to the same facts;[140] or to avoid multiplicity of proceedings;[141] or to take notice of subsequent events;[142] or where the amendment is of a formal nature;[143] or to clarify the pleadings;[144] or to allow misdescription of parties to be corrected,[145] etc.

(h) Leave to amend when refused

It is true that courts have very wide discretion in the matter of amendment of pleadings. But the wider the discretion, the greater is the possibility of its abuse. Ultimately, it is a legal power and no legal power can be exercised improperly, unreasonably or arbitrarily.

[137] *Tildesley* v. *Harper, supra,* at pp. 396-97.

[138] The following warning, however, should not be ignored: "The courts do not exist for so commercial a purpose as to be mere institutions for dispensing costs without deciding the merits. They exist primarily for the justice of determining the genuine and real disputes between the parties and incidentally for awarding costs." *Per* P.B. Mukharji, J. in *Nrising Prasad* v. *Steel Products Ltd., supra.*

[139] *Nanduri Yogananda Lakshmnarasimhachari* v. *Agastheswaraswamivaru,* AIR 1960 SC 622 at p. 624: (1960) 2 SCR 768; *L.J. Leach & Co. Ltd.* v. *Jairdine Skinner & Co., supra; Bikram Singh* v. *Ram Baboo,* (1982) 1 SCC 485: AIR 1981 SC 2036.

[140] *A.K. Gupta and Sons Ltd.* v. *Damodar Valley Corpn.,* AIR 1967 SC 96: (1966) 1 SCR 796; *Jagdish Singh* v. *Natthu Singh,* (1992) 1 SCC 647: AIR 1992 SC 1604.

[141] *L.J. Leach & Co. Ltd.* v. *Jairdine Skinner & Co.,* AIR 1957 SC 357: 1957 SCR 438; *Nichhalbhai* v. *Jaswantlal,* AIR 1966 SC 997 at pp. 999-1000; *Shikharchand Jain* v. *Digamber Jain Praband Karini Sabha, infra; Nair Service Society Ltd.* v. *K.C. Alexander,* AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; *Suraj Prakash* v. *Raj Rani,* (1981) 3 SCC 652 at p. 655: AIR 1981 SC 485 at p. 486.

[142] *See infra,* Chap. 7. See also *Shikharchand Jain* v. *Digamber Jain Praband Karini Sabha,* (1974) 1 SCC 675: AIR 1974 SC 1178; *Hqsmat Rai* v. *Raghunath Prasad,* (1981) 3 SCC 103: AIR 1981 SC 1711; *Harcharan* v. *State of Haryana,* (1982) 3 SCC 408 at pp. 411-12: AIR 1983 SC 43 at p. 45; *Vineet Kumar* v. *Mangal Sain,* (1984) 3 SCC 352 at pp. 359-61: AIR 1985 SC 817.

[143] *Gopal Krishnaji Ketkar* v. *Mohd. Jaffer,* AIR 1954 SC 5 at p. 8-9.

[144] *Purushottam Umedbhai & Co.* v. *Manilal & Sons,* AIR 1961 SC 325: (1961) 1 SCR 982; *Laxmidas* v. *Nanabhai,* AIR 1964 SC 11 at p. 18: (1964) 2 SCR 567.

[145] *Ibid,* See also *Kurapati Venkata* v. *Thondepu Ramaswami & Co.,* AIR 1964 SC 818 at p. 823: 1963 Supp (2) SCR 995; *Jai Jai Ram Manohar* v. *National Building Material Supply,* (1969) 1 SCC 869: AIR 1969 SC 1267.

In *Ganga Bai* v. *Vijay Kumar*[146], the Supreme Court has rightly observed:

> "The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations, and *wider the discretion, greater ought to be the care and circumspection on the part of the court.*"[147] (emphasis supplied)

Generally, in the following cases, leave to amend will be refused by the court:

(1) Leave to amend will be refused where the amendment is not necessary for the purpose of determining the real question in controversy between the parties.[148] As discussed above,[148] the *"real controversy"* test is the basic test and it is the primary duty of the court to decide whether such amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. Therefore, if the amendment is not necessary or is merely technical or useless or without any substance, it will be refused.[149]

The leading decision on the point is *Edevian* v. *Cohen*[150]. In that case, *A*'s furniture was wrongfully removed by *B* and *C*. *A* sued *B* for damages and for judgments against *B*. *A* then sued *C* for damages for the same wrong. After *A*'s evidence was over, *C* applied for amendment of written statement by pleading judgment against *B* as bar to suit against him. *B* and *C* being wrongdoers, the judgment against *B* precluded *A* from suing *C* for the same wrong. The application was rejected since it was not necessary to decide the real question in controversy between the parties but enabled *C* to avail for himself the benefit of the technical rule of law.

Thus, when the negligence was proved, the amendment to supply its particulars was refused, being unnecessary and useless since the real controversy had already been decided. Similarly, after the evidence of the plaintiff was over, an amendment application made by the defendant raising a purely technical objection to the plaintiff's right to sue was rejected. Likewise, if a landlord is not entitled to obtain possession of the rented property from the tenant on the ground of reasonable and *bona fide* requirement if he has purchased the property after a particular date, an amendment to add that ground for obtaining possession

[146] (1974) 2 SCC 393: AIR 1974 SC 1126.
[147] *Ibid*, at p. 399 (SCC): 1130 (AIR).
[148] *See supra*, "Leave to amend when granted".
[149] *See also*, Mulla, *Code of Civil Procedure* (1996) Vol. II at pp. 1189-90.
[150] (1889) 43 Ch D 187, (CA).

can be refused by the court as being unnecessary if the landlord has purchased the property after that date.

(2) Leave to amend will be refused if it introduces a totally different, new and inconsistent case or changes the fundamental character of the suit or defence.[151]

In *Steward* v. *North Metropolitan Tramways Co.*[152], the plaintiff filed a suit for damages against the tramway company for damages caused by the negligence of the company in allowing the tramway to be in defective condition. The company denied the allegation of negligence. It was not even contended that the company was not the proper party to be sued. More than six months after the written statement was filed, the company applied for leave to amend the defence by adding the plea that under the contract entered into between the company and the local authority the liability to maintain the roadway in proper condition was of the latter and, therefore, the company was not liable. At the date of the amendment application, the plaintiff's remedy against the local authority was time-barred. Had the agreement been pleaded earlier, the plaintiff could have filed a suit even against the local authority. Under the circumstances, the amendment was refused. Pollock, B. rightly observed, "The test as to whether the amendment should be allowed is, whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise. *Here the action would be wholly displaced by the proposed amendment and I think it ought not to be allowed.*"[153] (emphasis supplied)

Similarly, where the case of the plaintiff throughout was that the suit property was non-ancestral, an issue as to the character of property was framed, evidence led and the finding was recorded that the property was non-ancestral property; the application for the amendment of the plaint alleging that the property was ancestral cannot be allowed at the appellate stage as it sought to introduce a totally new and inconsistent case.

The test as to whether the amendment should be allowed is (as stated by Pollock) whether or not the party can amend his pleading without

[151] *Modi Spg. & Wvg. Mills Co. Ltd.* v. *Ladha Ram*, (1976) 4 SCC 320 at pp. 321-22: AIR 1977 SC 680 at p. 681; *Haji Mohd. Ishaq* v. *Mohd. Iqbal*, (1978) 2 SCC 493 at pp. 497-98: AIR 1978 SC 798 at pp. 800-01; *Suraj Prakash* v. *Raj Rani*, (1981) 3 SCC 652 at p. 655: AIR 1981 SC 485 at p. 487; *Jagan Nath* v. *Chander Bhan*, (1988) 3 SCC 57: AIR 1988 SC 1362; *A.K. Gupta and Sons Ltd.* v. *Damodar Valley Corpn.*, AIR 1967 SC 96: (1966) 1 SCR 796; *State of A.P.* v. *Pioneer Builders*, (2006) 12 SCC 119: AIR 2007 SC 113.

[152] (1886) 16 QB 178 (CA).

[153] *Ibid*, at p. 180; *see also*, the following observations of Straight, J., "We cannot countenance the notion that a plaintiff coming into court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that too directly in antagonism with his primary allegation."

placing the other side in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise.

Whether or not the proposed amendment changes the character of the suit would depend on the facts and circumstances of each case considering the nature of the amendment sought.

(3) Leave to amend will be refused where the effect of the proposed amendment is to take away from the other side a legal right accrued in his favour.[154]

As a general rule, every amendment should be allowed if it can be made without prejudice or injustice to the other side, and one of the classes of cases wherein the amendment may work injustice to the opposite party is where it takes away from a party a right accrued to him by lapse of time. Therefore, in absence of special circumstances such an amendment should not be allowed by the court.

The English case on the subject is *Weldon* v. *Neal*[155]. In that case, *A* filed a suit against *B* for damages for slander. *A* thereafter applied for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment. At the date of the application, those claims were barred by limitation though they were within the period of limitation at the date of the suit. The amendment was refused since the effect of granting it would be to take away from *B* the legal right (the defence under the law of limitation) and thus would cause prejudice to him.

The rule, however, is not a universal one and under certain circumstances such an amendment may be allowed by the court notwithstanding the law of limitation.[156] The fact that the claim is barred by the law of limitation is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed, but it does not affect the power of the court if the amendment is required in the interests of justice.[156]

[154] *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363 at p. 365-66: 1957 SCR 559; *L.J. Leach & Co. Ltd.* v. *Jairdine Skinner & Co.*, AIR 1957 SC 357: 1957 SCR 438; *Laxmidas Nanabhai*, AIR 1964 SC 11 at p. 18: (1964) 2 SCR 567; *A.K. Gupta and Sons Ltd.* v. *Damodar Valley Corpn.*, AIR 1967 SC 96: (1966) 1 SCR 796; *Ram Dayal* v. *Brijraj Singh*, (1969) 2 SCC 218 at p. 220: AIR 1970 SC 110 at p. 112; *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126; *Shanti Kumar* v. *Home Insurance Co. of New York*, (1974) 2 SCC 387 at p. 392: AIR 1974 SC 1719 at pp. 1722-23; *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91: AIR 1978 SC 484; *Jagan Nath* v. *Chander Bhan*, (1988) 3 SCC 57: AIR 1988 SC 1362; *Patasibai* v. *Ratanlal*, (1990) 2 SCC 42; *Muni Lal* v. *Oriental Fire & General Insurance Co. Ltd.*, (1996) 1 SCC 90; *K. Raheja Constructions Ltd.* v. *Alliance Ministries*, 1995 Supp (3) SCC 17: AIR 1995 SC 1768; *Usha Balashaheb* v. *Kiran Appaso*, (2007) 5 SCC 602: AIR 2007 SC 1663; *Ramchandra* v. *Damodar Trimbak*, (2007) 6 SCC 737: AIR 2007 SC 2577.

[155] (1887) 19 QB 394 (CA). See also *Steward* v. *North Metropolitan Tramways Co.*, *supra*.

[156] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126; *Arundhati Mishra* v. *Ram Charitra Pandey*, (1994) 2 SCC 29.

It is submitted that the following observations of Lord Buckmaster in the case of *Charan Das* v. *Amir Khan*[157] lay down correct law, wherein the learned Law Lord observed:

> "That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet *there are cases where such considerations are outweighed by the special circumstances of the case.*"[158] (emphasis supplied)

(4) Leave to amend will be refused where the application for amendment is not made in good faith.[159] As a general rule, leave to amend ought not to be granted if the applicant has acted *mala fide*.[159] Want of *bona fides* may be inferred from the circumstances of the case. When there is no substantial ground for the case proposed to be set up by the amendment, or the object is to defeat or delay the plaintiff's claim, or merely to reagitate the same question and lead further evidence, the amendment was not granted as not being *bona fide*.[160]

Thus, when, in an earlier proceeding, a compromise decree was passed and had become final, in a subsequent suit, the plaintiff cannot be allowed to amend his plaint by permitting him to raise contentions that had not found favour with the court. Apart from being highly belated, it was an afterthought for averting the inevitable consequence of earlier litigation. Such amendment, therefore, cannot be said to be *bona fide*.[161]

(i) Subsequent events

As a general rule, every litigation must be determined on the basis of facts existed on the date of filing of the suit. A court may, however,

[157] AIR 1921 PC 50: (1919-20) 47 IA 255.

[158] *Ibid*, at pp. 51-52 (AIR). See also *Ganga Bai* v. *Vijay Kumar, supra; Pirgonda Patil* v. *Kalgonda Patil, supra; L.J. Leach & Co. Ltd.* v. *Jairdine Skinner & Co., supra; Shanti Kumar* v. *Home Insurance Co. of New York, supra.*

[159] *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363 at p. 365: 1957 SCR 559; *Jai Jai Ram Manohar* v. *National Building Material Supply*, (1969) 1 SCC 869: AIR 1969 SC 1267; *Tildesley* v. *Harper*, (1878) 10 Ch D 393 at p. 397; *Banta Singh* v. *Harbhajan Kaur*, AIR 1974 Punj 247 (FB). See also supra, *Mogha*, at pp. 139-40.

[160] *Kanakarathanammal* v. *V.S. Loganatha Mudaliar*, AIR 1965 SC 271: (1964) 6 SCR 1; *Raj Kumar* v. *Raj Kumar Pasupathinath*, (1969) 2 SCC 258 at p. 262: AIR 1970 SC 42 at p. 45; *Gauri Shanker* v. *Hindustan Trust (P) Ltd.*, (1973) 2 SCC 127 at p. 132: AIR 1972 SC 2091 at p. 2095; *Ganga Bai* v. *Vijay Kumar, supra; Pandit Ishwardas* v. *State of M.P.*, (1979) 4 SCC 163 at p. 166: AIR 1979 SC 551 at pp. 552-53; *D.L.F. United (P) Ltd.* v. *Prem Raj*, (1981) 1 SCC 433 at pp. 434-35: AIR 1981 SC 805 at p. 806; *S. Kumar* v. *Institute of Constitutional & Parliamentary Studies*, (1983) 4 SCC 516 at p. 518: AIR 1984 SC 59 at p. 61; *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90 at pp. 97-98: AIR 1984 SC 1562 at pp. 1565-66.

[161] *Patasibai* v. *Ratanlal*, (1990) 2 SCC 42.

take into account subsequent events in order to shorten litigation or to preserve, protect and safeguard rights of both the parties and to subserve the ends of justice. For that purpose, a court may allow amendment in pleading of the parties.[162]

(j) Merits not to be considered

While considering whether an application for amendment should or should not be allowed, the court should not go into correctness or falsity of the case in the amendment. "The merits of the amendment sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment."[163]

(k) Who may apply?

Normally, it is the plaintiff or the defendant who may apply for amendment of his pleading i.e. plaint or written statement.

Where there are two or more plaintiffs or defendants in a suit, one or more plaintiffs or defendants may make such application.

(l) Who may grant amendment?

Ordinarily, it is the trial court which can grant an application for amendment of plaint or written statement. But an appellate or revisional court can also grant such application for amendment of pleading. Even the Supreme Court may grant an application for amendment of plaint or written statement in an appropriate case.[164]

(m) Notice to opposite party

When an application for amendment is made by a party to a suit, an opportunity should be given to the other side to file an objection against such prayer. An order granting amendment without hearing the opposite party is not legal and valid.

But, if the amendment is purely formal or technical in nature, non-issuance of notice is not material.

Where the plaint is amended, notice of amended plaint must be served on the defendant.

(n) Recording of reasons

While deciding an application for amendment of pleading, the court must apply its mind and should record reasons for allowing or not allowing the amendment.

[162] For detailed discussion, *see infra,* Chap. 7.

[163] *Sampath Kumar* v. *Ayyakannu,* (2002) 7 SCC 559; *T.K. Sreedharan* v. *P.S. Job,* AIR 1969 Ker 75; *Mangal Dass* v. *Union of India,* AIR 1973 Del 96; *Usha Devi* v. *Rijwan Ahmad,* (2008) 3 SCC 717.

[164] For detailed discussion, *see infra,* "At any stage of proceedings".

(o) Principles

Provisions relating to amendment of pleadings must be liberally construed with a view to promote the ends of justice and not to defeat them. The purpose and object of rules of pleadings is to decide the real controversy between the parties and not to punish them for their mistakes, negligence or shortcomings. The exercise of discretionary power must be governed by judicial considerations and the wider the discretion, the greater the care and circumspection.

Ordinarily, the following principles should be borne in mind in dealing with applications for amendment of pleadings:

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

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

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

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

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

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

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

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

(*ix*) error or mistake which if not fraudulent should not be made a ground for rejecting the application for amendments of pleadings;

(*x*) The above principles are illustrative and not exhaustive.[165]

(p) At any stage of proceedings

Leave to amend may be granted at any stage of the proceedings. Such amendment applications are not governed by any law of limitation.[166] Leave to amend may be granted before, or at, or after the trial, or

[165] *Dalip Kaur* v. *Major Singh*, AIR 1996 P&H 107 at p. 108.

[166] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126; *Arundhati Mishra* v. *Ram Charitra Pandey*, (1994) 2 SCC 29; *see also supra*, "Limitation".

in First Appeal[167], or in Second Appeal[168], or in Revision[169], or in the Supreme Court[170] or even in execution proceedings[171], provided the decree is legal, lawful and enforceable, not otherwise.[172]

Proviso to Rule 17, as inserted by the Amendment Act of 2002, now restricts and curtails the power of the court and declares that the court should not allow such amendment after the commencement of the trial unless it comes to the conclusion that in spite of due diligence, the matter could not have been raised by the party before the commencement of the trial.[173]

(q) Amendment after commencement of trial: Proviso

Proviso to Rule 17, as inserted by the Code of Civil Procedure (Amendment) Act, 2002 restricts and curtails power of the court to allow amendment in pleadings by enacting that no application for amendment should be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter (for which amendment is sought) before the commencement of the trial.[174]

[167] S. 107. See also *Pirgonda Patil v. Kalgonda Patil*, AIR 1957 SC 363 at p. 365: 1957 SCR 559; *Nanduri Yogananda Lakshminarasimhachari* v. *Agastheswaraswamivaru*, AIR 1960 SC 622 at p. 624: (1960) 2 SCR 768; *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; *Mohd. Mustafa* v. *Abu Bakar*, (1970) 3 SCC 891: AIR 1971 SC 361; *Gangabai* v. *Vijay Kumar, supra*; *Pandit Ishwardas* v. *State of M.P., supra*; *Harcharan* v. *State of Haryana*, (1982) 3 SCC 408 at pp. 410-11: AIR 1983 SC 43 at p. 45.

[168] S. 108. See also *Laxmidas* v. *Nanabhai*, AIR 1964 SC 11 at p. 18: (1964) 2 SCR 567; *Shikharchand Jain* v. *Digamber Jain Praband Karini Sabha*, (1974) 1 SCC 675: AIR 1974 SC 1178; *Hasmat Rai* v. *Raghunath Prasad*, (1981) 3 SCC 103: AIR 1981 SC 1711; *Bakshish Singh* v. *Prithi Pal Singh*, 1995 Supp (3) SCC 577; *Arundhati Mishra* v. *Ram Charitra Pandey, supra*.

[169] *Charan Dass* v. *Kripal Singh*, 1977 RCJ 924; *Netai Chandra* v. *Gour Mohan*, AIR 1976 Cal 58 at p. 59; *Pasupuleti Venkateswarlu* v. *Motor & General Traders*, (1975) 1 SCC 770: AIR 1975 SC 1409; *Vineet Kumar* v. *Mangal Sain*, (1984) 3 SCC 352 at p. 360-61: AIR 1985 SC 817 at p. 820-21; *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91: AIR 1978 SC 484.

[170] *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*, AIR 1957 SC 357: 1957 SCR 438; *A.K. Gupta and Sons Ltd.* v. *Damodar Valley Corpn.*, AIR 1967 SC 96: (1966) 1 SCR 796; *Mulk Raj Batra* v. *District judge*, (1982) 3 SCC 233: AIR 1982 SC 24; *S. Kumar* v. *Institute of Constitutional & Parliamentary Studies*, (1983) 4 SCC 516: AIR 1984 SC 59: *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90: AIR 1984 SC 1562.

[171] *C.T.A. CT. Nachiappa Chettiar* v. *M.G. Ramaswami Pillai*, AIR 1964 Mad 236 at p. 237; *Shrikant Roguvir* v. *Jaidev Saunlo*, AIR 1975 Goa 24; *Ex-Servicemen Enterprises (P) Ltd.* v. *Sumey Singh*, AIR 1976 Del 56.

[172] *Rukmini Devi* v. *Pawan Kumar*, AIR 1979 Pat 88.

[173] For detailed discussion, *see supra*, "Amendment after commencement of trial: Proviso".

[174] *Usha Devi* v. *Rijwan Ahmad*, (2008) 3 SCC 717; *Ajendraprasadji N. Pandey* v. *Swami Keshanprakashdesji N.*, (2006) 12 SCC 1: AIR 2007 SC 806; *Baldev Singh* v. *Manohar Singh*, (2006) 6 SCC 498: AIR 2006 SC 2832; *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344: AIR 2005 SC 3353.

(r) Doctrine of "relation back"

Normally, an amendment relates back to the pleading, but the doctrine is not absolute, unqualified or of universal application.[175] In appropriate cases, the court may order that the amendment would take effect from the date an application was made or the amendment was allowed and not from the date when the plaint or written statement was presented.[176]

(s) Limitation

No period of limitation is prescribed either in the Code of Civil Procedure or in the Limitation Act for making an application for amendment.[177] On the contrary, Rule 17 permits a party to alter or amend his pleading "at any stage" of the proceedings.[178]

But it is well-settled that ordinarily, an amendment of pleading should not be allowed if the effect of such amendment is to deprive a party of a right which he has acquired by virtue of the law of limitation.[179]

The above principle also must be read in the light of proviso to Rule 17 inserted by the Amendment Act of 2002.[180]

(t) Res judicata

Strict rule of *res judicata* does not apply to amendment of pleadings.[181]

(u) Successive applications

As a general rule, once an application for amendment is rejected on merits, a second application on the same averments is not maintainable. But, if there is change of circumstances, an application for amendment may be filed provided no prejudice is caused to the other side. Similarly, a fresh application would also lie if earlier one is withdrawn or dismissed for default or not decided on merits.[182]

(v) On such terms as may be just

The rule confers an unfettered discretion on the court as to the terms to be imposed while granting an amendment of pleadings. Generally, amendment will be allowed on payment of costs to the opposite party

[175] *Brij Kishore* v. *Mushtari Khatoon*, AIR 1976 All 399; *Siddalingamma* v. *Mamtha Shenoy*, (2001) 8 SCC 561: AIR 2001 SC 2896.

[176] *Vishwambhar* v. *Laxminarayan*, (2001) 6 SCC 163: AIR 2001 SC 2607; *Sampath Kumar* v. *Ayyakannu*, (2002) 7 SCC 559.

[177] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126; *Arundhati Mishra* v. *Ram Charitra Pandey*, (1994) 2 SCC 29.

[178] For detailed discussion, *see supra*, "At any stage of proceedings".

[179] For detailed discussion, *see supra*, "Leave to amend when refused".

[180] For detailed discussion, *see supra* "Amendment after commencement of trial: Proviso".

[181] For detailed discussion of "res judicata", *see supra*, Chap. 2.

[182] For detailed discussion of "res judicata", *see supra*, Chap. 2.

by the party amending his pleadings.[183] The costs awarded, however, should be reasonable and not exemplary.[184]

There has been divergence of judicial opinion whether a party who has accepted costs under an order of amendment can subsequently challenge the validity of the order of amendment. One view is that he cannot, since he has taken benefit (of costs) under that order. The other view is that he can, since award of costs has nothing to do with the validity or otherwise of an order of amendment.

In *Bijendra Nath* v. *Mayank Srivastava*[185], the Supreme Court rightly held that the doctrine of estoppel precluding the party from challenging an order of amendment would apply where the party has accepted the costs as a condition precedent to the amendment. This principle cannot be invoked in a case where a direction issued for payment of costs is independent of the exercise of discretionary power of the court.

(w) Appeal

An order allowing or disallowing an application for amendment is neither a "decree" as defined in Section 2(2) nor an order appealable under Section 104 read with Order 43 of the Code. No appeal, therefore, lies against such an order. An order allowing or disallowing application, however, may be attacked in an appeal from a decree.

(x) Revision

An order granting or refusing amendment is a "case decided" and is subject to the revisional jurisdiction of the High Court.[186]

Since it is at the discretion of the court to allow an amendment, while exercising powers under Section 115 of the Code, normally, the High Court will not interfere with exercise of discretion by the trial court.[187]

As has been said, "It is well-settled that the court should be extremely liberal in granting prayer of amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. *It is also clear that a revisional court ought not to lightly interfere with a discretion exercised in allowing amendment in absence of cogent reasons or compelling circumstances.*"[188] (emphasis supplied)

[183] *Chintaman Kaushal* v. *Shanker*, AIR 1951 Nag 128; *Pahali Raut* v. *Khulana Bewa*, AIR 1985 Ori 165 at p. 168.

[184] *Jash Behari* v. *Jagnandan Singh*, AIR 1974 Pat 18.

[185] (1994) 6 SCC 117 at p. 132: AIR 1994 SC 2562 at p. 2572-73.

[186] For detailed discussion, *see infra*, "Revision", Pt. III, Chap. 9.

[187] *Maitreyee Banerjee* v. *Prabir Kumar*, (1982) 3 SCC 217: AIR 1982 SC 17; *Panchdeo Narain* v. *Jyoti Sahay*, 1984 Supp SCC 594: AIR 1983 SC 462; *Usha Balashaheb* v. *Kiran Appaso*, (2007) 5 SCC 602: AIR 2007 SC 1663.

[188] *Haridas Aildas Thadani* v. *Godrej Rustom Kermani*, (1984) 1 SCC 668: AIR 1983 SC 319; *D.L.F. United (P) Ltd.* v. *Prem Raj*, (1981) 1 SCC 433: AIR 1981 SC 805; *Mulk Raj Batra*

(y) Writ petition

Though, it is open to an aggrieved party to challenge an order passed by the trial court allowing or rejecting an application for amendment of pleading by filing a writ petition under Article 226 or 227 of the Constitution of India, *normally*, a High Court will not exercise extraordinary or supervisory jurisdiction to interfere with the order of the trial court unless it has caused serious prejudice to the applicant or has resulted in miscarriage of justice.

Ordinarily, the Supreme Court will also not exercise its power under Article 136 of the Constitution by interfering with the order passed by the High Court on an application for amendment.

(z) Failure to amend: Rule 18

If a party, who has obtained an order for leave to amend, does not amend accordingly within the time specified for that purpose in the order or if no time is specified then, within 14 days from the date of the order, he shall not be permitted to amend after expiry of the specified time or of 14 days unless the time is extended by the court.[189] It does not, however, result in dismissal of the suit. Again, the court has discretion to extend the time even after the expiry of the period originally fixed.[190] In an appropriate case, the court may allow the amendment to be carried out by the party in spite of his default on payment of further costs.[191]

The reason is simple. "We cannot be oblivious of facts of life, namely, the parties in courts are mostly ignorant and illiterate—unversed in law. Sometimes their counsel are also inexperienced and not properly equipped", and the court should endeavour to ascertain the truth to do justice to the parties.[192]

v. *District judge*, (1982) 3 SCC 233: AIR 1982 SC 24.

[189] R. 18. See also *Dilbagh Rai Jarry* v. *Union of India*, (1974) 3 SCC 554 at p. 560: AIR 1974 SC 130 at p. 135; *B. Channabyre Gowda* v. *State of Mysore*, AIR 1974 Kant 136 at p. 138.

[190] *Bhugwan Das* v. *Haji Abu*, (1892) 16 Bom 263; *Rahmat Bi* v. *R. Krishna Doss*, AIR 1940 Mad 641; *Banku Ramulu Patrudu* v. *Konda Narayana*, AIR 1962 AP 527; *Nareshchandra* v. *State of Gujarat*, AIR 1977 Guj 109; *Ramesh Bejoy* v. *Pashupati Rai*, (1979) 4 SCC 27 at p. 40: AIR 1979 SC 1769 at p. 1779; *Pahali Raut* v. *Khulana Bewa*, AIR 1985 Ori 165; *Konkan Trading Co.* v. *Suresh Govind*, (1986) 2 SCC 424: AIR 1986 SC 1009 at p. 1010.

[191] *Jainul Abedin* v. *Bibi Nisha Khatoon*, AIR 1984 Pat 251 at p. 252; *Pahali Raut* v. *Khulana Bewa, supra*.

[192] *Pahali Raut* v. *Khulana Bewa, supra*, at pp. 167-68; see also *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395: AIR 1987 SC 1086; *Bachhraj Factories (P) Ltd.* v. *Paramsukhdas*, AIR 1993 Bom 175.